

## FIGHTING UNJUST WARS POLITICAL AUTHORITY, TRAGIC CHOICES, AND THE VALUE OF OBEDIENCE

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POLITICAL AUTHORITIES are not perfect. Hopefully, we can agree about this much. Even legitimate authorities acting in good faith—those that diligently follow procedures designed to uphold justice and protect moral rights—occasionally issue mistaken directives. When this happens, we face the question of whether we ought to obey such directives. Do we have a duty to do so?

In many ways, this question goes to the very heart of the problem of political authority. After all, whenever legitimate authorities get things right, the duty to obey them is typically not in tension with other important moral duties we have. Interesting philosophical questions remain, of course—for example, whether we ought to *obey* the law (i.e., act as the law requires because the law requires it) or merely *conform to it* (i.e., act as the law requires but for other reasons).<sup>1</sup> But even philosophical anarchists will not lose any sleep over the question of how to act in these cases, nor should they. By contrast, when legitimate authorities issue mistaken directives that conflict with other moral obligations we have, the question of obedience becomes something more than a philosophical puzzle.

The question is especially pressing in a set of cases that have two features:

1. Obeying the mistaken directive would lead us to take part in the perpetration of a serious injustice.
2. The victims of the injustice in question are not themselves subject to the authority that issued the directive.

The significance of the first feature should be obvious. When obeying a mistaken directive would not lead to the perpetration of a serious injustice, it is easier to justify obedience as one of the costs of having political authorities that, necessarily, are not infallible. What is the significance of the second feature?

1 See, e.g., Wolff, *In Defense of Anarchism*; Simmons, *Justification and Legitimacy*, ch. 6; and Raz, *Ethics in the Public Domain*, ch. 15.

The idea here is that when the victims of the injustice are themselves subject to the authority responsible for the injustice, it is easier to justify obedience by appealing to the thought that they are themselves under a duty to support the authority in question. After all, if the authority has the power to impose on us obligations to comply with directives that will lead us to contribute to serious injustices, we might think that it also has the power to impose on the victims an obligation to bear the costs associated with those injustices.

To see this, consider a case in which a legitimate court acting in good faith wrongfully convicts an individual. While the conviction is in one sense unjust, since innocent people do not deserve to bear the costs of punishment, we might think that the defendant is nonetheless liable to bear those costs. This is because a duty to obey the law of one's country includes a duty to accept the decisions of its legitimate institutions, even when they are mistaken.<sup>2</sup> Notably, here it is the same justification that explains why, say, a prison guard has a duty to detain a wrongfully convicted person that is meant to also explain why that person has a duty to accept their own imprisonment. This is hardly surprising, since we are assuming that both the guard and the defendant are equally bound by the directive issued by the court.

The same line of argument, however, is not available in cases where the costs produced by a mistaken directive fall on someone who is not liable to bear them by virtue of being themselves bound by the directive. Suppose, for example, that state *A*, acting in good faith, mistakenly orders its citizens to wage a war against state *B*. Since the war is in fact unjust, obeying this order involves intentionally contributing to the killing of innocent people in *B*—i.e., people in *B* who have not done anything to waive their right not to be killed.<sup>3</sup> The members of *B*, however, have no duty to bear the costs of *A*'s mistaken decision, since they are not subject to *A*'s authority. Here, then, unlike in the wrongful conviction case, the justification that is meant to ground the duty to take part in perpetrating an injustice cannot also be invoked to ground a duty for those targeted by the injustice to bear its costs.

In addressing the question of whether we have a duty to obey unjust directives (call this *the question of obedience*), I will here restrict my attention to cases of unjust directives that have these two features.<sup>4</sup> Specifically, I will focus on the case of orders to fight wars that are unjust. But it is worth noticing that the

2 For a prominent version of this argument, see Estlund, "On Following Orders in an Unjust War."

3 This includes not only *B*'s civilians but also *B*'s enemy combatants. See McMahan, *Killing in War*, 10–15.

4 I will use the terms 'directive' and 'order' interchangeably throughout. Likewise, I will treat 'duty' and 'obligation' as synonymous.

question of obedience arises not only in the context of war. For example, state A might require its citizens to dispose of certain toxic substances in a way that will inflict unjust harm on the citizens of state B. As I see it, the moral issues raised by this directive are the same as those raised by the order to fight an unjust war. So, although my focus here is on the case of war, the view I defend extends to other cases of mistaken directives.<sup>5</sup>

In answering the question of obedience, philosophers have adopted one of two strategies. Some have argued that we have a duty to obey the order to fight even when the order is in fact unjust. The question of the justice of the war we are asked to fight is simply one that is not for us to answer. So even when our state makes a mistake in issuing the order to fight, our participation in the wrongs suffered by our victims is “sanitized because [we are] following orders.”<sup>6</sup> Call this the *orthodox view*.<sup>7</sup>

The problem with this view is that insofar as the victims of our attack are morally innocent, they retain their right not to be attacked. For how could the existence of this right be compromised by an order issued by another state, no matter how well intentioned? This has led others to conclude that when a legitimate state orders us to fight a war that is unjust, our duty is to disobey, since even well-intentioned orders cannot change the fact that violating the rights of innocent people is morally impermissible. Call this the *revisionist view*.<sup>8</sup>

The reason to reject both these views, as I see it, is that they each neglect a morally significant aspect of the problem. If the war we are asked to fight is unjust, surely that has to make some difference as to whether we have a duty to obey. For even if we have a duty to obey the law, that is not the only duty we have. And it would be surprising if not contributing to the killing of innocent people did not figure in the list of our further duties. This is the aspect of the problem neglected by defenders of the orthodox view. On the other hand, the fact that we have a *pro tanto* duty to obey the law presumably does make some

5 I stress this point because arguments for the duty to obey orders to fight an unjust war sometimes rest on the idea that the morality of war is exceptional. According to this approach, the fact that in the context of war, we are permitted to act in ways that would normally be impermissible is explained by the thought that the morality of war is somehow special. The view I defend does not rest on this assumption.

6 Estlund, “On Following Orders in an Unjust War,” 213.

7 Versions of this view have been defended by Walzer, *Just and Unjust Wars*; Estlund, “On Following Orders in an Unjust War”; Kutz, *On War and Democracy*; Shue, *Fighting Hurt*; and Buchanan, *Institutionalizing the Just War*. There are importance differences between them, but they need not concern us here.

8 Prominent defenses of this view include Rodin, *War and Self-Defense*; McMahan, *Killing in War*; Fabre, *Cosmopolitan War*; Frowe, *Defensive Killing*; and Tadros, *To Do, To Die, To Reason Why*.

difference to how we ought to act when a legitimate authority acting in good faith issues a binding directive.<sup>9</sup> This is the aspect of the problem neglected by defenders of the revisionist view.

My aim in “Political Authority and Unjust Wars” was to offer an answer to the question of obedience that does justice to both these aspects of the problem. I am very grateful to Thomas Christiano, David Estlund, and Christopher Kutz—three philosophers from whom I have learned a great deal in thinking about these issues—for their thoughtful engagement with that answer. Their contributions probe my view in important ways, raising insightful challenges from different directions. I particularly welcome the opportunity to address those challenges because though Christiano, Estlund, and Kutz use them to support answers to the question of obedience that are different from mine, they do so while recognizing the importance of meeting the two desiderata above. Engaging with their objections is thus a crucial way of strengthening the case for my account. For the plausibility of the account obviously depends not only on how it compares to traditional approaches, which neglect those desiderata, but also on how it compares to competing views that seek to meet them in different ways.

### 1. THE MODEL OF PRESUMPTIVE REASONS

Let me start by sketching in broad strokes my answer to the question of obedience. I set aside finer details for now, though we will need to come back to some of them later. My aim here is not to present a comprehensive articulation of my view but rather to provide an outline that is sufficiently informative to render the objections discussed below intelligible to someone who is not already familiar with it.

The core idea in “Political Authority and Unjust Wars” is simple. When a legitimate state acting in good faith orders us to fight an unjust war, we acquire a *pro tanto* duty to obey. However, this duty, being *pro tanto*, can be overridden under certain conditions by a weightier duty we have not to contribute to the unjustified killing of innocents. To defend this view, I offer an account of the *presumptive nature* (as I call it) of the reasons that legitimate authorities generate for us when they issue a valid directive.<sup>10</sup> This is where the complications begin.

9 To simplify my prose, I will assume that the legitimate state issuing the order to fight is acting in good faith. I will also use the expression ‘unjust wars’ to refer to wars that are in fact unjust, despite the fact that the state waging them is unaware of this. So the predicate ‘unjust’ is to be understood *de re*, not *de dicto*.

10 As I explain in “Political Authority and Unjust Wars,” the notion of presumption I work with is practical, not epistemic (351). To see what I mean, consider the notion of

Unlike in the classic model of exclusionary reasons defended by Joseph Raz, according to which any competing reasons for action the authority was meant to consider in issuing its directives are to be excluded from our deliberation, I argue that authoritative directives create only a presumption in favor of such exclusion.<sup>11</sup> That presumption can be overridden when we are (1) justified in believing that the authority has made a mistake and (2) sufficiently confident about this belief. This is because when such an epistemic threshold is met, we are permitted—and sometimes required—to balance the new reasons created by the authority against the reasons the authority intended to exclude. And of course, when we do that, the duty to obey will be normally overridden when we are ordered to fight unjust wars since, barring exceptional circumstances, the reasons we have not to target innocent people (including enemy combatants who have done nothing to forfeit their right not to be attacked) will typically outweigh the reasons we have to obey the authority. Importantly, however, when the epistemic threshold is *not* met, we are not allowed to balance the new reasons created by the authority against those the authority intended to exclude. In this case, the duty to obey the order will remain undefeated.<sup>12</sup>

Does that mean we must scrutinize every directive issued by the authority for errors? No, that would defeat the purpose of having the authority. (More on this below.) Generally, it is enough to remain open to the possibility that the presumption might be overturned, occasionally conducting a quick

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*presumption of innocence*, as it is used in criminal law. The presumption of innocence does not tell us what we should believe about the defendant. It tells us how the defendant should be treated. The defendant should not be punished unless their guilt has been proved beyond any reasonable doubt. I return to this idea below.

- 11 For this formulation of Raz's view, see Owens, "Rationalism About Obligation," 413–14. Strictly speaking, deliberating about excluded first-order reasons is allowed, according to Raz, as long as we do not act on them. But this is only because Raz understands deliberation as merely thinking about reasons rather than thinking about them with the aim of deciding what to do. This latter possibility is precisely what exclusionary reasons are meant to rule out. When exclusionary reasons are present, we are not allowed to balance competing first-order reasons against them in deciding what to do. I find Owen's formulation clearer, but nothing hangs on this choice. For Raz's classic discussion of exclusionary reasons, see his *Practical Reason and Norms*.
- 12 Since the question we are considering here is whether there is a duty to obey the order to fight in unjust wars, my discussion will focus on cases where the mistake made by the authority would lead us to act unjustly. Notice, however, that the model of presumptive reasons is meant to cover all cases of mistaken authoritative directives. In cases where obedience would lead us to act unjustly, whenever we meet the epistemic threshold, we are morally required to balance the reasons created by the authority against those the authority intended to exclude. In other cases (such as the one discussed in note 29 below), we are merely permitted to do so.

preliminary check rather than always undertaking a thorough investigation.<sup>13</sup> In some cases, the mistakes will be immediately apparent; in others, they will not, but this will not be a problem since, as far as we can tell, not much is at stake. Here, as we have seen, obedience can be justified as one of the costs of dealing with fallible political authorities. However, when we have reason to suspect that a political authority may be biased or prone to error, and when such errors could lead to grave injustices, we have a duty to actively scrutinize the authority's decisions. In these cases, the amount of scrutiny required is a function of both the likelihood that a mistake was made and the seriousness of the injustice in question.

The motivation for this view is twofold. On the one hand, our duty to obey the authority is primarily grounded in the idea that doing so is the best way for us to discharge our natural duty not to expose others to the dangers of the state of nature.<sup>14</sup> This is because authorities provide us with vitally important benefits—most notably by enforcing authoritative standards of conduct that, given reasonable disagreement about justice, are necessary to coordinate our behaviors so that we can respect each other's rights. Authorities, however, could not perform this function effectively if every time they issue a directive, each person's duty to obey was conditional on their own assessment that the directive is sound. On the other hand, the claim that the benefits of authority would be unattainable if we had to scrutinize every directive is compatible with the claim that, at times, we ought to do so. This is why the benefits provided by the authority are not lost if we scrutinize its directives in a restricted number of cases—namely, when we are justified in believing that the authority has made a mistake and we are sufficiently confident about that.

Importantly, this argument is premised on the idea that the authority in question is both *legitimate* and *acting in good faith*. Illegitimate authorities cannot create an obligation to fight unjust wars because they lack the right to impose obligations at all. This matters because, on my view, legitimacy requires that an authority be at least minimally just. Consequently, states that are seriously unjust lack the power to create duties to obey.<sup>15</sup>

As for legitimate authorities that do not act in good faith (i.e., those that intentionally fight unjust wars), they cannot create an obligation to fight

13 This idea comes from Schauer, "Rules and the Rule of Law" and *Playing by the Rules*.

14 I defend this view in "State Legitimacy and Self-Defence." Although this is the primary justification for the duty to obey the law, it is not the only one. See Renzo, "Associative Responsibilities and Political Obligation," "Fairness, Self-Deception and Political Obligation," and "A Pluralist Theory of Political Obligation." Still, the arguments developed here (as well as in "Political Authority and Unjust Wars") are grounded exclusively on this justification.

15 A seriously unjust state is one that fails to be minimally just.

because intentionally creating obligations to perpetrate serious injustices falls outside the scope of any normative power.<sup>16</sup> Just as we cannot generate obligations, even *pro tanto*, for ourselves to commit serious injustices by promising, an authority cannot generate obligations, even *pro tanto*, for us to perpetrate serious injustices by issuing an order.

## 2. RETHINKING LEGITIMACY

One way to put pressure on my view is by challenging the notion of legitimacy on which it rests. This is what Christiano does when he writes:

Renzo ... seems to say that a state is either legitimate or illegitimate. Legitimacy must depend on possessing a complex set of properties simultaneously. Hence, it appears that the legitimacy of the state cannot be piecemeal; it must be holistic. This approach is not adhered to on all dimensions, as far as I can tell, because Renzo does say that different people with different amounts of knowledge or access to knowledge might have different obligations. So, there is a certain amount of piecemeal legitimacy regarding who is under a duty. But Renzo seems to think that if a state is legitimate in one area, it must be in most or all other areas. But it is not clear that this is consistent with a thoroughgoing instrumentalism. Why not think that the state's commands enable you to act better in accordance with duty in some areas but not others?<sup>17</sup>

The first thing to say here is that my view of legitimacy is not piecemeal in the way Christiano suggests. Within my view, all the members of a legitimate authority are subject to the same *pro tanto* duty to obey. The reason some members are required to disobey while others are not is simply that our all-things-considered duties result from the interaction between the duty to obey and other moral considerations (most notably, competing duties) that apply to us, and these will be different for different people. This is a feature of all normative powers that generate obligations. Promises, for example, function this way. Even if you and I make the same promise, our all-things-considered duties may differ depending on which further moral considerations apply to us. It may well be that your all-things-considered duty is to keep the promise, and mine is not (if, say, doing so would be incompatible with discharging a more

16 I leave open here the possibility that a state can retain its legitimacy despite intentionally fighting unjust wars, though such cases, if they exist, are presumably uncommon.

17 Christiano, "War, Legitimacy, and Democracy," 753.



stringent duty of mine). This feature, however, does not render an account of promises piecemeal in any interesting sense.

The same holds for the authoritative directives issued by legitimate authorities. The distinctive feature of the model of presumptive reasons is that when the relevant epistemic threshold is met, stringent competing duties that were previously excluded from the scope of our deliberation are now capable of defeating the duty to obey authoritative directives.<sup>18</sup> However, this is a feature of the duty to obey as it applies to *all* those subject to the legitimate authority. It is true for all of them that when they meet the epistemic threshold, they ought to balance the duty to obey with competing duties. Thus, it would be misleading to view this account as piecemeal.

I mention this point to dispel the worry that there might be an internal tension within my view. Christiano's challenge, however, stands. For the challenge targets precisely the "holistic" understanding, as he puts it, of legitimacy that I work with. The challenge is: Why not take a more piecemeal approach, which would enable us to make more fine-grained judgments in determining who is under a duty to obey the order to fight unjust wars and who is not?

One way to do that, Christiano suggests, is to reject the idea that in order to be legitimate—and thus have the right to impose moral obligations—an authority must be minimally just. Within this approach then, even seriously unjust states—those that fail the legitimacy test in fundamental ways (say, by persecuting internal minorities or failing to maintain the rule of law)—can retain the right to impose obligations in relation to war-related matters. Their injustice does not undermine their legitimacy *tout court*, only their legitimacy with respect to the domains in which they act unjustly. Thus, if they do not act unjustly within the domain of war-related activities, they can enjoy legitimacy within this domain.

This is an intriguing suggestion, and piecemeal notions of legitimacy are certainly worth exploring. Still, I believe we should resist Christiano's proposal. This is because complying with the directives of a state is a way of providing support to its existence and its functioning. But when a state is seriously unjust, we have a duty not to provide this kind of support (barring exceptional circumstances).<sup>19</sup> Here Christiano might reply that insofar as our obedience is restricted to the orders falling within a domain in which the state is not acting unjustly—in this

18 Some have objected to my view that it is unclear how meeting the epistemic threshold could generate new duties. See Venezia, "Mistaken Authority and Obligation," 347–48. That is a misunderstanding of the view. Meeting the epistemic threshold does not generate any duties; it only allows us to balance preexisting duties that are normally excluded from our deliberation.

19 The sort of circumstances I have in mind are those discussed in note 35 below.



case, the domain of war-related matters—it is a good thing that it can count on our support. Thus, it is simply not true that our duty is not to support a seriously unjust state within this domain. This reply, however, is unconvincing.

To begin with, it is implausible that a state that regularly engages in human rights violations will set such violations aside in the context of war. If, for example, it systematically targets or discriminates against a religious minority, that persecution will likely not stop during the course of a military effort. Thus, it is hard to imagine a realistic scenario in which supporting the unjust state in its military efforts, even only those aimed at pursuing just wars, does not also involve supporting the unjust treatment of the minority in question. This is because it is unrealistic to conceive of the various domains in which states make decisions as insulated from each other in the way that Christiano's suggestion requires. Specifically, decisions about war-related matters are not completely disconnected from decisions about economic, cultural, and religious matters. Indeed, if we try to articulate what the boundaries of the domain of war-related activities are, it quickly becomes apparent that they cannot be drawn so as to neatly exclude other domains.

To take an obvious example, war efforts are normally funded by taxes. Does that make the tax system part of the domain of war-related activities to which, according to Christiano's suggested piecemeal account, we owe obedience? The answer cannot be no, since without financial resources there could be no war-related activities. But if the answer is yes, then it is hard to see how the domain of war-related matters can be insulated from the unjust goals pursued by the state in other domains. This is partly because the revenue secured through taxation will also be used to pursue such goals (say, the funding of segregationist policies), partly because in a profoundly unjust state, the tax system itself will likely reflect and entrench unjust social relationships within the political community in question.

Suppose now that we were to concede that there can be a clear separation between the various domains within which a state operates so that the injustices perpetrated within one domain do not necessarily have an impact on other ones. In this case too, I believe we should resist the idea that an unjust state can enjoy legitimacy within specific domains. To see this, consider the case of a mob family that tightly controls the criminal activities in a big city. Suppose that the family provides valuable services within certain domains to those living in that city, such as protecting them from other forms of criminality or providing food to families in need. Should we say that the citizens have a duty to obey the directives of the mob in these domains? That seems implausible. Even if we stipulate that in performing these valuable functions, the mob is not disrupting the activity of another legitimate authority (say, because the existing

institutions are inefficient or corrupt), it seems clear that the mob family lacks the right to impose genuine moral obligations. People might have reasons, even duties, to act in conformity with what the family requires, if doing so happens to be the best way to discharge independent moral duties they have. But these duties are not grounded in the fact that the mob enjoys anything resembling legitimacy (i.e., the right to impose binding moral obligations), not even within a restricted number of domains.

We should think about profoundly unjust states in the same way. The fact that they are engaged in the pursuit of serious injustice intuitively undermines any claim they might have to impose genuine moral obligations on us. We might have duties to act in conformity with what they require if doing so is the best way to discharge independent moral duties we happen to have. These duties, however, are not justified by the fact that such states enjoy legitimacy, albeit within restricted domains.<sup>20</sup>

### 3. RETHINKING AUTHORITY

As Estlund notices, the central idea on which my account rests is a formal point about the nature of authority—namely, the idea that when a legitimate authority issues an order, that order has *pro tanto* force even if it is mistaken, provided that the authority in question acts in good faith. So, although a state cannot generate a *pro tanto* duty to obey an order to  $\phi$  if it knows that  $\phi$ -ing would be unjust in the circumstances at hand, it can generate a *pro tanto* duty to obey if in issuing the order to  $\phi$ , the state has made an honest mistake. This duty may be overridden by competing ones if the epistemic threshold is met; nevertheless, it retains its normative force.

This is what opens up the possibility of a duty to obey a mistaken order, even when doing so involves perpetrating a serious injustice. When the epistemic threshold is *not* met, our all-things-considered duty is to obey the order to  $\phi$ , even if  $\phi$ -ing is in fact unjust, simply because in this case, we are not allowed to balance the duty to obey against any competing duties.

A natural way to reject my view is to challenge this way of understanding the notion of authority—a strategy independently pursued by Christiano and Estlund in their contributions. This is an important objection, which, as we will see, can take different forms. And the idea behind it is appealing in its simplicity: Rather than holding that legitimate authorities generate *pro tanto* duties whenever their orders are issued in good faith, why not adopt a view in

20 One way to see this point is to notice that philosophical anarchists have no problem acknowledging the existence of such duties in the context of illegitimate states. This is because those duties are not grounded in legitimacy.

which unjust orders lack binding force altogether? On this alternative picture of authority, whenever the state commands us to fight an unjust war, we acquire no duty—not even *pro tanto*—to obey, and thus, there is no need to meet any epistemic threshold to justify disobedience. Within this view, the duty to obey does not exist in the first place. Since the state “has no authority to engage in unjustified war, . . . it cannot impose duties on citizens to participate.”<sup>21</sup>

One way to defend this approach is to argue that the directives of a legitimate authority, at least in the domain of war, are binding only insofar as they are correct. And this view might seem especially attractive if, as I contend, the duty to obey the law ultimately rests on instrumental considerations—namely, the fact that obedience enables us to discharge our natural duties of justice.<sup>22</sup> Tempting as it is, however, the view ultimately rests on an implausible understanding of the notion of authority.

To begin with, if authoritative directives were binding only when correct, then every time we receive an order to  $\phi$ , in order to establish whether the directive binds us, we would first need to determine independently whether  $\phi$ -ing is what we are already required to do. But this would defeat the purpose of having the authority, since the justification of authority rests on the idea that within its domains of competence, a legitimate authority is generally better placed to determine how we ought to act. This is not only because the authority, given its resources and expertise, is normally best placed to assess what we have reasons to do in cases where those reasons are fully determined independently of its decisions, but also because there are cases in which what we have reason to do is *not* fully determined in this way. In these cases, what is required instead is some sort of coordination among those subject to the authority. But since multiple forms of coordination are possible, and reasonable disagreements can arise over which to adopt, the authority becomes necessary to select and enforce a common system.

For example, we know that disposing of industrial waste in certain ways can be extremely harmful. So, are the authority’s directives requiring us to employ particular methods of industrial waste disposal binding? If answering this question requires establishing by ourselves whether the authority’s chosen methods are indeed the right ones, the advantage of relying on the authority’s judgment is lost. We also know that certain failures to coordinate can lead to “tragedy of the commons” scenarios in which natural resources become depleted. Are the directives of a legitimate authority aimed at preventing such outcomes binding?

21 Christiano, “War, Legitimacy, and Democracy,” 755–56.

22 For the worry that my “good faith” condition is hard to justify within the sort of instrumental picture I favor, see Tadros, *To Do, To Die, To Reason Why*, 44.

The challenge here is even more acute for two reasons. First, assessing the directives in question is an especially complex task, since their effectiveness will depend on how multiple parties are meant to interact. Second, a uniformly followed albeit imperfect directive often proves more effective at averting tragedy of the commons scenarios than superior directives that lack universal compliance.<sup>23</sup> This is why Raz writes that “there is no point in having authorities unless their determinations are binding even if mistaken (though some mistakes may disqualify them). The whole point and purpose of authorities ... is to preempt individual judgment.”<sup>24</sup>

Although I cannot fully develop this point, it is worth noticing that there is nothing special about authority here. This is how we should generally think about normative powers, at least duty-conferring ones. Consider, once again, promising. Above, I said that we cannot generate *pro tanto* obligations for ourselves to commit serious injustices by promising. By that, I only meant that we cannot do so *intentionally*. We cannot incur a *pro tanto* obligation to  $\phi$  by promising to  $\phi$  if we know that  $\phi$ -ing would constitute (or contribute to) a serious injustice. But we can incur a *pro tanto* obligation to  $\phi$  by promising to  $\phi$  if we are not aware of that. Here, too, the good faith condition applies.<sup>25</sup>

To see this, suppose you promise me that tonight you will turn on the irrigation system in my garden while I am away. In doing so, you acquire a *pro tanto* duty. Of course, if when you are about to flip the switch, you realize that doing so will cause a short circuit that will electrocute my neighbor, your promissory duty is overridden by your duty not to harm poor old Mrs. Clarke.<sup>26</sup> It is overridden in the same way it would be if activating the irrigation system conflicted with your duty to take an injured person to the hospital. By contrast,

23 Victor Tadros challenges this view by arguing that machines can in principle solve coordination problems by issuing random coordination points, as long as we agree to abide by them, whatever they may be. But since machines are not authorities and do not issue orders, Tadros argues, this shows that solving coordination problems does not require binding orders issued by authorities (*To Do, To Die, To Reason Why*, 81). The reason this argument fails is that once we assume the existence of an agreement to adhere to the machine's coordination points, the coordination problem no longer exists. Effectively, Tadros's case is one in which we have agreed on a specific way to coordinate, i.e., by complying with the machine's instructions. Genuine coordination problems arise precisely when no such agreement is in place. Further arguments offered by Tadros in support of his view raise similar issues, as they fail to address the challenges raised by disagreement, even among well-intentioned parties, in achieving successful coordination.

24 Raz, *The Morality of Freedom*, 47–48.

25 Venezia's attempt to reject my view by appealing to the parallel with promises (in “Mistaken Authority and Obligation,” 350–51) fails because he neglects this distinction.

26 This is based on a case in Thomson, *The Realm of Rights*, 229.

you could not have incurred a *pro tanto* duty to turn on the irrigation system if you knew that doing so would electrocute Mrs. Clarke. Intentionally generating for yourself a duty to do something profoundly wrong falls outside the scope of the power to promise.

Here one might be tempted to raise the same objection that Christiano and Estlund raise about authority. Why not say that even when made in good faith, the promise to activate the irrigation system is not binding if doing so would result in Mrs. Clarke's demise? The answer is the same. If that was the case, promisor and promisee could not rely on the fact that a *pro tanto* promissory duty is created until they have first established that no serious injustice will follow from keeping the promise. But that would be incredibly burdensome. Knowing that any promise involving flipping a switch is binding would require first checking that the switch in question will not electrocute someone if flipped. Knowing that any promise to meet someone for lunch is binding would require checking first that this would not be incompatible with discharging our duty to take injured people to the hospital. That would render promise making highly inefficient, thereby undermining the very value of the institution of promising.<sup>27</sup>

Consider now a weaker revision to the notion of authority my account presupposes. Instead of arguing that states cannot generate a duty to take part in an unjust war by appealing to the idea that mistaken directives always fail to be binding, we might do so by appealing to the idea that only some mistaken directives fail to bind—namely, those that, if obeyed, would lead us to the perpetration of serious forms of injustice. This is the view that Estlund has in mind when he writes that even if we agree that the formal features of the structure of authority I have identified are substantially correct, “that cannot by itself show that a command from a legitimate authority can be morally binding, all things considered, regardless of how severe the wrong would be that one would thereby be contributing to.” Estlund continues:

Renzo's epistemic exception gives no antecedent weight to the severity of the wrong—only to warrant and confidence in the soldier's belief that it is wrong. What if the allegedly bracketed consideration was instead the fact that if the soldier were to obey, they would be contributing to the imminent collapse of civilization? Renzo's view suggests that even if there were little risk or cost from disobeying, unless the soldier not only believes the truth with good reason but also has some additional quantum of confidence, then obedience is required. No one should bite

27 Unlike in the case of authority, I do not go as far as to say that it would undermine our capacity to achieve the goods that justify the institution of promising. This is only because I do not have set views about what those goods are.

that bullet just because authority has a certain formal bracketing structure. Even if it is correct, that whole structure of authority must surely be within the scope of certain exceptions, at least partly on grounds of great severity. And then the revisionist can fairly ask: Why would the killing of innocent people not be within the class of exceptions . . . thus preempting Renzo's epistemic exception requiring warrant and confidence?<sup>28</sup>

Despite calling for a weaker revision to the notion of authority, this argument faces the same objection discussed above. If we were to adopt Estlund's suggestion, whenever we receive a directive, we would need to determine whether obeying it would lead us to perpetrate a serious injustice. Doing so, however, would defeat the purpose of having the authority, since legitimate authorities are better placed to make that judgment, especially in contexts that require coordinated action. Estlund's view is weaker than Christiano's because it restricts the set of cases in which directives fail to bind us to situations in which obeying would lead us to perpetrate some serious injustice. But we are still left with the problem of having to assess every directive we receive in order to determine which ones fall within this set. There is, however, a different objection, which is in the neighborhood of Estlund's but avoids this difficulty.

While having to evaluate every directive for its potential to lead us to cause severe injustice would defeat the purpose of having the authority, doing so in a restricted number of cases—i.e., when it is especially clear that such an outcome might be produced—does not. And indeed, this is precisely what my view calls for. In cases where we have reason to believe that obeying might lead us to the perpetration of serious injustice, my view requires that we scrutinize the directive of the authority. Still, as we have seen, the directive remains binding in these cases too, according to my view, and this is why our duty is to obey it unless we meet the epistemic threshold. Here one might object, in the spirit of the worry raised by Estlund, that this is implausible. Would it not be better to adopt a picture of authority according to which when we have some reasons to believe that obeying the directive might lead to severe injustice—even if those reasons are not strong enough to meet the epistemic threshold—the directive is not binding at all? An advantage of this view, we might think, is that when the epistemic threshold is not met, disobedience rather than obedience is required.

The problem with this picture of authority is that although it does well with false positives (cases in which obeying would lead to severe injustice), it does terribly with false negatives (cases in which failing to obey would lead to severe injustice). Avoiding false negatives, however, is surely as important. After all,

28 Estlund, "The Weight of Authority in War," 782. At times, Christiano also seems to have in mind this formulation of the objection.

if cases in which states order us to fight wars that will lead to the collapse of civilization are certainly possible, so are cases in which they order us to fight wars that are necessary to prevent the collapse of civilization. So, what happens if we have some reasons to believe that obeying the order to fight a given war might lead to severe injustice, but in fact, the war in question is necessary to prevent the collapse of civilization? Adopting a view of authority according to which such an order is not binding unless we are sufficiently confident that the order is just would render authorities ineffective in preventing the collapse of civilization since they would be unable to count on our obedience.

This provides further support for the central idea on which my account rests. Since legitimate authorities are generally best placed to assess what we have reasons to do, as well as to coordinate collective behavior, this gives us reasons to treat their directives as *pro tanto* binding, so that the default, when we fail to meet the epistemic threshold, is obedience. A model that treats these directives as not binding (such as the one just considered or the one adopted by revisionist approaches) makes disobedience the default whenever we fail to meet the epistemic threshold. This, however, would undermine our capacity to achieve the very goals that the authority is meant to help us secure.<sup>29</sup>

#### 4. WAR AND TRAGEDY

Suppose I am right that a legitimate authority acting in good faith can generate a *pro tanto* duty to obey an order to fight an unjust war. Another way to criticize my account is by rejecting the idea that when this duty conflicts with the duty not to contribute to the killing of innocents, we should expect the latter to prevail. Kutz pursues this line of argument, objecting that the very thought of resolving the

29 This provides a natural account of cases that traditional theories of authority notoriously struggle with. Consider, for example, the case of the red traffic light on a deserted road late at night, where visibility is perfect, and it is clear that no one is approaching. The idea that one has a duty to obey the directive to stop in such a scenario seems so implausible that many take this case to show that there can be no legitimate authority (or at least no duty to obey legitimate authorities). If we adopt the traditional understanding of authority, the only available reply here is to bite the bullet and accept, as Raz does, that one ought to “blindly” follow the directive and stop at the red light (Raz, *The Authority of Law*, 24). By contrast, the model of presumptive reason treats this as a case in which the epistemic threshold is easily met. This explains why, at least in some circumstances, the duty to stop will be easily overridden by competing considerations. Even in such cases, however, it is important that obedience be treated as the default from which departure must be justified on a case-by-case basis by establishing that the epistemic threshold is met. A system in which disobedience is treated as the default and obedience has to be justified on a case-by-case basis (by identifying good reasons to stop) would fail to adequately serve the purposes that justify the existence of traffic law for the reasons discussed in the text.



tension between these duties is misguided.<sup>30</sup> Instead, we should acknowledge that the tension is irresolvable and that what we are faced with is a tragic choice.

This approach has two advantages, according to Kutz. First, it explains why it would be appropriate for soldiers who obey the order to fight an unjust war to feel regret for their actions. Second, it explains why their victims have the power to forgive them. And surely both ideas are plausible. To see this, consider Jose, the soldier (described by Kutz) who, having failed to meet the epistemic threshold, fights in an unjust war. If Jose later feels no regret for his conduct, even after new evidence has shown that the war was in fact unjust, that would be deeply troubling. Likewise, it seems clear that the victims of Jose's actions have the right to forgive him. But if Jose was all-things-considered justified in acting as he did, Kutz argues, there is no place for regret or forgiveness.

The idea of conceiving Jose's situation as a moral dilemma is an intriguing and, in many ways, natural suggestion. It also has the advantage of capturing the spirit of my own view (the thought that an adequate answer to the question of obedience requires acknowledging the force both of our duty not to contribute to the killing of innocents and of our political obligations) while avoiding complicated discussions about which reasons are excluded from our practical deliberation under which conditions. Instead, we simply have two competing duties and no resolution about which one should prevail. This means that no matter what we do, we will do something wrong. But this is a feature, not a bug of the view, Kutz argues. Indeed, it is a welcome feature since it explains both why Jose ought to regret his decision to fight and why his victims have the power to forgive him. Given that Jose's duty to obey cannot be said to override his duty not to contribute to the killing of innocents, it is the violation of this latter duty that warrants his regret, as well as the power of his victims to forgive him. Similarly, had Jose decided not to fight, he would have had to regret that decision, and his fellow citizens would have had the power to forgive him.

The reason to resist this suggestion is that it seems implausible to claim that the following two duties constitute a genuine moral dilemma:

1. The duty not to contribute to severely harming innocent people.
2. The duty to obey a mistaken order that we are sufficiently confident (having met a suitably robust epistemic threshold) will lead us to contribute to a serious injustice.

To see this, let me propose the following question as a heuristic for determining whether a given conflict of duties constitutes a genuine moral dilemma: *Would*

30 Christiano also raises this worry, albeit more briefly. See Christiano, "War, Legitimacy, and Democracy," 758.

*both parties whose claims are at risk of being violated by the agent's decision have a legitimate complaint if their claims were indeed violated?*

The idea behind this test is that if one party intuitively lacks a legitimate complaint, this is plausibly explained by the fact that the competing duty had overriding force after all. So, if Sartre's soldier decides to stay with his mother, intuitively, his fellow soldiers can legitimately complain that the value of fighting the Nazis should not have been subordinated to the value of caring for a family member; and if he opts to join the Free French Forces, intuitively, his mother can legitimately complain that the value of caring for her should not have been subordinated to the value of fighting the Nazis. This shows that the soldier faces a genuine moral dilemma. But suppose that the soldier had faced instead a choice between joining the Free French Forces and keeping his promise to regularly water his neighbor's plants. Any complaint by the neighbor that the soldier ought to have kept his promise would plainly lack force. This is evidence of the fact that in this version of the story, the soldier was not facing a dilemma.

Let us now examine the case in which, having met the epistemic threshold, we face the question of obedience. If we obey the order to fight an unjust war, the victims of our actions clearly have a legitimate complaint about our decision to contribute to the killing of people who we are sufficiently confident are innocent. If we do not, do our fellow citizens have a legitimate complaint that we should have obeyed an order that we were sufficiently confident (having met a suitably robust epistemic threshold) would have led us to contribute to a serious injustice? This seems implausible.

One way to see this is to notice that while in the case at hand, obeying the mistaken directive conflicts with our duty not to inflict unjust harms on members of another political community, there will be also instances when obeying a mistaken directive conflicts with our duty not to inflict unjust harms on members of our own political community. (Think, again, of a scenario in which we are required by law to dispose of industrial waste in a way that will significantly harm our fellow citizens.) Plausibly, in these cases, our fellow citizens would not insist that our duty is to obey the directive if we are sufficiently confident that it is mistaken. If so, this shows that we do not face a genuine dilemma when our choice is between the duty not to contribute to severely harming innocent people and the duty to obey mistaken orders that we are sufficiently confident will lead us to contribute to a serious injustice.

## 5. JUSTIFICATION AND REGRET

A worry raised by both Kutz and Estlund is that my view seems to be incoherent or paradoxical. For Kutz, this is a worry about the psychology of combatants.

Soldiers will experience their own position as incoherent insofar as they will have to think of themselves as justified in fighting (since they are under a binding obligation to do so) and, at the same time, as unjustified in doing so (since they cannot rule out that the war is unjust). For Estlund, the paradox concerns the very idea that a given conduct can be morally unjust and morally required at the same time. In this section, I consider Kutz's objection. Estlund's is the focus of the next one.

In addressing Kutz's objection, the first thing to notice is that it needs to be reformulated. Surely, if there is a view that raises the worry of incoherence or of generating paradoxical results (though I would not myself put the point quite this way), it is the one that sees soldiers as facing a moral dilemma. For if they are facing a moral dilemma, they are—by definition—in the position of having to see themselves as having a duty to do something and, at the same time, having a duty not to do it. According to my view, by contrast, regardless of whether soldiers end up obeying or disobeying, they can see themselves as acting for an undefeated duty. Although they are aware that even legitimate states acting in good faith sometimes wage unjust wars by mistake, soldiers who obey may take comfort in the fact that, when they are not sufficiently confident that the state has made a mistake, obedience is the most reliable way to discharge their natural duties of justice.<sup>31</sup>

Now, this is precisely the idea that Kutz finds problematic. His point is that this way of thinking fails to do justice to the complexity of the situation. As he puts it, "this tragic dimension of individual political membership . . . may simply be an irreducible fact of life even in a generally legitimate state, so long as that state exists in a confusing and unjust world. We disguise it by pretending that the duties can be ranked and thus reconciled, as Renzo does. But they cannot be."<sup>32</sup> Perhaps. But even if this concern has merit, the worry is not that my account is paradoxical or incoherent but rather that it mischaracterizes our normative situation. Soldiers might be delusional in understanding their situation as my account recommends, but they would not be facing any paradox or incoherence. Still, addressing Kutz's arguments in support of the incoherence objection is helpful, as they rest on a misunderstanding of my position that needs clarification. So let us look at them more closely.

Kutz understands my view as involving a form of justification that is neither fact-relative nor evidence-relative but "hybrid," in the sense that it makes the permissibility of fighting depend on the actual justice of the war and, at

31 If they are shaken by the incoherence of two conflicting duties, one of which is overridden by the other, wait until they hear that, in fact, neither duty is overriding, and they will be acting wrongly no matter what they do!

32 Kutz, "Soldiers and Moral Tragedy," 769.

the same time, on whether we have epistemic access to this information.<sup>33</sup> According to this interpretation of my view, if after the war, Jose acquires further evidence that the war was unjust, he should somehow look at his conduct as being justified and unjustified at the same time, and herein lies the alleged incoherence. To support this point, Kutz considers cases in which we find ourselves having to gamble or to guess at some future outcome. In such cases, we will try to make the best choice we can, given the evidence available to us at the time, Kutz concedes. But this cannot change the fact that our choice lacks fact-relative justification if, as it turns out, we choose wrongly. Which is why we should feel regret for our choice, even if we know that it was justified from the evidence-relative perspective at the time of the action.

I should say that, even if we stick to cases of gambling and guessing, I do not find the sort of psychological state described by Kutz problematic. These are simply cases in which, looking back, we should think that at the time we acted, we had an evidence-relative justification for our conduct but, as it turns out, not a fact-relative one. Regret is certainly an apt response, but the worry of incoherence seems once again misplaced.

More importantly, my view does *not* treat Jose's case along the lines of the gambling and the guessing scenarios mentioned by Kutz. For my view relies exclusively on fact-relative considerations to justify Jose's duty to fight, not on evidence-relative ones. Jose's justification for fighting is that the fact-relative reasons that ground his duty to obey remain undefeated. It is true that evidential considerations play a role in determining when a further set of fact-relative reasons can be admitted in Jose's practical deliberation, and that when that happens, these further reasons (which ground his duty not to kill innocents) can defeat his reasons to obey. This, however, is not enough to render the justification evidence-relative. The reasons on which the justification of Jose's conduct rest remain exclusively fact-relative.<sup>34</sup>

To see this more clearly, consider how my view would handle cases in which we do meet the epistemic threshold. In such cases, my view says that our all-things-considered duty is to disobey, barring exceptional circumstances.

33 Kutz prefers to distinguish between 'objective' and 'subjective' justifications, but I will stick to the distinction between 'fact-relative' and 'evidence-relative' justifications, which I use in "Political Authority and Unjust Wars." Nothing hangs on this choice.

34 Luciano Venezia and Rodrigo Sánchez Brígido argue that my account cannot vindicate the idea that Jose has a fact-relative justification for obeying, since in "kill(ing) innocent persons without justification," he is acting against what he has reasons to do ("Between Traditionalism and Revisionism," 362). But this argument begs the question against the view that the duty to obey can provide such a justification. My account is precisely meant to explain why it does.

This is not, however, because given the evidence available to us, we are justified in believing that fighting would be unjust. Rather, it is because our fact-relative reasons to obey are overridden by the fact-relative reasons we have not to contribute to the killing of innocents. So once again, this is a fact-relative justification through and through.<sup>35</sup>

The comparison with how we normally think about the justification for the conduct of other officials is helpful here. Take judges, for example. If the prosecution fails to prove a defendant's guilt beyond a reasonable doubt, the judge must acquit. That is the case even if the only reason the standard of proof was not met is that crucial evidence was thrown out on procedural grounds, and thus the judge knows that the defendant committed the crime (and did so with the requisite *mens rea*). Clearly, the justification for the judge's conduct here is not that they have evidence-relative reasons to believe that the defendant did not commit the crime. By hypothesis, they know that the defendant did. Rather, the justification is that correctly following criminal procedure gives

- 35 In writing that our all-things-considered duty is to disobey *barring exceptional circumstances*, I have in mind two types of cases. First, there might be situations in which, despite meeting the epistemic threshold, we are nevertheless mistaken about the injustice of the war. I might have collected sufficient evidence to justify both my belief that the war is unjust and my confidence in this conclusion—and yet still be mistaken. Against all the evidence, the war is in fact just. In this case, because the epistemic threshold is met, I am required to balance the fact-relative reasons I have to obey with the fact-relative reasons I have not to contribute to the war. But since, by hypothesis, the war is not unjust, I do not have any fact-relative reasons not to take part in it. Thus, my all-things-considered duty is to obey the order, despite meeting the epistemic threshold. If I do not obey because I reasonably believe that my duty is to disobey, my conduct might be excused. (Blame is justified by how we respond to our evidence-relative reasons for action rather than to our fact-relative ones.) Still, I will have failed to discharge my all-things-considered duty.

The other kind of exceptional circumstance I have in mind concerns cases in which, despite meeting the epistemic threshold, we may nonetheless have an all-things-considered duty to take part in an unjust war on lesser evil grounds. Consider:

*Lesser Evil:* State *A* is fighting (in good faith) an unjust war against state *B*. *A* should stop the war, but it is not going to because it believes the war to be just. If *A* loses the war, the consequences would be disastrous (say, because *A*'s defeat would destabilize a vast region, leading to far more innocent deaths than those produced in defeating *B*).

Here, *A*'s citizens have an all-things-considered duty to fight. Importantly, however, this is not because the duty not to contribute to the killing of innocents in *B* is outweighed by the duty to obey. It is because the duty not to contribute to the killing of innocents in *B* is outweighed by the duty to prevent disastrous consequences. So, while *A*'s citizens do have a fact-relative justification, all things considered, for fighting, this is not strictly speaking a justification for obeying the order. Rather, it is a justification for conforming to it, in the way that philosophical anarchists believe we ought sometimes to conform to what the law requires.

the judge undefeated fact-relative reasons to acquit. Similarly, our duty to obey (or disobey) is the product of the fact that following the correct deliberative procedure generates undefeated reasons to do so, not the fact that this is the right choice in light of the evidence available to us at the time of the action.

Importantly, none of this undermines the aptness of feeling regret if it turns out that the order we obeyed was mistaken. Consider again Jose's case. That he had a fact-relative justification for obeying means only that he is not at fault for doing so. This is compatible with the presence of regret, however. Regret requires Jose to "wish that things had been otherwise," as well as some sort of first-personal reaction to his own conduct, such as willingness to compensate his victims or apologize to them.<sup>36</sup> But if it is apt for the lorry driver in Williams's famous case to have such responses despite not being at fault for his conduct, the same holds for Jose. And if it makes sense for Jose to apologize, it also makes sense for his victims to forgive him.

My view thus has no problems vindicating either of the ideas Kutz uses to motivate the claim that the tension between the duty to obey and the duty not to contribute to the killing of innocents is best understood as a tragic choice. His mistake is inferring that Jose faces a tragic choice from the aptness of Jose's regret. This inference is unwarranted because even if we agree that regret is always present in tragic choices, it is not present *only* in tragic choices (as Williams's case illustrates).

#### 6. *PRIMA FACIE* VERSUS *PRO TANTO* DUTIES

While for Kutz, my view is paradoxical in the sense that its adoption would be psychologically unstable, for Estlund, it is paradoxical in the sense that it involves a sort of conceptual incoherence. His worry concerns my claim that soldiers who have an all-things-considered duty to obey, despite being on the unjust side, can be said to wrong their victims and thus perpetrate a serious injustice, despite the fact that they act permissibly. This is because on Estlund's view, an action cannot be wrong (or unjust) and permissible at the same time.

Estlund understands, of course, that my claim is that Jose's action is only *pro tanto* wrong. But it is precisely the claim that an action can be *pro tanto* wrong and all-things-considered permissible that he regards as "unnecessarily paradoxical." To get around this issue, he reformulates my view in terms of *prima facie* rather than *pro tanto* duties. Unlike *pro tanto* duties, *prima facie* duties do not possess genuine normative force. Rather, they are best understood as initial

36 Williams, *Moral Luck*, 31. I acknowledge the aptness of these responses ("Political Authority and Unjust Wars," 356).

appearances of a duty—appearances that may not survive closer scrutiny and thus might turn out not to constitute actual duties in the end.

How does this help with the alleged paradox? Once reformulated in this way, my view would say that whenever the epistemic threshold is not met, our *prima facie* duty to obey the order becomes an actual duty (or “duty proper”), and our duty not to kill the innocent people we will be targeting is thereby revealed to be just apparent. But if our duty not to kill them is just apparent, then we do no wrong in killing them. To be sure, our victims still suffer a wrong, insofar as they have not lost their right not to be killed. But the wrong is not inflicted by us, Estlund argues. Rather, it is inflicted by the state that has issued the order to fight. It is in this sense that our participation in the unjust war can be “sanitized” by the fact that we are following orders.

Let me start by noticing that here, too, the charge of being paradoxical seems misplaced—not so much because the distinction between *pro tanto* and all-things-considered force is widely accepted in contemporary moral theory, but because the point of the distinction is precisely to explain why it is a mistake to conflate the claim that a certain course of action has a genuine normative valence (such as being wrong) with the claim that it reflects what we ultimately ought to do. Conceptually, these are two different types of moral judgments, and the point of the *pro tanto*/all-things-considered distinction is precisely to dispel the air of paradox that certain moral statements have if we fail to appreciate this difference.

I do not deny, of course, that the distinction might still have a ring of paradox to some ears.<sup>37</sup> But if any such feelings linger even once we have grasped the distinction, we should disregard them as unwarranted. After all, we might imagine the same feelings persisting once we adopt Estlund’s suggestion of formulating my view in terms of *prima facie* duties. Suppose one were to argue that there is a ring of paradox in the claim that we have a *prima facie* duty not to contribute to the killing of someone who has not forfeited their right not to be killed while, at the same time, having an actual duty to obey an order to do just that. Surely any uneasiness one might feel about this formulation would be unwarranted. The point of invoking the distinction between *prima facie* and actual duties is precisely to explain how the two are compatible once we appreciate their different nature.

Of course, there might still be good reasons to reformulate my account in terms of *prima facie* rather than *pro tanto* duties, if doing so better illuminates the moral phenomena we are trying to capture or if the resulting view is, say, more elegant or parsimonious. These reasons, however, have nothing to do

37 Though, for what it is worth, not to mine.



with the claim that the view is somehow paradoxical. It is on these reasons that we should focus to adjudicate whether we should adopt the model of *pro tanto* reasons or the *prima facie* ones, so let us look at them instead.

One problem for the view that the duties Jose must balance are *prima facie* rather than *pro tanto* is the implication that if Jose fails to meet the epistemic threshold, he cannot be said to have reasons to regret how he acted, let alone to apologize or compensate his victims. This is because within the *prima facie* model, once the duty to obey becomes actual, any competing duties lose all their normative force. (Indeed, strictly speaking, we should say that they are revealed to never have had such force to begin with.) But this cannot be right. As Kutz notices, there is a clear sense in which Jose ought to regret acting as he did, even when he has a justification for his conduct. And it also seems plausible that he might have compensatory duties and duties to apologize, though this further claim is perhaps more controversial.<sup>38</sup>

One might reply that the force of this objection is provisional, in the sense that its plausibility ultimately depends on how we should understand the justification of regret, compensation, and apologies. Obviously, I cannot address such questions here, but even if we concede this point and bracket the aptness of these responses, a fundamental problem with the *prima facie* model remains. The problem is that within this model, once it has been established that Jose's actual duty is to obey, there seems to be no room for the idea that there are nonetheless weighty considerations in favor of him not attacking his targets.<sup>39</sup> And *that* surely is implausible. That such considerations persist seems clear, regardless of the role they should play in calling for an apology, regret, or compensation. It is a serious cost of the *prima facie* model that it fails to vindicate their existence.

Estlund could perhaps reply that, strictly speaking, the *prima facie* model does not need to rule out the existence of such considerations; it rules out only the idea that such considerations render Jose's conduct wrong. What is rendered wrong by them is rather the conduct of those who gave Jose the order to fight. This reply would be puzzling, however. If the innocence of his targets is not only a consideration for Jose's state not to order their killing, but also a consideration for Jose himself not to kill them, it's hard to see why that same consideration should render the state's decision wrong but not Jose's conduct.

A further problem with the *prima facie* model is that it seems to have limited explanatory power. This is because establishing what our duty is within this model effectively requires us to already have an answer to the question of which

38 See section 5 above.

39 Kiesewetter, "Pro Tanto Rights and the Duty to Save the Greater Number," 202.

of the competing moral considerations we are faced with should prevail. But intuitively, the fact that we have a duty to do something is itself a consideration that should play a role in answering that question.

For example, knowing that I have a *duty* to keep my promise to meet a student and merely *reasons* to watch the football match taking place at the same time often explains why I ought to keep the meeting rather than watch the match.<sup>40</sup> Within the *prima facie* model, by contrast, the notion of duty seems to be essentially a heuristic device used to signal that the question of how we should act has already been solved. But how should we go about solving that question then? Not being able to rely on the notion of duty significantly reduces the tools available to us to do so. We can of course still balance the competing reasons that apply to us. But the value of the notion of duty is precisely to mark the existence of situations in which what we ought to do is not exclusively determined by the weight of the sum of individual reasons. To say that we have a duty to do something is to recognize that some of these reasons have a distinct peremptory force, which gives them a special role to play our deliberation regardless of their weight. A view that cannot vindicate this idea misses an important dimension of the sort of moral problems we are considering here.

In light of these problems, we should resist the suggestion to abandon the understanding of authoritative directives on which my argument rests.<sup>41</sup> The duty created by binding authoritative directives is best understood as having *pro tanto* rather than *prima facie* force.

## 7. THE VALUE OF OBEDIENCE

I conclude by considering a further argument raised by Estlund. As he acknowledges, this argument is somewhat modest. Its aim is to highlight that revisionists cannot rule out the possibility that the duty to obey can outweigh the duty not to fight in an unjust war simply by assuming that the only plausible

40 'Often' is not an understatement here. My point is not that duties will always prevail over competing reasons in this sort of cases. Perhaps there are situations in which the football match is so valuable to me that I am justified in breaking my promise. See Wolf, "Above and Below the Line of Duty"; and Tadros, *Wrongs and Crimes*, 30–32. The point is that the fact that I have a duty, as opposed to mere reasons, to keep the promise is meant to play an important role in determining how I should act. This is true regardless of whether the duty is defeated by competing considerations.

41 It is no coincidence that the model of *prima facie* duties raises problems that mirror some of the main worries afflicting specificationist accounts of moral rights. See Feinberg, *Rights, Justice, and the Bounds of Liberty*, 221–51; and Thomson, *The Realm of Rights*, 82–104. Both positions are ultimately motivated by the same basic idea—namely, that once the scope of application of these normative phenomena is suitably qualified, they have absolute force.

justification for killing innocent enemy combatants is preventing the killing of other innocent lives or other similarly dire consequences. This is because revisionists already acknowledge at least one notable exception to this idea—namely, wars of national defense.

A war of national defense is one in which a country is threatened with violent conquest that is aimed not at killing anyone but rather at securing control over “political goods” such as territory, natural resources, or political self-determination. Importantly, although aggressors taking part in such wars act unjustly, this does not mean that they are not innocent, as Estlund notices. This is both because, statistically, many of them do not end up posing any actual threat of serious harm and because even when they do, they might do so nonculpably if they have been forced to take part in the war.<sup>42</sup> So if revisionists are willing to concede that it is permissible to take part in wars of national defense, this shows that they already acknowledge the possibility of cases in which killing innocents can be permissible, despite the fact that doing so is not necessary to prevent seriously harmful consequences. (Calls this an instance of *subtle justification*.)<sup>43</sup> But if so, Estlund’s argument continues, then revisionists cannot easily rule out that a similar permission can exist in other cases. Specifically, if the value of national defense can provide a subtle justification for killing innocents, the same could be true, at least in principle, for the value of obedience to a legitimate authority.

To be sure, those fighting in wars of national defense fight on the just side, unlike those facing the question of obedience in the sort of case we are considering here—and that, we might think, makes a difference. After all, the reason we can entertain the idea that the duty not to contribute to the killing of innocents can be defeated by the duty to protect political goods is that the existence of such duties, at least when we are unjustly attacked, does not seem controversial. But can we say the same for the duty to obey unjust orders? Estlund needs to show this in order to complete his argument. For if the idea of a duty to obey an unjust order is implausible to begin with, obviously any attempt to rely on the value of obedience to defeat the duty not to contribute to the killing of innocents is a nonstarter. To support this idea, Estlund appeals to a further analogy. He considers the case of a jailer who is ordered to incarcerate someone who has been erroneously convicted after a fair trial. Estlund argues that the order received by the jailer is intuitively binding, and for the same reasons, we should think that so is the order to fight in an unjust war.

42 As in Estlund’s imaginary case of Crushia’s aggression to Nukraine.

43 The label ‘subtle justification’ was used by Estlund himself in an earlier version of his paper to refer to a justification for defensive killing that appeals to something other than “causes, contributions, or complicity around harms to persons” (“The Weight of Authority in War,” 784).

Ultimately, then, Estlund's argument is that the best way to justify the duty to obey the order to fight an unjust war is by showing that (1) the orders of a legitimate authority are binding even when they are seriously unjust, and (2) there is no principled reason to rule out that the value of obeying binding orders can be sufficiently weighty to provide a subtle justification for killing innocents, once we acknowledge that the value of national defense can provide such justification.

Now, strictly speaking, this is not an argument against my view. In principle, both my argument and Estlund's can independently succeed in justifying the duty to obey the order to fight in an unjust war. The motivation for presenting his argument in alternative to mine is Estlund's skepticism about my argument, prompted by his other objections. If my answers to those objections are persuasive, this motivation is obviously weakened, and so is the pressure to rely on Estlund's alternative strategy. Still, his argument deserves close attention. For while I think the argument ultimately fails, it raises a deep question about how the notion of authority ought to figure in a plausible answer to the problem of obedience. There is an important lesson to be learned from engaging with Estlund's answer to that question.

I will not discuss here the jailer analogy, both because I criticize that argument elsewhere and because I have already mentioned above a reason to be doubtful about it.<sup>44</sup> There is an important difference between cases in which the victims of the injustice produced by our obedience are themselves subject to the authority that has issued the order and cases in which they are not. In the former case, the justification that is meant to ground our duty to take part in perpetrating the injustice can also be invoked to ground the victim's duty to bear the costs associated with it; in the latter, it cannot. Once we pay attention to this point, it is far from obvious that the conclusion reached in the jailer case should be presumed to apply to the case of obedience to the order to fight in an unjust war.

Be that as it may, my focus here will be Estlund's argument that since revisionists admit that the value of national defense can provide a subtle justification for killing innocents, they cannot—without further argument—rule out that the value of obedience can do the same. The problem with this argument is that Estlund offers it without considering in sufficient detail the question of *how* revisionists justify the permission to participate in wars of national defense. He objects that appealing to the violation of political rights (such as the right to participate in collective sovereignty or political self-determination) to justify killing innocents is in tension with two core revisionist commitments: first, that lethal defensive

44 I analyze the jailer analogy in Renzo, "Democratic Authority and the Duty to Fight Unjust Wars."

force can be justified only by appealing to “personal harms”; and second, that this justification is regulated by “ordinary interpersonal morality” rather than a special morality of war.<sup>45</sup> Yet he does not elaborate on either objection. Instead, he pivots, somewhat unexpectedly, to a different argument. He observes that only those who have received a binding order from a relevant authority are permitted to kill innocent aggressors in a war of national defense. Someone lacking this authorization would not be permitted to do so. According to Estlund, this supports the view that, at least in wars of national defense, following orders is what grounds the permissibility of using lethal defensive force. Authority thus has “a surprising moral weight.” It can “convert from wrongful to permissible what would otherwise be a wrongful killing of a relevantly innocent person.”<sup>46</sup>

Both moves—ignoring how revisionists justify wars of national defense and pivoting to the question of authorization—are problematic. Start with the latter. The question of whether someone lacking the relevant authorization is permitted to use lethal defensive force in a war of national defense is orthogonal to the question of whether the value of national defense can provide a justification for killing innocent aggressors. Estlund runs them together when he attempts to derive an answer to the latter from his answer to the former. The problem here is that even those who regard acting under a “legitimate authority” as a genuine *jus ad bellum* criterion do not understand it the way Estlund does.<sup>47</sup> The criterion only states a necessary condition for being permitted to take part in a war: we may take part in a war only if we are ordered to do so by a legitimate authority. The criterion does not purport to provide a justification in the sense that meeting the criterion can be said to weigh in favor of fighting (or, as I would put it, “give us reasons to fight”). To infer the latter from the former is a mistake. Compare: in many countries, being at least eighteen years old is a necessary condition for being legally permitted to drink alcohol.<sup>48</sup> Being eighteen, however, does not provide a justification in the sense that meeting the minimum drinking age requirement can be said to weigh in favor of drinking alcohol. The justification for doing so must come from elsewhere—that I would enjoy drinking, that I want to drown my sorrows, that I wish to loosen up at a dinner with strangers, and so on. If it does not—say, because I do not like drinking or I am intolerant of alcohol—the fact that I am eighteen years or older does nothing to change that.

45 Estlund, “The Weight of Authority in War,” 787.

46 Estlund, “The Weight of Authority in War,” 788.

47 It is worth noticing that many revisionists do not accept the legitimate authority requirement. See McMahan, “Just War,” 671–72; and Fabre, *Cosmopolitan War*, chs. 3–4.

48 At least when the drinking takes place in public, as opposed to in one’s home.

Raising the question of authorization only muddies the waters then. Nor does Estlund's argument depend on it. For his argument, remember, is that since revisionists admit that the value of national defense can provide a subtle justification for killing innocents, they cannot easily rule out the possibility that the value of obedience can do the same. This argument, if successful, is enough to vindicate Estlund's conclusion, without any need to appeal to the issue of authorization.

The argument is not successful, however. This is because the revisionist case for the permissibility of taking part in wars of national defense is *not* in fact best understood as an instance of subtle justification. The revisionist case is, roughly, that since we have vitally important interests in enjoying goods such as collective self-determination, sovereignty rights, and political independence, the value of protecting these interests is sufficiently weighty to justify resorting to lethal defensive force.<sup>49</sup> (Or, as Estlund might put it, the prospect of having such interests undermined is a sufficiently dire consequence that it overcomes the prohibition against killing.) While these interests cannot be subsumed under the interest not to be killed or maimed that revisionists typically focus on, they are nonetheless interests not to suffer a sort of personal harm. And because of that, their defense is regulated by ordinary interpersonal morality rather than by a special morality of war.

For example, we might think that when we have a strong interest in making decisions together with people we are in a valuable relationship with, threatening that interest constitutes a form of personal harm that could warrant resorting to lethal defensive force (subject to necessity and proportionality constraints). This explains why, as a last resort, I might be permitted to kill you if you use violence to wrongfully prevent me from making important decisions that I have a right to make together with my family—say, about how to raise our children, which cultural identity to embrace, or where to live. If so, the same interest can be invoked to ground the permission to fight in wars of national defense. If we value making important decisions together with the members of our political community, threatening that interest constitutes a form of personal harm that could warrant resorting to lethal defensive force.<sup>50</sup>

49 See Hurka, "Proportionality in the Morality of War"; Frowe, *Defensive Killing*, 139–47; Fabre, "Cosmopolitanism and Wars of Self-Defence"; Stilz, "Territorial Rights and National Defence"; Moore, "Collective Self-Determination, Institutions of Justice, and Wars of National Defence"; and Renzo, "Political Self-Determination and Wars of National Defense."

50 This argument is subject to a number of caveats I cannot discuss here. See Renzo, "Political Self-Determination and Wars of National Defense," especially 717–22. At one point, in explaining why an unauthorized attempt to defend political goods would be impermissible,

Indeed, some revisionists qualify this case in a way that further weakens Estlund's argument. Cécile Fabre and Anna Stilz, for example, deny that it is permissible to take part in wars of national defense to protect purely political goods. They argue that the permission exists only if failing to defend certain political goods would likely lead to the sort of harm to life and limb that is normally required by revisionist justifications for defensive killing. These arguments thus explicitly tie the justification of wars of national defense to the value of preventing the killing or injuring of other innocents.<sup>51</sup>

This is why Estlund's argument is unsuccessful. Once we bear in mind the grounds on which the permissibility of wars of national defense is plausibly justified by revisionists, it becomes clear that this is not an instance of subtle justification. But if so, the comparison with national defense cannot put any pressure on them to acknowledge that genuine forms of subtle justification, such as arguments that appeal to the value of obedience, can successfully overcome the prohibition against killing.

There is an important lesson to be learned here about the different ways in which the value of protecting political goods and the value of obedience can plausibly contribute to the justification of lethal defensive killing. It is not hard to see why the value of protecting goods such as collective self-determination or political independence is the sort of thing that should figure in our proportionality calculation for the permissibility of resorting to defensive lethal force. Once we accept that we have vitally important interests in enjoying such goods, failing to protect them compromises our well-being, and this is clearly the sort of harm that can be weighed against the harm of killing innocents. It is implausible, however, to think about the value of obeying orders along the same lines.

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Estlund writes that a given society "should get to decide whether a violent defense is to be mounted or not" ("The Weight of Authority in War," 787). I agree, and the argument I have just sketched explains why. A self-determining community might decide that it does not want to resist political aggression, and in that case, engaging in lethal defensive violence on its behalf would violate its right to decide for itself how to respond to the aggression—a right that, once again, is grounded in the interests of the members in making decisions together. Crucially, however, authority—understood as the power to issue binding orders—is not what is doing the work here. The right to political self-determination primarily belongs to political communities, not to states or political institutions, and thus is not inherently connected to authority. (See Renzo, "Revolution and Intervention," 237–38.) One way to see this important point is to consider situations in which a state is so unjust that it loses its right to exercise political authority, yet the people retain the right to make decisions together. Likewise, a political community might be colonized or annexed by another state and thereby lack political institutions capable of issuing binding orders; yet the people retain the right to make decisions together.

51 Fabre, "Cosmopolitanism and Wars of Self-Defence"; and Stilz, "Territorial Rights and National Defence."



Even if we accept that legitimate institutions are extremely valuable and that this generates a duty to obey the law, it is hard to see how the value of obedience could play a significant role—indeed, any role—in our proportionality calculation. Since failing to obey the law in itself does not undermine anyone’s well-being or set back anyone’s interests, it is implausible to think of obedience as the sort of good that can be weighed against the value of not contributing to the killing of innocents.<sup>52</sup> And this is the deeper reason to resist the sort of political argument for the duty to obey offered by Estlund. Given the difference in nature between the value underlying the justification of wars of national defense and the one underlying the justification of political arguments, it is a mistake to rely on the former to justify the latter.

Ultimately, this is the motivation for adopting the more formal approach to the question of obedience that I develop in my account. The reason we can have a duty to obey an order to fight an unjust war is not that the value of obedience can ever outweigh the value of not contributing to the killing of innocents. It is that we are under a moral duty to obey the law of just institutions that perform morally necessary tasks, and complying with this duty requires excluding from our deliberation certain competing moral considerations—even when these competing considerations are extremely weighty—unless stringent epistemic conditions are met.<sup>53</sup>

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52 Of course, disobedience can lead to the sort of harmful consequences that we can weigh against the value of not contributing to the killing of innocents. When these consequences are sufficiently serious, obedience might be morally required. But in these cases, the justification for obeying is grounded in the value of avoiding such consequences, not in the value of obedience. (As we have seen, what is required in such cases is, strictly speaking, not obedience but conformity to the directive.)

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