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SOLDIERS, UNJUST WARS, AND TREASON

It is widely accepted that jus in bello principles cannot be overridden because of military necessity. The responsibility of soldiers in this regard is clear; they may not adopt measures which harm innocents or which are excessively cruel. These proscriptions are recognized by law, and a soldier's obedience is required to legal orders only; indeed, he has the duty to disobey illegal ones.

Although a debate will probably always exist as to the precise limits of noncombatant immunity and excessive cruelty, in this paper I will assume that the virtues of obedience and loyalty can (almost) never permit the violation of jus in bello principles.[1] Instead, I will focus on the responsibilities of soldiers when they appear to be fighting for an unjust cause. In such cases a terrible dilemma exists; does the soldier have the obligation to perform his duty regardless, or does he have a duty (or right) to follow higher values?

The dilemma is perhaps best demonstrated by the German High Command during World War II. Some members were involved in Operation Valkyrie, the plot to assassinate Hitler, while others, such as Guderian, von Manstein, and Keitel, fought effectively as long as they were able. Many in both groups displayed revulsion with the actions of those in the other. General Adolf Heusinger, one of the conspirators, summarizes their dilemma quite adroitly:

Let us not forget what such a decision entails for a soldier--an officer raises his hand, at the height of the conflict, against his supreme commander. . . even though he is convinced that his murderous act can on no

account prevent his country's unconditional surrender to the enemy. He still goes through with it, in the hope of sparing his people from even greater suffering. . . . [The] people themselves will condemn him because they still believe in the Fuhrer. . . . Most of the soldiers at the front believe that their only salvation lies in a concerted resistance to the external enemy. For them Hitler is still the symbol of the struggle and their talisman of victory.

This officer is flying in the face of all the principles of military discipline. How then is he to secure the obedience of his subordinates? He is destroying loyalty, so who will remain loyal to him? In the eyes of many of his comrades he is committing an assault on honor itself. . . . He has reminded his men a hundred times of the sacred nature of their undertaking to do their duty. Two million German soldiers have gone to their death to uphold it. . . . The oath of allegiance is more than a matter of form-- he has sworn before God.

One might reply, But would God require him to respect such an oath? This then is the soldier's crisis of conscience. Everyone had to fight this battle in his own heart. There could be no resolution on principle that would be valid for everyone, only tragic and unresolvable contradictions between two different conceptions of duty. If he were faithful to one of them, he would be derelict in the other. Who was wrong? Such things are not for mere men to decide. [\2]

Which actions were correct, or are the decisions matters of individual judgement? Whatever the answer, the implications are likely to be problematic.

If the conspirators were right, then at some point a soldier has the right, perhaps even the obligation, to overthrow his political leadership if that leadership's ends are (seen to be) unjust. This implies that military discipline and civilian rule are subordinate to other principles. If Operation Valkyrie was legitimate, a Pandora's Box is opened. Hopefully, the lid would only be cracked in extreme circumstances, but we now have the problem of identifying the precise conditions for opening the

3

box. For example, many in the American military opposed the involvement in Vietnam. Would they have been justified in overthrowing the government for prosecuting an unjust war?[\3]

If those not involved in Operation Valkyrie were correct in adhering to the principle of duty, other problems arise. Some might argue that if one is required to obey just orders in an unjust war, then this weakens the requirement to disobey unjust orders in a just war. This is because the virtue of obedience is elevated, and that of justice is diminished in the soldier's calculation.

If obedience is paramount, the soldier is reduced to the status of an automaton. He is nothing more than a powerful tool which can be used to achieve whatever ends a political leadership decides. He forfeits his right to act as a free moral agent. We might wonder if this denial of the soldier's right of conscience in any way threatens similar rights of other citizens who also have some perceived duty to the state. (This danger may be more real in societies which have a large reserve manpower pool; however, it may also appear in any modern society where the distinction between combatant and noncombatant is blurred.)

Thus far, we have developed two contending views; either that (1) there is an objective way of knowing when an Operation Valkyrie would be proper or (2) an Operation Valkyrie can never be proper. If we reject both of these outlooks, we seem to be left with the proposition that individuals must determine for themselves when justice demands action and what action to take.

This is certainly not a clean solution, and may not be very illuminating. We might conclude that both the Valkyrie conspirators and the loyal officers acted properly; this does not provide soldiers any valuable guidance for the future. Moreover, this view would appear to tolerate civil wars and power struggles, without a clear means of determining which side is right. As long as the combatants are true believers, they all can be viewed as acting correctly.

Cogent arguments to support any of the views can be presented. Believing that there can be no moral division of labor, Robert Nozick categorically states that "It is a soldier's responsibility to determine if his side's cause is just; if he finds the issue tangled, unclear, or confusing, he may not shift the responsibility to his leaders. . . ." [4] This presumes that the justness of a war is to some degree self-evident; however, in reality it is often not very clear. Many still contend that the Vietnam War, if not very smart from the American standpoint, was nevertheless fought for legitimate reasons. Even the charge of unjust German aggression during World War II is contested by some who argue that it was

"launched in mortal necessity. . . the only serious attempt to destroy the Communist enemy of Western liberties and conscience. [The Nazis] left to defend two thousand years of the highest civilization. . . . The Soviets defeating the Reich--that would be Stalin mounting the body of a Europe which, its powers of resistance exhausted, was ready to be raped. . . . People will regret the defeat in 1945 of the defenders and builders of Europe." [5]

We may see these opinions as nothing more than confused

propaganda; nevertheless, we must concede that these views, however mistaken, were actually held by some of the Nazi participants.

Michael Walzer states that soldiers do not have the responsibility to wrestle with the larger question of jus ad bellum.^[6] This frees the soldier, and it frees us from judging him on these grounds. We might then ask if the soldier has the right to consider jus ad bellum, and, if so, how may he act? In blunt terms, what we are asking is: When, if ever, is the soldier permitted to commit treason?

To answer this question, we must consider the soldier's role; foundations for obedience; how loyalty is articulated and obtained; and the limits of loyalty. The soldier exists to defend his nation-state and, by extension, its interests. He can be called upon risk his life; his life, in effect, becomes subordinate to a higher cause.^[7] (We might speculate that if a soldier's life is an expendable commodity, then his conscience must be expendable as well, as it is merely a subcomponent of that life. This, however, will be rejected out-of-hand; some people choose to fight and die for matters of conscience. Additionally, as hazardous as the soldier's activities are, they are rarely of an absolutely suicidal nature; a soldier still hopes to preserve his life and, presumably, his conscience.) It is widely accepted that soldiers are implementers, not makers, of policy; this view was held by the German High Command as strongly as it is held by the American military today.^[8] Discipline and

loyalty are required both to create a functioning military and to ensure that the military is used in the interests of the society it defends. It is normally seen as virtuous for a soldier to follow orders he dislikes or disagrees with.[\9]

Obedience has a moral grounding in addition to its functional one. John Rawls writes that "if the basic structure of a society is just, or as just as it is reasonable to expect in the circumstances, everyone has a natural duty to do what is expected of him."[\10] Certainly, we expect the military to follow its orders and to fight required wars. At first glance, we do not expect soldiers to second-guess and resist their directives from legitimate political authority. Edgar Denton III writes that as citizens "we obey the laws of the state, not because the laws are always right, but because we consider it right to obey the law."[\11] He further notes that, according to Socrates:

in any conflict between the state and god (and by god he meant perfect good, perfect justice) god must take priority; in any conflict between man (and by man he meant human self-interest) and the state, the state should prevail. . . . The state must be dissuaded but not disobeyed.[\12]

In general, the state attempts to enact positive laws in accordance with natural laws. Citizens (and soldiers) are usually obliged to follow positive laws, even when they conflict with the individual's interpretation of natural laws. Rawls cites a general duty to comply even with unjust laws, noting that "the injustice of a law is not, in general, a sufficient reason for not adhering to it."[\13] Rawls does not address "treason"

per se, but notes that civil disobedience cannot be "grounded solely on group or self-interest. Instead, one invokes the commonly shared conception of justice that underlies the political order."[\14] Such disobedience, furthermore, must be a public act, conducted "openly with fair notice, not covert or secretive."[\15]

A soldier's loyalty is not without tensions. West Point's motto "Duty, Honor, Country" is often expanded to the military in general as an appropriate ethical standard, and all three facets can compete with each other under certain circumstances. We might wonder which facet trumps which, and it is often unclear which has been operative. The recent Iran-Contras arms issue can be cast in several ways vis-a-vis the role of Lieutenant Colonel Oliver North. He may have been dutiful in his obedience to the directives or hints of his superiors, [\16] while letting his personal integrity and the good of the nation take a back seat. Alternatively, he may have felt a moral imperative to assist the Contras which he believed overrode his duty to adhere to legalities. Finally, he may have felt that the nation's interest dominated all other considerations.

Thus, any of the three facets of the code could have been tapped to justify his particular course of action. In many situations, however, the three will compel differing actions. Those participants in Operation Valkyrie appear to have stressed "Country"[\17], while those who remained obedient emphasized "Duty". An officer who valued "Honor" above all, presumably,

would have resigned during the early years of the war, when such practice was allowed. In the later years, he probably would have willingly accepted a court-martial and possibly worse.

A soldier's loyalty is often codified in an oath. A priori, the oath should delineate actions required and prohibited of an officer, and should indicate the foundation to which a soldier's loyalty is ultimately tied. The oath for American Army officers is as follows:

I, (NAME) having been appointed an officer in the Army of the United States, as indicated above in the grade of (RANK) 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.

The oath for German soldiers during World War II was somewhat terser:

Before God I swear absolute obedience to the Fuhrer of the Reich and of the German people, Adolf Hitler, supreme commander of the Wehrmacht. As a brave soldier I will be prepared at all times to lay down my life for this oath.

Both oaths seem to lock in the soldier, and seem to resolve potential moral conflicts between state laws and higher laws. The American oath may permit a conflict between "the duties of the office" (if this is interpreted to mean obedience to orders) and "domestic enemies" (if one sees the actions of a political leadership as unconstitutional). Nevertheless, if the oaths are accepted as absolutely binding, they seem to provide little maneuver room for the soldier. Thus, the implication is that the

Valkyrie participants were wrong, and that the loyal German officers were right. Furthermore, the dutiful nature of the loyal officers had a moral dimension as well.

The Valkyrie participants can be vindicated only if the moral grip of their oaths is loosened. Utilitarian reasoning would do this easily enough, but it would be useful to see if their "treason" had a stronger moral justification. Two issues regarding the German oath can be addressed. First, the Nazi oath of allegiance was to Adolf Hitler the national leader and not to Adolf Hitler the private individual. Hitler, in his role as national leader, had certain responsibilities; to defend the country, to further its interests (arguably), and to preserve its physical and moral well being. As Philip Flammer notes, when properly framed, loyalty entails a reciprocal relationship. A superior deserves loyalty, but at the same time he is trusted to fulfill the responsibilities of his office.[18] The relationship between trust and loyalty is similar to that between rights and duties. A citizen has duties because his country gives him rights; if a country unjustly denies a citizen his rights, how can he have duties to that country?

A strong argument, I believe, can be made that an official whose actions betray the trust of his people cannot legitimately command their loyalty. The fact that Hitler came to power legally was often cited as further argument that loyalty was required. By creating a dictatorship, however, he attempted to deny Germany any peaceful, "legal" means of binding him to the

national trust. By betraying that trust he made the flip-side, loyalty, a meaningless concept. The oath, in other words, is a function not only of its words, but also of the context of certain presuppositions and tacit understandings. It was natural for the Valkyrie participants to see "treason" as the only means of restoring trustworthiness to the national leadership. What other choice did they have?

A second issue regarding the oath is one raised by General Heusinger: Would God require the soldier to respect such an oath? This question may be more than utilitarianism in disguise. The oath attempts to link obedience to some form of Divinity. Even if we grant this linkage, could not other values also be linked to "Divinity", and might not these take precedence over an oath to a government or to a political leader?

Rawls writes that government institutions, such as a nation's constitution and the branches of its government, reflect interpretations of just principles. The institutions may have political legitimacy; their moral legitimacy is a separate issue. Even the political legitimacy is not absolute, as the "final court of appeal is not the court, nor the executive, nor the legislature, but the electorate as a whole." [19] The leader derives his legitimacy from his institutional office, and the institution derives its political legitimacy from the will of the people.

Popular opinion, then, may provide guidance as to which acts may be politically legitimate. It does not, however necessarily

tap any degree of moral legitimacy. To appeal to popular opinion would at times be a morally incomplete practice; the masses may sometimes be wrong. (Guderian wrote that in 1944 "the great proportion of German people still believed in Hitler."[\20]) Also, it is not always possible to obtain a referendum when seeking moral guidance. Nevertheless, it would seem that a just popular belief should override the clearly unjust desires of a leader; this is strengthened if we affirm that a leader's legitimacy is ultimately traced to the people.

Rawls offers additional advice which is more germane. He notes that the "natural duty not to be made the agent of a grave misjustice outweighs [one's] duty to obey."[\21] This implies that even though one's oath may be grounded in a Divine foundation, the broader concept of justice is grounded even more firmly.

We can discern some possible limits to the loyalty that is required of soldiers. Denton's consideration of the issue is particularly well-reasoned. Especially for a soldier, the benefit of the doubt must go to the state and to the law (see page 6). In extreme cases, however, disobedience may be legitimized; this disobedience "should be limited to what is unquestionably an injustice which, if rectified, should establish a basis for a return to obedience."[\22] Nazi Germany was such an extreme case. A more recent example was the Philippines military involvement in the ouster of President Marcos. Subsequent factional intrigues against President Aquino, however,

would not have met the criterion, nor would a hypothetical American military revolt during the Vietnam War. In neither case was it clear that an unjust political institution merited betrayal by the military, nor would the military have imposed a more just cure. Coups in third world countries which replace a dictator with a democratic government would be legitimate; however, it should be noted that most past cases have merely resulted in another dictator.

The soldier may indeed presume that a war his nation enters into is just, and should follow all just orders in a just manner. He cannot, however, be prohibited from reflecting on the nature of the war, and developing his own independent judgment. Again from Rawls: "in a democratic society. . .each citizen is responsible for his interpretation of the principles of justice and for his conduct in the light of them."^[23] If the war is indeed repugnant to the soldier's sense of justice, he is first obliged to resign,^[24] whereupon we might expect him to pursue "public acts of civil disobedience." In societies where resignation is not an option (such as the Third Reich during the last years of the war) and the threat to justice is extremely grave, "treason" such as that committed by the Valkyrie participants is morally permissible.^[25]

Several points must be made. First, the soldier may make this determination, but he is not required to.^[26] It is impractical to contend that different individuals will reach identical judgments, particularly regarding a topic which is

inherently contrary to the individuals' profession. In other words, a soldier should not be faulted for remaining loyal, even when popular sentiment, some of his comrades, or history would argue that he should have committed "treason". Liddell Hart's observation, while overstated, captures an important aspect: "The German generals of this war were the best-finished product of their profession--anywhere. They could have been better if their outlook had been wider and their understanding deeper. But if they had become philosophers they would have ceased to be soldiers."[\27] Officers like Guderian, von Manstein, and von Rundstedt can justifiably be seen as dedicated professionals worthy of emulation. It is the primary responsibility of the political leadership to ensure that the professional competence of its military is not abused.

Second, justified "treason" is an exceptional act for exceptional circumstances. The precise conditions are subject to debate, and whether the conditions have been met at a given time is subject to interpretation. The line-drawing problem is not unique to this issue, and we should perhaps recall that "the fact of twilight does not mean you cannot tell day from night."[\28]

Third, in Denton's words:

[T]he validity of resistance to and disobedience of the commands of the state depends, in the final analysis, upon the motivation behind that resistance and disobedience. If the motivation is irrational egoism, eccentricity, or self-interest, social, political, or economic, then disobedience is fundamentally immoral.[\29]

In other words, "treason" motivated by concerns for justice is

sometimes permissible in order to prevent a great evil. If, however, von Stauffenberg had attempted to assassinate Hitler after receiving a payment from the Russians, the act would have been flatly wrong. Naturally, different motives can exist; this entangles the problem and makes moral judgments even more difficult. It is worth noting that "revisionist" portrayals of Operation Valkyrie contend that the participants were not concerned about justice at all; rather, they turned on Hitler merely because the war had taken a turn for the worse.

Finally, the inherent risk of treason must be stressed. Heusinger's account reflects this quite well, and Denton states that

[T]he individual must and will act in the way his moral principles demand. . . . [H]e will take the responsibility for his actions, knowing full well that only the thin line of fate separates the hero from the villain and the patriot from the rebel. [130]

These conclusions should be acceptable whether one ultimately grounds his beliefs in human rights or justice. Certainly, the soldier retains some right of conscience; this right would be violated if, in patently extreme cases, he was forced to be an evil agent. Additionally, a concern for universal human rights, if these rights are absolute, would compel disobedience to a regime which was a gross violator. Conversely, it would seem that a soldier has the right to concentrate on the mechanics of his duties, and to be free from a moral guessing game as to whether his political leadership is acting justly. Moreover, the citizens of a country have a basic

right of physical security; inherent in this right is a confidence that the military will be reliable. This right is not enhanced by a military which makes its own fragmented judgements about what it should or should not do.

Justice, in the Aristotlian tradition, requires that an individual both provide and receive that which his role requires. It would, seemingly, be unfair to vilify a soldier for being loyal, in fulfillment of his role. From a liberal Rawlsian view, however, the paramount issue is the just nature of institutions. An unjust institution legitimizes actions taken against it, if these actions result in a just replacement.

In holding that loyalty is (almost) always allowed and that treason is (sometimes) permitted, we are left with at least two disturbing conclusions. First, some moral decisions are within the realm of subjective individual evaluation, even in the disciplined, regimented life of the soldier. There are reasons that would justify "treason." We do not, however, have a clear-cut template that can easily be applied to all cases. What is more, such a formula may not even be desirable; it would be subject to grave abuse, it would intensify the ethical dilemma of the soldier to the point of paralysis, and it would necessitate "post-treason" condemnation of and recriminations against loyal soldiers who may have acted in good faith.

Secondly, there are limits to what a society can expect of its military. A society may not be able to disregard morality in its policies, and then expect the military to follow its bidding.

I have argued that under certain conditions a soldier may be permitted to object. It is only a short additional step to a position that states a soldier should in fact do so.

ENDNOTES

1. One might conceive of very extreme situations where a moral agent might want to bend these principles. One might argue on utilitarian grounds that a catastrophe should be prevented if the cost is quite small.
2. Pierre Galante, Operation Valkyrie: The German Generals' Plot against Hitler (New York: Harper & Row, 1981) p 246.
3. See page 11.
4. Robert Nozick, Anarchy, State, and Utopia (New York: Basic Books, 1974) p 100.
5. Leon Degrelle, Campaign in Russia: The Waffen SS on the Eastern Front (Torrance, Ca: 1985) pp xi, 4, 10, 11.
6. Michael Walzer, Just and Unjust Wars (New York: Basic Books, 1977) p 304.
7. Walzer, Ch 9.
8. See "In Retrospect" in F.W. von Mellenthin Panzer Battles (New York: Ballantine Books, 1956). Also Walzer, p 289: "aggression is first of all the work of political leaders."
9. A classic example of this is the case of General Edwin Walker, who commanded the 101st Airborne Division when it was tasked to enforce desegregation laws in Little Rock, Arkansas in 1957. He performed his duties flawlessly, despite the fact that he was an extreme conservative who vehemently opposed desegregation. William Manchester, The Glory and the Dream (Boston: Little, Brown and Co., 1973) p 986.
10. John Rawls, A Theory of Justice (Cambridge: Harvard University Press, 1971) p 334. Note that this leaves some room for subjective interpretation. What is "reasonably just under the circumstances?" A government that is 99% just? 50%? 10%?
11. Edgar Denton III, Limits of Loyalty (Waterloo, Canada: Wilfrid Laurier University Press, 1980) p 11.
12. Denton, pp 12-13.
13. Rawls, p 350.
14. Rawls, p 365.
15. Rawls, p 366

16. Particularly in the military, fine lines exist between orders, suggestions, and hints; they all normally elicit the same responses.

17. German law differentiates between treason against the government (hochverrat) and treason against the country (landesverrat). Denton, p 102.

18. Malham M. Wakin (ed), War, Morality, and the Military Profession (Boulder: Westview Press, 1986) ch 11.

19. Rawls, p 390.

20. Heinz Guderian, Panzer Leader (London: Futura Publications, 1952) p 349.

21. Rawls, p 380.

22. Denton, p 19.

23. Rawls, p 390.

24. Walzer, p 294. However, Von Manstein, in Lost Victories, stated that resignation by members of the High Command would have been unfair to front-line troops who did not have the luxury of walking away from the war.

25. I have not addressed the morality of assassination; it is certainly not taken for granted that it is a permissible action, even if treason can be condoned. Guderian writes of the July 20th attempt: "For myself I refuse to accept murder in any form. Our Christian religion forbids it in the clearest possible terms. I cannot therefore approve of the plan of assassination." (p. 348.) The act was also of debatable morality when one considers that the bomb was indiscriminate, killing and injuring other persons who may have been innocent. Indeed, one of the injured persons was General Heusinger, a member of the Valkyrie conspiracy.

26. Some argue that high-ranking officers are less able to claim obedience as a justification for their actions. Such was the rationale for the executions of Keitel and Jodl after World War II. If this is indeed the case, judgments concerning the levels at which soldiers acquire additional responsibility must be made. I would contend that if the Joint Chiefs of Staff are accountable political leaders, they are no more so than Cabinet members and Congressmen.

27. B. H. Liddell Hart, The German Generals Talk (New York: Quill, 1948) p 300.

28. Quoted in Richard A. Wasserstrom, War and Morality (Belmont, Ca: Wadsworth Publishing Company, 1970) p 52.

29. Denton, p 19.

30. Denton, p 19.

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