

# JUST WAR THEORY: REVISIONISTS VS. TRADITIONALISTS

## I. Traditionalists and Revisionists

Since the publication of Michael Walzer's *Just and Unjust Wars*, in 1977, a 'traditionalist' stance has dominated thinking about the morality of war in universities, military academies, and international legal circles. Its central commitment is to provide moral foundations for international law as it applies to armed conflict: states (and only states) may go to war only for national defence, defence of other states, or to intervene to avert 'crimes that shock the moral conscience of mankind' (Walzer [2006b: 107]). Civilians may not be targeted in war, but all combatants, whatever they are fighting for, are morally permitted to target one another, even when doing so foreseeably harms some civilians (as long as it does not do so excessively).

Over the last two decades, this traditionalist theory of just war has been subjected to exacting scrutiny, as for the first time sustained analytical attention has been brought to bear on the ethics of war. Analytical philosophers have overturned almost all the traditionalist conclusions: its continued popularity outside philosophy departments is now matched by its contentiousness within them. Many of these sceptics are 'revisionists'. They have: challenged the permissibility of national defence, and the moral standing of states more generally; argued for expanded permissions for military intervention; questioned civilian immunity; and argued that combatants fighting for wrongful aims cannot do anything right, besides lay down their weapons.

This paper is about the revisionist critique of traditionalist just war theory, and the traditionalist response. I begin with some methodological notes, before turning to the ethical evaluation of first wars as a whole, then of individual actions within war.

## 2. The Methodology of Just War Theory

In this section I identify some methodological disputes that underpin the substantive debate between revisionists and institutionalists. For each dispute I note that, though revisionists typically fall on one side and traditionalists on the other, this need not be the case. And for each I indicate which side presently has the better of the argument.

The first split is between philosophers who make *institutions* their focus and those who concentrate on acts. Institutionalists tend either to look to the long-term effects of the laws of war (Mavrodes [1975]; Dill and Shue [2012]; Shue [2013]; Waldron [2016]), or to see them as the basis of an actual or hypothetical contract between either states or their citizens (Benbaji [2008, 2011, 2014]; Statman [2014]). Non-institutionalists think that acts can be right or wrong independent of how they relate to existing institutions. They typically focus on the individual rights that the act threatens, and on its consequences (as contrasted with the long-run consequences of an institutional rule).

Traditionalists are often institutionalists. Revisionists less often so. As we will see below, it is hard to see how some acts permitted by the laws of war could be non-institutionally justified. This is most obviously true for harms inflicted in the pursuit of an unjust cause. But one can advance non-institutionalist arguments for traditionalist conclusions (e.g. Lazar [2015]). And one could defend revisionism on institutionalist grounds—for example, Cheyney Ryan [2016] advocates pacifism in virtue of moral criticism of the military-industrial complex.

Most revisionists, however, are *moral* revisionists only. They reject traditionalists' attempts to morally vindicate the laws of armed conflict. But they agree with traditionalists that we could not secure widespread agreement on any more restrictive changes to the laws of war, and any attempts to change them would undermine their authority, with

disastrous results.<sup>1</sup> Imagine you lived in a society in which physical assault was so widespread that the only way to limit the number of fatalities was to legally permit any assault that did not rise to the level of murder. Imagine that enough people benefit thereby that it would be impossible to change the law to prohibit assault. Indeed, any attempts to do so would undermine the authority of the law, leading to an increase in murder rates. In such a society, we might well agree that the existing law should be retained, since it is the best we can do, and at least reduces the amount of wrongful death. But would that settle the question of whether *you* should commit an assault? Clearly it would not.

So, even if traditionalists and revisionists reluctantly agree about preserving the existing laws of war, important questions remain to be settled. Do those laws reflect our moral reasons? Or do they do no more than set minimum standards that we should, in our own conduct, seek to rise above?

The next divide is more in-house. Most contemporary moral and political philosophers use something like Rawls's method of seeking reflective equilibrium. On this approach, we develop moral arguments by taking our considered judgements about the permissibility of action in particular cases, and trying to identify the underlying principles that unify them. We then take those principles and test their application to other cases. If the principles generate conclusions that conflict with our considered judgements about those cases, then we must revise either the principles or our judgements. As our project evolves, and we revise our principles in light of our judgements, and our judgements in light of our principles, we approach reflective equilibrium.

What kinds of cases should test our principles in the ethics of war? We can think realistic scenarios, paying attention to international affairs and military history. Or, more clinically, we can construct hypothetical cases to isolate variables and test their independent impact on our judgements. Revisionists often use very abstract cases (e.g. McMahan [1994]; Rodin [2002]). Traditionalists take them to task for this, lamenting their tone-deaf ignorance of the realities of war (Walzer [2006b]; Dill and Shue [2012]). Some philosophers buck these trends—there are revisionists who draw deeply on military history (e.g. Fabre [2012]) and traditionalists who use far-fetched hypotheticals (Lazar [2013]).

Abstraction has some advantages. It avoids awkward disputes over historical details and background political assumptions. Discussing the principle of proportionality by thinking about, say, the NATO campaign in Kosovo might well invite serious debate over how many civilians were actually killed in the campaign. Any examples involving Israel or Gaza are likely to inflame political passions.

But abstraction also has costs. Our intuitions about far-fetched cases might be unreliable. It is perhaps morally dubious to invoke sanitised hypothetical examples when we could instead draw on the harrowing experience of real victims of war. And in abstracting away from the distinctive nature of war, we often lose morally relevant information. Philosophers' cases usually presuppose omniscience, for example, rather than condescending to the radical uncertainty that bedevils all decisions about and within war. They make no concessions for fear or trauma, and underemphasise crucial aspects of the phenomenology of war, such as combatants' attachments to their comrades-in-arms.

We should avoid dogmatism: many different approaches can illuminate the morality of war. But I think that highly artificial hypotheticals should be used carefully, ensuring that

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<sup>1</sup> On the relationship between the morality of war and the law of war, see the broadly traditionalist arguments of Henry Shue and Seth Lazar, the morally but not legally revisionist arguments of Jeff McMahan, and the morally *and* legally revisionist arguments of David Rodin. McMahan [2008]; Shue [2008]; McMahan [2010a]; Shue [2010]; Rodin [2011]; Lazar [2012a]; Shue [2013]. For a book-length treatment of the topic, see Haque [Forthcoming].

any conclusions they support are tenable when applied to the messy reality of war; and that one's intuitive judgements are the starting-point for investigation, rather than its end.

One reason for the preponderance of highly abstract hypotheticals in recent just war theory is that many revisionists are *reductivists*, since they think that all justified killing, in war or outside of it, is justified at root by precisely the same properties. In their most extreme moments, they argue that wars are justified if and only if they are composed exclusively of justified acts of individual self- and other-defence (Rodin [2002]; McMahan [2004]). *Non-reductivists* think, in a nutshell, that there is something different about killing in war. Wars have some distinctive properties that are relevant to the morality of killing. Typical examples include the sheer scale of the fighting, the widespread indifference to moral constraints that war often involves, the political and territorial goods at stake, the 'fog of war', the existence of institutions such as international law, and the fact that the conflict is fought by organised groups.

Here, as before, we can advance non-reductivist arguments for revisionist conclusions (Bazargan [2013]), and reductivist arguments for traditionalism (Steinhoff [2008]; Lazar [2015]). But the predominant dialectic has been the other way. I cannot settle this debate here. Reductivist considerations are crucially important: people have fundamental rights to life and liberty that they don't simply lose once they enter a state of war. But it is oddly dogmatic to confine our normative palette to these reasons alone. The laws of war matter morally. The institutions at stake matter morally. The collective character of military action matters. An exclusively reductivist account of the morality of war would be incomplete.

Just war theorists further divide in their attitudes to the apparently collective nature of warfare. Some are all-out individualists: they think that only individuals act in war, not collectives (they are *descriptive individualists*). And they think that only individuals matter in war (they are *evaluative individualists*).<sup>2</sup> By contrast, Walzer's *Just and Unjust Wars* was evaluatively collectivist—pointing to something transcendental about the survival of political communities to justify intentionally attacking civilians in 'supreme emergencies', for example (Walzer [2006b: 247]). Its implicit descriptive collectivism was made explicit in Walzer's later work (Walzer [2006a]). His first critics argued that applying a thoroughgoing descriptive and evaluative individualism to war entailed revisionist conclusions (Luban [1980b]; McMahan [1994]; Rodin [2002]). Many philosophers then sought to defend traditionalism by rejecting either descriptive (Kutz [2005]; Walzer [2006b]; Lazar [2012b]) or evaluative individualism (Zohar [1993]). Again, of course some individualists defend traditionalism (Emerton and Handfield [2009]). And some collectivists are revisionists (Bazargan [2013]).

Of all the divides that separate (most) traditionalists from (most) revisionists, this one is potentially the most consequential, while being the hardest to settle. War can provide useful test cases for thinking about collective action and the value of collectives; but we really need to develop our theory of collective action and value first, then apply it to war. My view on this question, then, is even more provisional than my verdict on the other disputes. I think that collectives can be valuable independently of how they contribute to their members' well-being, for the prosaic reason that not only individual well-being has value. Groups can instantiate other goods—justice or solidarity, for example (Temkin [1993]). I am not, ultimately, sure whether descriptive collectivism is true. It may be possible to reduce any putatively collective act to the acts of the collective's members. But doing so is often alarmingly circuitous, and does not, I think, alter the moral stakes. Some normative constraints apply primarily to what we do together, and continue to do so regardless of

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<sup>2</sup> Two useful starting points for considering evaluative and descriptive collectivism respectively: Taylor [1995]; List and Pettit [2011].

how we decompose our group acts into individual acts. For example, when fighting a war we must ensure that the overall harm that we inflict, *together*, is kept to the minimum feasible (Lazar [2012b]).

The archetypal traditionalist, then, is a non-reductivist collectivist, who uses realistic cases. The archetypal revisionist is an individualist reductivist, who uses cases involving meteors and mind-control. Simplifying a little, we might unify the former positions under the heading of *political philosophy* approaches to just war theory and group the latter together as *moral philosophy* approaches. There are, of course, political arguments for revisionism, and moral arguments for traditionalism. But we can diagnose much of the recent success of revisionist just war theory as having its roots in the preponderance of moral philosophers in the field.

### 3. *Jus ad Bellum*

Just war theorists have traditionally divided their enquiry into thinking about the resort to war—*jus ad bellum*—and conduct in war—*jus in bello*. My approach is an extension of this. The *jus ad bellum* concerns the morality of the war as a whole. This obviously governs permissible resort. But it also determines whether the war can permissibly be continued. *Jus in bello* concerns the morality of particular actions within war. I address *jus ad bellum* first, then *jus in bello*.

The great suffering and destruction wrought by war can be justified only if fighting serves some great end. Just war theorists typically argue that going to war is impermissible unless it is aimed at a ‘just cause’. And the cataclysm of war is so severe that the list of candidate just causes is short. Traditionalist just war theory recognises only two: national defence (of one’s own state or an ally’s) and humanitarian intervention to avert the very gravest mass atrocities. Importantly, the right of national defence is assumed to apply to most actual states with all their flaws, not solely to (for example) ideal liberal democracies. Only states actively engaged in the kind of mass atrocities that can warrant humanitarian intervention lack rights of national defence.

Walzer offered three arguments to justify states’ rights to national defence (Walzer [2006b: 58]). First, states protect their citizens’ basic human rights to life and liberty. Second, they protect a common cultural life made by their citizens over time. Third, they are the objects of a kind of organic social contract, through which people have given up particular freedoms for the sake of a better outcome for all. Walzer construes this, too, as the object of a basic human right.<sup>3</sup>

These arguments for sovereignty are double-edged. They help justify wars of national defence, but also raise the bar for justifying humanitarian intervention. Intervening militarily in the affairs of another state obviously threatens its political sovereignty and territorial integrity. Hence Walzer wanted to tightly constrain military interventions in other states. They could be permitted, he argued, only to avert the very gravest of crimes.

Revisionists lacerated Walzer’s arguments for traditionalist positions on national defence and humanitarian intervention. They highlighted and challenged his implicit evaluative collectivism (Doppelt [1978]; Beitz [1980]; Luban [1980a]), noting that, far from protecting individual rights, states are often the pre-eminent threat to those rights. They also argued that the prosperity of the ‘common life’ often means oppression for cultural minorities (Caney [2005]). Even setting this point aside, is the common life of a state really threatened by war? And is it really worth killing for? They were equally sceptical about the

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<sup>3</sup> Walzer focused on the importance of political sovereignty, but said little about *territorial* rights; to date little has been written about the role of territory in just cause (though see Stilz [2014]).

organic social contract idea—is it much more than a metaphor (Wasserstrom [1978]; Luban [1980b])? David Rodin (Rodin [2002]), in particular, developed a comprehensive account of how the traditionalist stance on when states may go to war in national defence could not be grounded in the defence of individual rights.

By undermining states' rights to national defence, revisionists also made humanitarian intervention easier to justify. Sometimes these arguments were directly linked: if states cannot protect their citizens' security, they lack the rights to sovereignty which military intervention might otherwise undermine (Shue [1997]). Caney [2005] concludes that military intervention is permissible just in case it improves the net satisfaction of basic human rights. Others defend, at least in principle, 'redistributive' wars, fought against the global rich to redress the suffering of the global poor (Luban [1980b]; Fabre [2012]; Lippert-Rasmussen [2013]; Øverland [2013]).

Revisionists exposed the holes in Walzer's traditionalist arguments, but many philosophers have been reluctant to endorse the radical implications of their critique. In particular, if states' rights to national defence are grounded in individual rights, then national defence will be impermissible against 'lesser aggressors'—those who wage war for purely political and territorial reasons, who will threaten life and liberty only if their target state uses lethal force against them (think, for example, of the US and their allies invading Iraq, or of the Falklands/Malvinas war). Moreover, if military intervention is permissible whenever it will secure a net gain in human rights satisfaction, then states will lack rights of national defence against, for example, wars to spread democracy and other good liberal institutions. Indeed, on the individualist view it is hard to see how any state short of an ideal Rawlsian liberal democracy would have rights of national defence (Kutz [2014]). We have, then, two options: either endorse these radical implications or seek out alternative foundations for familiar rights of national defence (Emerton and Handfield [2014]).

Some revisionists have argued that the defence of individual rights *is* sufficient to justify ordinary rights of national defence. They emphasise the importance of deterrence and the impossibility of knowing, in cases of lesser aggression, whether it will remain bloodless (Fabre [2014]). Others think that we must take people's *political interests* into account when justifying war. People have an interest in having at least a home-grown, if not a democratically elected government. Perhaps these interests are not important enough for their defence to justify killing in isolated cases. But when enough people are threatened, perhaps the total interests at stake can justify the death and destruction of war (Hurka [2007]; Frowe [2014]).

These arguments in favour of national defence also limit the scope of humanitarian intervention. We can justify further limits if we recall the very limited conditions in which military intervention can succeed—for example, stopping an ongoing atrocity is considerably easier than improving a state's political institutions. Perhaps redistributive wars *could*, in principle, be justified. But since any attempt to rescue the global poor by using force against the rich would obviously make lives worse for the very people it aims to help, it is a moral non-starter. That said, resource wars might become more practically salient in our more radically straitened future.

So Walzer's defence of traditionalist positions came up short; but revisionists' early radicalism has since been much reined in. The most pressing challenge that remains, in my view, is to give a richer account of people's political *and territorial* interests, to explain just why we have an interest in being subject to home-grown government, even if it is not democratic; and why it matters to the average Turkish citizen, for example, that Russian aircraft remain outside their airspace. In each case, we must explain why these interests are important enough to be worth killing for.

International law is written by and for states. Unsurprisingly, it has a statist bias. Only states have rights of national defence. It is much harder for non-state actors to acquire, for

example, the rights to kill and to prisoner of war status than it is for the uniformed members of a state's armed forces. Together, these positions reflect a long-standing commitment in the just war tradition to the principle of 'legitimate authority', according to which only sovereigns have the right to go to war.

Revisionists have argued that if war is justified by the protection of individual rights, then why should only sovereigns/governments be allowed to kill defensively? We are not obliged to await institutional support when using necessary lethal force in ordinary cases of self- and other-defence. So we should either disregard the requirement of legitimate authority or see it as something that non-state actors can, in fact, fulfil (Fabre [2008]; Finlay [2010]; Schwenkenbecher [2013]).

Revisionists are, I think, right about defence of life and liberty. We are self-authorising when those rights are at stake. But not all justified wars involve defending life and liberty alone. As we saw above, we cannot sustain ordinary rights of national defence without appealing to people's political interests in having a representative government. But these very interests are set back when states go to war without authorisation from their polity (). So a modicum of statism is appropriate: states are better able to secure the authorisation of their people before going to war (either by explicit vote or by a standing constitutional licence). Having this authorisation makes it easier to justify the state's going to war. Non-state actors, and non-democratic states, fare worse on this score than do democratic states.

With legitimate authority as with just cause, revisionists have shown the flaws of existing arguments for traditionalist conclusions. But, again, the right response is not to jettison those conclusions, but to seek better arguments. Perhaps legitimate authority as it was conceived in historical just war theory is unimportant; undoubtedly the statism of international law is overdone. But when a subset of a group fights on behalf of the group as a whole, then it clearly matters that they be authorised to do so. States, especially democratic states, are better able to secure that authorisation than non-state actors.

The other key conditions of historical just war theory are right intention, reasonable prospects of success, imminent threat, proportionality and necessity. Right intention now receives almost no attention—for good reason: it pertains to an age when princes rather than governments went to war, and just war theory's primary concern was to guide the princes' confessors. Revisionist just war theory has advanced our understanding of the other four conditions in two ways. First, it has undermined the canonical view that each of them is a necessary condition for *ad bellum* justice. In fact, only proportionality and necessity are truly necessary. Wars can be *ad bellum* just even if they lack reasonable prospects of success, and even if the threat that they seek to avert is not imminent. Second, and relatedly, they are not really distinct conditions for justification (Hurka [2005, 2007]; McMahan [2016]). Reasonable prospects of success and imminence are staging-posts on the way to judgements of proportionality and necessity.

The necessity constraint prohibits the unnecessary infliction of harm (here I draw on Lazar [2012b]). Harm is almost always bad (the exception may be where it is deserved), so can be permissible only if it enables us to realise some countervailing good or avert some evil. If you could achieve the same good (or avert the same evil) by inflicting less harm, then the surplus harm is unnecessary, and so unjustified. Obviously, in actual wars, we cannot know how much harm we will inflict or, indeed, how much good fighting will do. We must therefore factor this uncertainty into our calculations of necessity. The simplest way to do this is to discount possible outcomes by their probability of occurring, so that you can weigh the *expected* harm inflicted against the *expected* good done. If you have two alternatives, A and B, and A will realise the same expected good as B, but inflict less expected harm, then B involves unnecessary expected harm and so is impermissible. If the expected harm from A is less than B, but so is the expected good, then we need to decide

whether the reduction in expected harm is morally important enough to require you to bear that much additional risk to the pursuit of your objective. If it is, then B involves inflicting unnecessary expected harm.

Proportionality and necessity are superficially distinct. A war might be necessary, since there is no other means to achieve its end, and yet disproportionate, because the end is not valuable enough to justify the means. To work out proportionality, we need to ask whether the evil inflicted is great enough to justify the evil averted. This means comparing going to war with what would happen if we allowed the threat to eventuate. That comparison is substantively identical to the comparisons between different means for achieving one's ends involved in applying the necessity constraint. Applying the necessity constraint means comparing *all* your options that have some prospect of averting the threat, to ensure that the chosen one does not involve inflicting unnecessary harm. Applying the proportionality constraint means comparing your best military option with what would happen if you did not avert the threat. Both could be subsumed into a broader criterion, which simply compares all your options in this way.

If a war lacks adequate prospects of success, then it is unlikely to be proportionate. Going to war involves inflicting great evils. If it is unlikely to achieve any good, then it is most likely ruled out. But this is a defeasible presumption: the costs of defeat might be great enough that even a very small chance of success is enough to make fighting proportionate.

If the threat is not imminent, then there are probably less harmful means to safety than the resort to war. Again, this presumption is defeasible. Sometimes delay will make defeat much more likely. Hence Walzer argued for the permissibility of pre-emptive attacks, such as Israel's in the Six Day War (Walzer [2006b: 80]). It is much harder to justify 'preventive' wars, fought to avert a threat that is further in the future: the more distant the threat, the more likely it is that it can be neutralised by some means other than fighting. In practice, retaining the imminence requirement is a sensible way to minimise abuses by states looking for excuses to go to war (Buchanan and Keohane [2004]). But this is a pragmatic concession to predictably wrongful state practice, rather than a deliverance of moral theory.

To work out proportionality and necessity, we need to ask *what* matters in war, and *how* it matters. What are the salient goods and bads? Obviously the goods involved in the just cause—the protection of life and liberty, and people's political interests—are vital. And the most obvious bads are the death and destruction to which fighting will inevitably lead. Crucially, we need to consider *all* the goods and bads that will arise because of the war—including those that will follow the active phase of the conflict. Recent misadventures by the US and its allies in the Middle East underscore how central to a war's justification is the realisation of a worthy peace when the fighting is done (Bass [2004]; Coady [2008]; May [2012]).

Knowing the goods and bads realised by war is not enough. We also need to know how to weigh them. The simplest approach would be to weigh all lives, for example, equally. But this is not plausible. Lives matter in two ways. First, because they add value to the world. Second, because they are protected by rights (Lazar [2015]). Ending a life is (almost) always bad. But it only sometimes amounts to a rights-violation. And right-violating killing is much harder to justify than its counterpart. Walzer argued that all soldiers lose their right to life (Walzer [2006b: REF]); many revisionists have replied that, even if this is true for those fighting for unjust ends, it is false for just combatants. But everybody thinks that *some* soldiers are unprotected by rights to life. And that clearly matters to the proportionality of the war.

We need also to consider our own standing in relation to lives taken. Many think that, when working out proportionality and necessity, deaths inflicted by the enemy side in a war should not count equally with the deaths we impose (though see Rodin [2014]). Some

think this is because we have stronger obligations not to do harm than we have to prevent harms done by others (e.g. McMahan [2010b]). We might also think that the lives of those with whom we share special relationships should bear greater weight in our deliberations—this seems relatively obvious at the small scale, where deep personal relationships are concerned. But it also seems plausible when weighing the lives of comrades-in-arms and of compatriots (Kamm [2004]; Hurka [2005]; Lazar [2013]).

#### 4. *Jus in Bello*

Underpinning the law of armed conflict are three fundamental principles:

Discrimination: Intentionally attacking noncombatants is impermissible.<sup>4</sup>

Proportionality: Unintentionally harming noncombatants is permissible only if the harms are proportionate to the goals the attack is intended to achieve.<sup>5</sup>

Necessity: Unintentionally harming noncombatants is permissible only if the least harmful means feasible are chosen.<sup>6</sup>

These principles presuppose that the victims of war fall into two classes—combatants and noncombatants. Combatants may be killed almost without constraint.<sup>7</sup> Noncombatants enjoy substantial protections. Combatants are members of the armed forces of a group at war, as well as those who directly participate in hostilities, including those who have a continuous combat function. Noncombatants are not combatants. The boundaries are vague. What counts as direct participation in hostilities? When is one's combat function continuous? These are hard questions, and I will not answer them here.

Both international law and traditionalist just war theory assume that any combatant who adheres to these three principles fights permissibly, regardless of what she is fighting for.<sup>8</sup> This is the 'moral equality of combatants', also known as the 'symmetry thesis' and, as I shall refer to it, 'Combatant Equality'.

I will discuss Proportionality and Necessity more briefly below. Discrimination and Combatant Equality are the most controversial tenets in the traditionalist just war theory canon. Walzer argued that people have fundamental rights to life and liberty, grounded in their moral status. Attacking people in war can be justified only if those rights are either overridden or somehow lost. He argued that they could be overridden only in exceptional

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<sup>4</sup> Compare: 'In order to ensure respect for and protection of the noncombatant population and noncombatant objects, the Parties to the conflict shall at all times distinguish between the noncombatant population and combatants and between noncombatant objects and military objectives and accordingly shall direct their operations only against military objectives.' Article 48, first additional protocol to the Geneva Conventions.

<sup>5</sup> Compare: 'an attack which may be expected to cause incidental loss of noncombatant life, injury to noncombatants, damage to noncombatant objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.' Article 51(4b), first additional protocol to the Geneva Conventions.

<sup>6</sup> Compare: 'With respect to attacks, the following precautions shall be taken: (a) those who plan or decide upon an attack shall... (ii) take all feasible precautions in the choice of means and methods of attack with a view to avoiding, and in any event to minimizing, incidental loss of noncombatant life, injury to noncombatants and damage to noncombatant objects; ... 3. When a choice is possible between several military objectives for obtaining a similar military advantage, the objective to be selected shall be that the attack on which may be expected to cause the least danger to noncombatant lives and to noncombatant objects.' From Article 57, first additional protocol to the Geneva Conventions.

<sup>7</sup> Other principles prohibit harming combatants in particular ways—for example with poisonous gas.

<sup>8</sup> Article 43 of the first additional protocol states explicitly that 'combatants... have the right to participate directly in hostilities'. The Preamble, meanwhile, makes clear that these principles apply 'without any adverse distinction based on the nature or origin of the armed conflict or on the causes espoused by or attributed to the Parties to the conflict.'



cases of ‘supreme emergency’—if attacking noncombatants were the only way to avert Nazi domination of Europe, for example. In the ordinary circumstances of warfare, an act is permissible only if each of the victims has, ‘through some act of his own... surrendered or lost his rights’ [Walzer [2006b: 135]. In general, ‘a legitimate act of war is one that does not violate the rights of the people against whom it is directed’ [Walzer [2006b: 135].

Walzer then argues that all and only combatants lose their rights to life and liberty (Walzer [2006b: 136]). First, because they threaten the lives of others, they lose their own rights to life (Walzer [2006b: 142]). Second, because by joining the armed forces, a combatant has ‘allowed himself to be made into a dangerous man’ [Walzer [2006b: 145], and thus surrenders his rights. Noncombatants neither threaten others, nor make themselves dangerous, so they retain their rights and may not be attacked. Discrimination follows directly. And Combatant Equality follows too: if all combatants lose their rights not to be killed, then a combatant fighting for an unjust cause does no wrong by killing just combatants.

Walzer’s arguments for Discrimination and Combatant Equality have been refuted by revisionist just war theorists. Even if we accepted Walzer’s versions of Discrimination, Proportionality, and Necessity, Combatant Equality would still be false, since unintended noncombatant deaths can be justified only if the goal fought for is worth those deaths. Unjust combatants fighting in pursuit of an unjust cause achieve nothing that can counterbalance the violated rights of their victims (McMahan [1994]; Rodin [2002]; Hurka [2005]). When ISIL attacks Syrian and Iraqi towns, their intended goals cannot justify *any* unintended harm to noncombatants.

This is enough to refute Combatant Equality. But Walzer’s critics went further. Accepting his premise that, barring supreme emergencies, intentional killing in war must be justified by the target’s lack of rights to life and liberty,<sup>9</sup> they disputed his account of how those rights can be lost. In particular, they have shown that posing a threat is neither sufficient nor necessary for one to be liable to be killed (McMahan [1994]). Those who threaten others’ lives in self-defence, or defence of others, do not themselves forfeit their rights to life. The combatants of the Kurdish Peshmerga, heroically fighting to rescue Yazidi Christians from ISIL’s genocidal attacks, do not lose their rights against their Manichean adversaries. Nor are they like boxers or gladiators, who waive their rights against attack.

Nor is posing a threat necessary for one to lose one’s right to life. Revisionists argue that what really grounds liability is *responsibility* for a *wrongful* threat. The commander-in-chief, for example, might be responsible for threats without posing them. The same is true for a terrorist leader. Combatants fighting for unjust causes are responsible for wrongful threats: they are liable to be killed. Just combatants are not responsible for wrongful threats: they are not liable. So only just combatants can kill legitimately. Combatant Equality is false.

We must also reconsider Discrimination (McMahan [1994]; Arneson [2006]; Fabre [2012]; Frowe [2014]). In many states, noncombatants play an important role in the resort to military force. In modern industrialized countries, as much as 25 per cent of the population works in war-related industries (Downes [2006: 157-8], see also Gross [2010: 159]; Valentino et al. [2010: 351]); we provide the belligerents with crucial financial and other services; we support and sustain the combatants who do the fighting; we pay our taxes and in democracies we vote, providing the economic and political resources without which war would be impossible. Our contributions to the state’s capacity give it the strength and support to concentrate on war. If the state’s war is unjust, then many noncombatants are responsible for contributing to wrongful threats. They are therefore permissible targets.

This is a troubling conclusion. But if we insist that noncombatants are simply not

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<sup>9</sup> The views in this and the next paragraph are widely shared. Some of the most significant sources are: Rodin [2002]; McPherson [2004]; Arneson [2006]; McMahan [2009]; Fabre [2012]; Frowe [2014].

responsible *enough* to be liable to be killed in war, then we will probably find that many unjust combatants also are not responsible enough to lose their rights (McMahan [1994]). Whether through fear, disgust, principle, or ineptitude, many combatants are wholly ineffective in war, and contribute little or nothing to threats posed by their side (Marshall [1978]; Grossman [1995]). Many contribute no more to unjustified threats than do noncombatants. They also lack the '*mens rea*' that might make liability appropriate in the absence of a significant causal contribution. They are simply unlucky. The loss of their right to life is not a fitting response to their conduct.

If we insist that intentional killing in war is permissible only in supreme emergencies or when one's targets have lost their rights to life, and if, as seems plausible, many unjust noncombatants and combatants are equally responsible for wrongful threats, then we face a dilemma. If the degree of responsibility required for liability to be killed is high, then noncombatants are protected in war; but so are many combatants—we would have to endorse a kind of near-pacifism. But if we lower the amount of responsibility required to lose one's right to life, to ensure that we can fight otherwise justified wars, then we also license much weaker protections for noncombatants than are currently provided by international law. If we care at all about the fit between one's behaviour and the fate of losing one's right to life, then we must surely agree that many unjust combatants have done nothing that warrants their becoming liable to be killed. But if we don't care about fit, then we cannot deny that, in modern states, most adults contribute in some way to their government's capacity to wage unjust wars. This is the 'responsibility dilemma' for just war theory (Lazar [2010]).<sup>10</sup>

As with Walzer's account of the *jus ad bellum*, we again find that he derived plausible conclusions from implausible premises. But the revisionists' counter-arguments are not compelling enough to warrant jettisoning traditionalist conclusions without first ensuring that we cannot provide them with firmer foundations.

Philosophers have pursued three paths in response to this dilemma. The first camp is all-out revisionist. Their task is to explain why killing apparently non-liable unjust combatants is permissible, without either undermining noncombatant immunity or re-opening the door to Combatant Equality. They do this by insisting that all and only unjust combatants are liable to be killed. Sometimes this clearly involves applying a double standard—talking up the responsibilities of combatants, talking down those of noncombatants (e.g. McMahan [2011]). But they have also advanced new arguments to this end. McMahan, for example, has argued that unjust combatants can be liable to be killed simply in virtue of being responsible for making just combatants reasonably believe that they are liable on ordinary grounds (McMahan [2011]). Others have abandoned Walzer's individualist focus, and argued that unjust combatants are liable because they are complicit in wrongdoing, even if they do not causally contribute to it (Kamm [2004]; Bazargan [2013]).

These arguments are troubling. Whether we retain or lose our rights should depend only on what we ourselves do. The complicity-based argument comes too close to making mere membership, even *identity*, a basis for losing one's right to life. This is a chilling result. What's more, if combatants are complicit in the wrongdoing of their comrades-in-arms, then surely many noncombatants are also complicit in the wrongful actions of their military ().

As to McMahan's argument: perhaps *culpable* responsibility for others' false beliefs is relevant to permissible harm. It *might* be permissible for a policeman to kill a prankster who pretends to be a suicide bomber. But that is because he is at fault. Philosophers

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<sup>10</sup> Some philosophers are happier than I am to skirt close to those extremes. Frowe [2014] endorses the responsibility view's troubling implications for Discrimination. And others (Rodin [2014]; May [2015]) endorse a form of contingent pacifism.

typically agree that many unjust combatants are not culpable for the injustice of their war (McMahan [1994]; Lazar [2010]). And blameless responsibility for others' beliefs *surely* cannot make one a permissible target—although if it did, then that would resurrect Combatant Equality again, since most just combatants are also blamelessly responsible for unjust combatants reasonably believing that they are liable to be killed.

The second approach is moderate traditionalist. It endorses a moderate form of Combatant Equality, according to which combatants are much more equal than the revisionists allow, but not exactly equivalent. In most wars, many just combatants fight impermissibly, and many unjust combatants fight permissibly. Still, unjust combatants whose actions contribute only to the advancement of their side's unjust cause cannot fight permissibly, no matter how scrupulously they observe Discrimination, Proportionality, and Necessity. That said, they always fight *less* wrongfully when they observe those principles.

The shortest route to moderate Combatant Equality starts by accepting that liability to be killed requires some fit between one's behaviour and the severity of that fate. This is lacking for almost all noncombatants. They simply don't do anything that can warrant losing their rights to life. This helps explain why killing noncombatants is so seriously wrong. But it also means that many unjust combatants retain their rights. The next step is to defend a principle I call Moral Distinction: killing noncombatants is worse than killing combatants. This is obviously true if the combatants are liable and the noncombatants are not. The challenge is to show that killing *non-liable* noncombatants is worse than killing *non-liable* combatants. If that is true, then it can be permissible to intentionally kill non-liable unjust combatants in war without that entailing that non-liable unjust noncombatants are also permissible targets.

Of course, even if killing combatants is better than killing noncombatants, that does not mean it is permissible. The third stage of the argument is to show that, since intentionally killing non-liable unjust combatants is not the most seriously wrongful kind of killing, it can be permissible even in ordinary wars. This allows us to deny pacifism, but it also lends support to moderate Combatant Equality. If killing non-liable combatants is not the worst kind of killing, then it is easier to justify the use of lethal force against just combatants by unjust combatants.

We can argue for Moral Distinction by explaining either why killing non-liable unjust combatants is not the worst kind of killing or why killing non-liable noncombatants is especially seriously wrongful. On the first point, the revisionist arguments just considered can be mobilised here. In particular, while I deny that one can lose the right to life merely in virtue of membership in the armed forces, perhaps one *does* have a special reason to bear cost to avert wrongdoing by those who are part of groups of which one is also a member, which somewhat lowers the barrier against permissible harm.

Additionally, many just combatants in many wars fight justly only through their good luck. Everything within their control could have been held constant, but they could have been fighting unjustly. They simply obey orders. I think that when combatants conform to our rights only by accident, they have weaker grounds for complaint against being harmed than noncombatants who more robustly respect the rights of others (Pettit [2015]).

Further, when combatants kill other combatants, they typically believe that their cause is just, and that killing combatants is an acceptable means to further it. I argue elsewhere that killing people when you know that doing so is wrong is more seriously objectionable than when you reasonably believe you are acting permissibly (Lazar [2015]). *Knowingly* violating someone's rights involves a special kind of disrespect for their moral standing.

Lastly, although combatants do not strictly consent to be killed by their adversaries, they do give their opponents a limited waiver of their rights. The role of the armed forces is to protect their noncombatant population from the ravages of war. This means, in part, drawing fire away from them. They implicitly say to their adversaries: 'you ought to cease

fighting entirely. But if you are going to fight, *then fight us*'. This is a very limited and conditional waiver of their rights against harm. But it does make harming those combatants somewhat less objectionable than harming noncombatants, who do not even waive their rights to this limited degree.

Just as we can show that killing innocent combatants is not the worst kind of killing, we can also show that killing innocent civilians is especially objectionable (Lazar [2015]). First, while killing civilians can sometimes be necessary in war (Lazar [2014]), it is typically wholly wanton.

Second, killing civilians typically involves an especially objectionable mode of harmful agency—their suffering is used as a means to compel their compatriots and leaders to end their war. Combatants, by contrast, are typically killed in order to avert the threat that they themselves pose. They are not used in the same way. Of course, at the strategic level all the suffering of war is used as a means to coerce the enemy leadership. But the killing takes place at the tactical level, where there is a robust difference between anti-civilian and anti-combatant violence.

Third, since civilians are so rarely liable to be killed, attacking them involves taking a much bigger risk of violating their rights than is the case when attacking combatants. Killing people in a more reckless way is worse than doing so when it is quite likely that they are liable. More precisely, killing an innocent person is more seriously wrongful the more likely it was that she was not liable to be killed (Lazar [2015]).

Fourth, civilians are typically more vulnerable and defenceless than soldiers. The notion that we have special duties to protect the vulnerable, and that harming the defenceless is especially objectionable, are as fundamental as the idea that we ought not to harm the innocent. Of course, sometimes soldiers are vulnerable and defenceless, and this explains why harming them is sometimes harder to justify (think, for example, of the 'Highway of Death', in Iraq, 1991).

So, killing non-liable noncombatants is worse than killing non-liable combatants. We can sustain a deep opposition to anti-civilian violence, while allowing that killing non-liable combatants is sometimes permissible. In particular, I think that unjust combatants who fight to defend their own territory, their co-citizens, and their comrades-in-arms sometimes fight permissibly (Kamm [2004]; Hurka [2005]; Kamm [2005]; Steinhoff [2008]; Lazar [2013]). This does not license them to make attacks that serve their unjust goals. But it does mean that Combatant Equality is closer to the truth than the revisionists believe.

Some traditionalists seek a more robust vindication of Combatant Equality. Three institutionalist arguments are especially prominent. The first is contractualist (Benbaji [2008, 2011]). The existing laws of war constitute a fair and optimal agreement among states and their populations, which allows all to sustain disciplined armies, necessary for national defence and international stability. Combatants waive their rights not to be killed, in order to allow themselves to go to war without having to analyse the merits on every occasion.

Although international law is clearly morally important—if you fight within international law, then you cannot be equated to a common murderer, even if your cause is unjust—I think Benbaji's view is too narrowly statist, and cannot explain how combatants pursuing an unjust goal can proportionately kill non-liable noncombatants. If their ends are evil, they cannot justify any of the evil that they do.

The second argument appeals to the authority of *domestic* law. Just as we have an obligation to obey the laws of our state, so combatants are obliged to obey their state's orders to fight (for discussion, see Estlund [2007]; Renzo [2013]; Ryan [2016]). Again, while I agree that this is a genuine moral reason it is not weighty enough to license otherwise wrongful killing.

The third argument grounds Combatant Equality in its long-term results, arguing that the existing laws of war limit the suffering caused by war (Dill and Shue [2012]; Shue [2013];

Waldron [2016]). Since combatants and their leaders almost always believe their cause to be just, requiring unjust combatants to lay down their arms would be wholly ineffective, while additional permission would be abused by all sides. The existing laws of war are a necessary compromise with harsh reality.

As already noted, this argument is certainly plausible, but leaves important gaps. Of course the laws of war should be sensitive to predictable non-compliance. But that doesn't tell us what *we* ought to do in war. And we cannot premise that question on the assumption that we will predictably act impermissibly (Lazar and Valentini [2017]). We need to know both what the laws of war should be and what we ought to do, faced with different situations in war.

Endorsing Moral Distinction brings us close to vindicating international law. But it does not take us the whole way. Discrimination prohibits intentional attacks on civilians; Proportionality licenses unintended but foreseen harms; Moral Distinction gives no special role to intentions. To justify current international law, we need to go further. Doing so takes us into one of the oldest debates in normative ethics, concerning the so-called 'doctrine of double effect' (for useful work, see Quinn [1989]; Rickless [1997]; McIntyre [2001]; Delaney [2006]; Thomson [2008]; Tadros [2015]). We can defend this principle in two stages: first, we have to show that mental states in general can be relevant to the permissibility of our actions (Christopher [1998]). Many philosophers deny even this (e.g. Thomson [1986]; Kamm [1993]).

Second, we need a coherent account of which mental states matter for permissibility, which sets intentions in context. My own view is that intentions do matter to permissibility, because intending to harm someone evinces greater disrespect for that person than merely foreseeing that one's actions will harm him. But the difference between intended and merely foreseen harm is not categorical. I cannot see why we would, for example, absolutely prohibit intentionally violating someone's rights, while having a relatively permissive stance towards merely foreseen rights-violations. The difference is one of degree, not of kind.

I therefore think that the absolute prohibition on targeting civilians in international law is not directly grounded in our first-order moral reasons. However, here as elsewhere, hard cases make bad law: better to have an exceptionless principle at the heart of international law than reflect the moral truth, lest the latter course lead to a serious increase in wrongful attacks on civilians. As it is formulated in international law, Discrimination is relatively clear and easy to apply (notwithstanding the difficulty of determining what counts as directly participating in hostilities). It is not a mere rule of thumb, since it is underpinned by the fact that killing civilians is worse than killing soldiers, and intentional killing is worse than merely foreseen killing. But it takes these differences in degree, and translates them into a difference in kind, for the sake of minimising wrongful killing.

Proportionality and necessity raise a number of other interesting questions, which I lack the space to address in depth. One issue that has been prominent in recent years is whether, when calculating proportionality, to discount the lives of civilians used as 'involuntary human shields' by the enemy. Pro-Israeli commentators have argued that Hamas' putative responsibility for using civilians as cover diminishes the Israeli Defence Force's responsibility for their deaths (Walzer [2009]). And they have argued that allowing Hamas to abuse the IDF's moral restraint creates perverse incentives for future conflicts (Keinon [2014]; for a philosophical version of the point, see Smilansky [2010]). Setting aside the disputed question of whether Hamas did in fact use civilians in this way, the moral arguments merit further consideration. My own view is that they don't stand up.

We ordinarily think that we should lose or forfeit our rights against harm only through our own actions. According to this argument, civilians' rights are diminished in weight by those who use them, involuntarily, as cover. This should be cause for concern. And even if

Hamas were responsible for using the civilians as cover, that does not diminish the IDF's responsibility for the resulting deaths—responsibility is not zero sum. Lastly, using these civilians as a means to deter future abuses of the IDF's moral restraint is even more objectionable than harming them as a side-effect.

With respect to necessity, the most potent recent debate has touched on similar themes. International law requires combatants to 'take all feasible precautions in the choice of means and methods of attack with a view to avoiding, and in any event to minimizing, incidental loss of civilian life, injury to civilians and damage to civilian objects'. This principle has deep moral foundations, which recent just war theory has helped bring to light (see especially Walzer [2006b: 155]; McMahan [2010b]; Lazar [2012b]; Luban [2014]). Combatants are required to bear significant costs to reduce the risk to civilians. But how much cost? Working that out means attending to all the arguments for Moral Distinction, but also to soldiers' special role-obligations to protect noncombatants, as well as their duties to protect one another.

## 5. Conclusion

The last two decades have been turbulent for just war theory. For the first time, it has received the kind of sustained philosophical analysis that other areas of moral and political philosophy have enjoyed for much longer. The first fruits of that analysis were revisionist, throwing the hard-won consensus at the heart of international law and practice into question. But as the debate has evolved, the more radical revisionist conclusions have been shown to depend mostly on a limited conceptual palette and a restricted philosophical imagination. Grounding our account of the ethics of war in our intuitions about small-scale cases of self-defence is like grounding our theory of distributive justice in the principles appropriate to shipwrecked castaways dividing up cowrie shells on a desert island. Undoubtedly we can learn something about the morality of war from those highly simplified interpersonal cases. But we must also think about war itself. Once we expand our focus, we quickly find that the core of the law of armed conflict—its commitments concerning national defence, legitimate authority, proportionality and necessity *ad bellum* and *in bello*, and discrimination—may not precisely mirror our more fundamental moral reasons, but nor is it the morally rootless product of power and compromise.<sup>11</sup>

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