

The Ethics of Killing in War*

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I. THE TRADITIONAL THEORY OF THE JUST WAR

The traditional theory of the just war comprises two sets of principles, one governing the resort to war (*jus ad bellum*) and the other governing the conduct of war (*jus in bello*). The two sets of principles are regarded, in Michael Walzer's words, as "logically independent. It is perfectly possible for a just war to be fought unjustly and for an unjust war to be fought in strict accordance with the rules."¹ Let us say that those who fight in a just war are "just combatants," while those who fight in a war that is unjust because it lacks a just cause are "unjust combatants." (A just cause is an aim that can contribute to the justification for war and that may permissibly be pursued by means of war.)² The most important implication of the idea that *jus in bello* is independent of *jus ad bellum* is that

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1. Michael Walzer, *Just and Unjust Wars* (Harmondsworth: Penguin, 1977), p. 21. Compare Henry Sidgwick's claim that "the rules which civilised opinion should attempt to impose on combatants . . . must abstract from all consideration of the justice of the war" (*The Elements of Politics* [London: Macmillan, 1891], pp. 253–54).

2. It is perhaps more natural to use the term 'unjust combatant' to refer to anyone who fights in an unjust war, irrespective of the reason why the war is unjust. I suspect, however, that those who fight in a war that has a just cause but is unjust for some other reason (e.g., because it is unnecessary or disproportionate) have a different moral status from those who fight without a just cause. My focus in this article will be on those who fight in the absence of a just cause.

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it makes no difference to the permissibility of an unjust combatant's conduct in war that he fights without a just cause. Unjust combatants do not do wrong merely by participating in an unjust war. They do wrong only if they violate the principles of *jus in bello*. So the moral position of unjust combatants is indistinguishable from that of just combatants—a condition that Walzer refers to as “the moral equality of soldiers.”³ Both just and unjust combatants have “an equal right to kill.”⁴

They do not, of course, have a right to kill just anyone. According to the traditional theory, combatants are permitted to kill only opposing combatants. This is, indeed, the traditional understanding of the central requirement of *jus in bello*: the requirement of discrimination. All combatants, just and unjust alike, must discriminate between combatants and noncombatants, intentionally attacking only the former and not the latter. This way of interpreting the requirement to discriminate between legitimate and illegitimate targets is so deeply entrenched that we typically reserve the pejorative term ‘terrorism’ for acts that violate the requirement, so understood—that is, for acts of violence intentionally directed against noncombatants as a means of achieving aims of a broadly political nature.⁵

In this article I will challenge all three foundational tenets of the traditional theory I have identified: (1) that the principles of *jus in bello* are independent of those of *jus ad bellum*, (2) that unjust combatants can abide by the principles of *jus in bello* and do not act wrongly unless they fail to do so, and (3) that combatants are permissible targets of attack while noncombatants are not. I will begin by examining certain arguments that have been offered in support of these tenets. I will then

3. Walzer, p. 34.

4. *Ibid.*, p. 41.

5. A representative definition is that “terrorists are those who target and kill noncombatants (including, as on the *USS Cole*, military people not engaged in hostilities) for the purpose of spreading fear and terror” (advertisement by the Committee for Accuracy in Middle East Reporting in America in the *New York Times* [October 12, 2003]). Similarly, C. A. J. Coady defines terrorism as “intentionally targeting noncombatants with lethal or severe violence for political purposes” (“Terrorism,” in *Encyclopedia of Ethics*, 2d ed., ed. Lawrence Becker, Charlotte B. Becker, and Mary Becker [New York: Routledge, 2001], pp. 1696–99). Jessica Stern, described on the back of her book as “the foremost U.S. expert on terrorism,” defines it as “an act or threat of violence against noncombatants with the objective of exacting revenge, intimidating, or otherwise influencing an audience”—a definition that implies that capital punishment and perhaps (if incarceration backed by a threat of force counts as an act or threat of violence) all legal punishment with retributive or deterrent aims is terrorism (*Terror in the Name of God* [HarperCollins, Audio CD, 2003], disc 1). See also the definitions given or presupposed in the articles by Coady (“Terrorism, Morality, and Supreme Emergency”), Frances Kamm (“Failures of Just War Theory: Terror, Harm, and Justice”), David Rodin (“Terrorism without Intention”), Saul Smilansky (“Terrorism, Justification, and Illusion”), and Noam Zohar (“Innocence and Complex Threats: Upholding the War Ethic and the Condemnation of Terrorism”), in this issue.

argue that the tenets cannot be correct. Finally, I will sketch the outlines of a revisionist understanding of the just war that I believe is more consistent and plausible, as well as better grounded, than the traditional theory.

II. THE PRESUMED PERMISSIBILITY OF DEFENSIVE FORCE

According to the traditional theory, we are all initially “morally immune” to attack. Those who do nothing to lose their right against attack are commonly said to be “innocent.” Yet, as Thomas Nagel observes, in the tradition “‘innocent’ means ‘currently harmless,’ and it is opposed not to ‘guilty’ but to ‘doing harm.’”⁶ The English term ‘innocent’ derives from the Latin *nocentes*, which means “those who injure or are harmful.” The innocent are those who are *not nocentes*. Those who retain their immunity to attack are therefore those who are not threatening. In the context of war, the innocent are those who do not contribute to the prosecution of the war, that is, noncombatants. The noninnocent are those who pose a threat to others, that is, combatants. They lose their immunity and are liable to attack.

These observations answer a question posed by Uwe Reinhardt, an economist at Princeton University, during the early days of the second U.S. war against Iraq. In an editorial in the *New York Times*, Reinhardt expressed understandable impatience with those who “prattle on about innocent civilians, as if the number of fallen enemy soldiers did not count. What does ‘innocent’ mean in the context of war?”⁷ In the just war tradition, to say that an individual is not innocent is not to say that he is guilty, that he deserves to die, that his life is less valuable, or that his death is less tragic. It is only to say that he has done something to meet the criterion for liability to attack—which, according to the traditional theory, is posing a threat to others. The notion of innocence bears only on the permissibility of killing, not on the tragedy of death.

These observations also help to reveal how the three tenets of the traditional theory follow from a general principle of the permissibility of defensive force. Because just combatants threaten unjust combatants, they are noninnocent and lose their right not to be attacked. For “that right,” according to Walzer, “is lost by those who bear arms ‘effectively’ because they pose a danger to other people.”⁸ It does not matter that they have done no wrong: “Simply by fighting,” just combatants lose “their title to life and liberty, . . . even though, unlike aggressor states,

6. Thomas Nagel, “War and Massacre,” in *International Ethics*, ed. Charles R. Beitz, Marshall Cohen, Thomas Scanlon, and A. John Simmons (Princeton, N.J.: Princeton University Press, 1985), p. 69.

7. Uwe Reinhardt, “Innocents in Uniform,” *New York Times* (March 22, 2003).

8. Walzer, p. 145.

they have committed no crime.”⁹ This is why unjust combatants do no wrong in attacking them. But just combatants are also permitted, for the same reason, to attack the unjust combatants who threaten them. The fact that just combatants fight in a just war while unjust combatants do not is irrelevant to their respective justifications for fighting; hence, the independence of *jus in bello* from *jus ad bellum*. Finally, the distinction between combatants and noncombatants is significant because combatants pose a threat and so may be the target of defensive force, while noncombatants do not pose a threat and thus cannot be the target of defensive force (though of course they may be used instrumentally in defensive efforts directed against threats posed by others).

The idea that the traditional theory of the just war can be grounded in the permissibility of defensive force is vulnerable to two objections. I will develop the first of these in the remainder of Section II and the other in Section III.

The appeal to the permissibility of defensive force cannot in fact support one of the three tenets of the traditional theory: the claim that unjust combatants do not do wrong merely by fighting in an unjust war. For there is often one phase in an unjust war—the initial phase—in which the action of unjust combatants cannot be construed as defensive even in the broadest sense.¹⁰

Suppose that one country’s forces initiate an unjust war by launching a surprise attack against the unmobilized forces of another country. Do the soldiers who participate in this attack act impermissibly? Adherents of the traditional theory typically claim that they do not, provided that their attack is directed only against their adversary’s military. But if they do not do wrong, that can only be because their attack is directed against combatants. Certainly there can be no justification for what they do other than the traditional theory’s claim that combatants are legitimate targets.

But this understanding of the case is incompatible with the assumption that only defensive force is justified. Recall that the reason why combatants are held to be legitimate targets is that, by posing a threat to others, they have lost their right not to be attacked. But the

9. *Ibid.*, p. 136.

10. For an earlier though less carefully developed statement of this objection, see Jeff McMahan, “Innocence, Self-Defense, and Killing in War,” *Journal of Political Philosophy* 2 (1994): 196–98. Some of the basic contentions of the present essay are defended, though for the most part by different arguments, in this earlier paper. Among the important differences is that my understanding of the morality of self-defense has evolved in significant ways since I wrote the earlier paper. For a statement of the account of self-defense presupposed by certain arguments in the present article, see McMahan, *The Ethics of Killing: Problems at the Margins of Life* (New York: Oxford University Press, 2002), pp. 398–421, esp. pp. 400–407.

members of a standing army that is based in its home territory, is configured for defensive operations only, is not mobilized, and has no plans for war do not pose a threat to others; they are innocent in the relevant sense. To claim that these military personnel are combatants is therefore to sever the connection between combatant status and the traditional theory's criterion for liability to attack. One can call them combatants but only at the cost of forfeiting the traditional theory's grounds for claiming that all combatants are legitimate targets of attack.

It might be argued that unmobilized military personnel have combatant status because they do pose a threat by virtue of being prepared to use force if their country is attacked.¹¹ They are, one might say, "conditional combatants." But if the fact that they would fight if attacked is sufficient to make them count as threats to others, then anyone, military or nonmilitary, who is prepared to fight if his or her country is attacked must count as a threat to others and therefore as a combatant. This suggestion empties the distinction between combatant and non-combatant of any significant content.

The alternative to treating unmobilized military personnel as combatants is to accept that they are noncombatants, albeit "military non-combatants."¹² On this view, they retain their immunity to intentional attack, and those who initiate an unjust war by attacking them are guilty of violating the *jus in bello* requirement of discrimination. If this is right, there is at least one phase of an unjust war in which unjust combatants cannot participate without doing wrong. And this, of course, conflicts with the second tenet of the traditional theory.

Perhaps many just war theorists would be willing to accept this understanding of the morality of initial aggression, despite its incompatibility with the traditional assumption that unjust combatants do not do wrong by fighting provided they confine their attacks to military targets. But consider more carefully what it means to concede that participation in an unjust initial attack is wrong. It means that unjust combatants do wrong if they attack another country's military personnel before the latter have mobilized but that they, or other unjust combatants who enter the war later, do not do wrong if they attack those same people after they have begun to mobilize in self-defense. It may even mean that it is permissible to participate in unjust aggression against military personnel if the victims are given warning that enables them to mobilize, so that they can then be regarded as posing a threat, but not if no warning is given. If so, this would lend credibility to the charge made by some of its critics that the theory of the just war is nothing

11. I owe this suggestion to Richard Hanley.

12. Recall that "military people not engaged in hostilities" are said to be noncombatants in the first definition of terrorism cited in n. 5.

more than a quaint chivalric code. So the fact that some unjust wars involve an initial surprise attack challenges the plausibility of the traditional theory even if it abandons the claim that it is always possible to fight an unjust war “in strict accordance with the rules.”

It is perhaps worth noting a further problem that arises if the theory treats unmobilized military personnel as noncombatants and if it recognizes moral reasons for attacking noncombatants that override the presumption of immunity afforded by their noncombatant status. Here is a possible example. Suppose a country has two distinct “security” services: a domestic police force and a standing army. The government has no aggressive ambitions, so its military forces are configured for defense only. But its police force is engaged in a genocidal campaign against a domestic minority. Suppose this campaign provides a just cause for humanitarian intervention. It seems that it could be justifiable to launch a surprise attack against the military forces of this country if, of all the options available, that would promise both the highest probability of success and the least harm to all concerned, precisely because these forces are the ones who, if not immediately overcome, would fight to defend the government.¹³ If that is right, soldiers can participate in a surprise attack against military noncombatants without doing wrong provided they have a just cause—in this case humanitarian rescue. But they do wrong by participating in a surprise attack against military noncombatants if the attack is unjust. So whether it is morally permissible to participate in an initial surprise attack depends on whether there is a just cause. And this is inconsistent with the traditional theory’s insistence that *jus in bello* is independent of *jus ad bellum*.

III. JUSTIFICATION AND EXCUSE

The second objection to the attempt to ground the tenets of just war theory in the permissibility of defensive force is simply that it is false that all defensive force is permissible. Consider a case at the individual level of a surprise attack. Suppose a villain attacks you, entirely without justification or excuse, but that the initial attack fails to overcome you. Rightly believing that he will otherwise kill you, you justifiably attack him in self-defense. If defensive force is permissible, the fact that you now pose a threat to your attacker makes it permissible for him to attack you—even to kill you if your defensive counterattack threatens his life. Hobbes accepted this conclusion, but he was one of the last people to

13. An alternative explanation of the permissibility of attacking these forces is that they are legitimate targets because they bear some responsibility for the genocide by virtue of shielding its perpetrators. This is the explanation I favor, but it invokes a criterion of discrimination different from that of the traditional theory. I will return to this alternative account of discrimination in Sec. VI.

accept it. Most find it impossible to believe that, by unjustifiably attacking you and thereby making it justifiable for you to engage in self-defense, your attacker can create the conditions in which it becomes permissible for him to attack you. Most of us believe that, in these circumstances, your attacker has no right not to be attacked by you, that your attack would not wrong him in any way, and that he therefore has no right of self-defense against your justified, defensive attack.¹⁴ But if your attacker has no right of self-defense, then not all defensive force is permissible.

Walzer recognizes this. He implicitly rejects the suggestion that the three foundational tenets of the traditional theory derive from a principle of the permissibility of defensive force. Indeed, he supplies his own counterexample to such a principle: "In the course of a bank robbery, a thief shoots a guard reaching for his gun. The thief is guilty of murder, even if he claims that he acted in self-defense. Since he had no right to rob the bank, he also had no right to defend himself against the bank's defenders."¹⁵ In general, Walzer believes, there is no right of self-defense in the course of criminal activity. And he concedes that "aggression is . . . a criminal activity."¹⁶ It seems, therefore, that he ought to abandon the claim that unjust combatants may permissibly attack just combatants because the latter pose a threat to them. For unjust combatants are engaged in aggression, which he accepts is a criminal activity, and should have no right of self-defense during the course of their aggression.

But Walzer argues that participation in an unjust, aggressive war differs in a morally significant way from participation in domestic criminal activities. In the domestic context, "the idea of necessity doesn't apply to criminal activity: it was not necessary to rob the bank in the first place."¹⁷ But the idea of necessity does, he argues, apply to war, and this makes a difference to the morality of participation in an unjust war. "Personal choice," he contends, "effectively disappears as soon as fighting becomes a legal obligation and a patriotic duty. . . . For the state decrees that an army of a certain size be raised, and it sets out to find the necessary men, using all the techniques of coercion and persuasion at its disposal."¹⁸ Because those who become combatants are subject to a variety of forces that compel their will—manipulation, deception, coercion, their own sense of the moral authority of the government that commands them to fight, uncertainty about the conditions

14. See Jeff McMahan, "Self-Defense and the Problem of the Innocent Attacker," *Ethics* 104 (1994): 257.

15. Walzer, p. 128. See also the discussion on pp. 38–39.

16. *Ibid.*

17. *Ibid.*

18. *Ibid.*, p. 28.

of justice in the resort to war, and so on—they cannot be held responsible for merely participating in an unjust war. As Walzer puts it, “their war is not their crime”; for “the war itself, . . . soldiers are not responsible.”¹⁹

Walzer advances these claims in support of the idea that unjust combatants do no wrong merely by participating in an unjust war. He accepts that aggression is a criminal activity yet asserts that those who participate in it in the absence of full freedom of choice are not criminals and retain their right of defense against those who threaten them. If this is sufficient to establish that unjust combatants do no wrong merely by fighting in an unjust war, it would thereby also provide support for the independence of *jus in bello* from *jus ad bellum*.

I believe that Walzer exaggerates the significance of the coercive pressures and the constraints on knowledge that often apply to those whose government orders them to fight.²⁰ It has been argued, moreover, that even if it were right that soldiers’ wills are effectively compelled, Walzer’s argument would still fail because a plea of duress is never fully exculpatory in cases of wrongful killing.²¹ The reality, however, is that unjust combatants differ in various relevant respects. Some could not have known that their cause was unjust; others could have but failed to do what was necessary to achieve that knowledge. Some may have been incapable of resisting coercive pressures of varying degrees of severity; others could have resisted but failed to do so. Still others freely chose, for discreditable reasons, to fight in the knowledge that their cause was unjust.

But these considerations are beside the point. For the various considerations that Walzer cites are at best *excuses*. They may show that a particular unjust combatant is not a criminal and is not to be blamed or punished for what he does, but they do not show that he acts permissibly. If, however, unjust combatants are at best merely excused for fighting, while just combatants are justified, two of the central tenets of traditional just war theory must be rejected. It is false that unjust combatants do no wrong to fight provided they respect the rules of engagement. And it is false, a fortiori, that *jus in bello* is independent of *jus ad bellum*.

There is, perhaps, one way that some of the considerations to which Walzer appeals might support the claim that unjust combatants are morally permitted to fight. We might accept a subjectivist conception of justification according to which, if one has certain beliefs that it is

19. *Ibid.*, pp. 37–38.

20. For a good discussion, see David R. Mapel, “Coerced Moral Agents? Individual Responsibility for Military Service,” *Journal of Political Philosophy* 6 (1998): 171–89.

21. David Rodin, *War and Self-Defense* (Oxford: Clarendon, 2002), p. 171.

reasonable to have in the circumstances, and if one's action would be justified if those beliefs were true, one's action is also permissible even if the beliefs are false. On such a view, the coercive pressures Walzer cites would provide only an excuse, but epistemic considerations could provide a justification. If it were reasonable for an unjust combatant to believe that his war was just—if, for example, it were impossible for him to know certain facts that make his country's war unjust—he could be justified in fighting.

This subjectivist conception of justification is controversial. But I will not dispute it here; for even if it is true, it shows only that *some* unjust combatants are justified in fighting, namely, those whose belief that their war is just is reasonable in the context. But these, it seems, constitute a minority among unjust combatants. For most unjust combatants, it is not impossible to discover the relevant facts and to reason morally on the basis of those facts to the conclusion that their war is unjust. In most cases, of course, they are actively deceived and are discouraged from inquiring about the facts or engaging in critical moral reflection, and they will find reassurance in the complacency of most of their fellow soldiers. But these considerations are insufficient to make their false beliefs reasonable. Whether their beliefs are reasonable in the circumstances depends in part on whether they have done what they could reasonably be required to do in order to ensure that their beliefs are justified; and that in turn depends on how important it is morally that their beliefs should be justified. In the case of soldiers, it is highly important that their beliefs should be justified because of the seriousness of what they are being asked to do, namely, to kill people of whom they have no personal knowledge. Moreover, the risk that their cause is unjust is high. Because wars are rarely if ever just on both sides but are sometimes unjust on both, it is likely that most soldiers in the history of war have fought in the service of an unjust cause. Soldiers, therefore, have very strong reasons to form justified beliefs about the morality of the war in which they are asked to fight. Most unjust combatants fail in this responsibility, for they typically believe their wars are just. But while the fact that this negligence is ubiquitous and widely tolerated may suggest that most unjust combatants are not culpable in falsely believing that their war is just, it does not make their beliefs reasonable if a more conscientious person could, in their circumstances, find his or her way to the truth.

It is perhaps worth adding that if the subjectivist conception of justification were correct, it might show not only that some unjust combatants would be justified in fighting but also that some combatants, just and unjust alike, would be justified in violating the principles of *jus in bello*—for example, that they would be justified, not merely excused, in bombing a children's hospital if they reasonably believed that it was

a munitions storage facility.²² But Walzer and other defenders of the traditional view claim that combatants are accountable for obeying the rules of *jus in bello* in a way that they are not accountable for the rules of *jus ad bellum*, so it would be surprising if the same considerations that supposedly enable combatants to act with justification in violating the rules of *jus ad bellum* would also enable them to act with justification in violating the rules of *jus in bello*.

IV. ARE UNJUST COMBATANTS JUSTIFIED IN FIGHTING?

There is in Walzer's *Just and Unjust Wars* a further defense of the claim that unjust combatants do not do wrong simply by fighting. It is not developed as a distinct argument but is nevertheless suggested by recurrent references to war as a "rule-governed activity." For example, when Walzer considers the idea that an unjust combatant is like a thief who engages in self-defense while committing a robbery, he finds a difference other than that war is subject to "the idea of necessity." "The crucial point," he writes, "is that there are rules of war, though there are no rules of robbery (or of rape or murder)."²³ Even "*aggressive* war is a rule-governed activity."²⁴ Presumably the idea is that because rules distinguish between the permissible and the impermissible, it must be permissible to participate in a rule-governed activity provided that one obeys the rules. For there cannot be permissible ways of doing the impermissible. So, if even aggressive war is governed by rules, mere participation in it cannot be impermissible.

But the rules of *jus in bello* need not, and in fact do not, state collectively sufficient conditions of permissibility. Thus, they could, in their application to unjust combatants, impose genuine moral constraints on impermissible action. They could indicate ways in which the basic wrong of participation in an unjust war could be aggravated or compounded by being done in a way that would involve additional offenses. Similarly, there could be a rule of robbery to the effect that, in robbing a house, one must not kill the inhabitants to avoid being identified by them, or burn the house as a means of erasing one's fingerprints. (Among the reasons why there are no recognized rules of robbery in our society are that such rules would probably have the effect of promoting theft by making it seem more acceptable and that it would

22. This observation is a variant of Lionel McPherson's cogent argument that defenders of the traditional theory cannot consistently hold that combatants cannot be held responsible for obeying the principles of *jus ad bellum* but are responsible for obeying the principles of *jus in bello*. See his "Innocence and Responsibility in War," *Canadian Journal of Philosophy* (forthcoming).

23. Walzer, p. 128.

24. *Ibid.*, p. 21 (emphasis added).

be difficult to persuade thieves that it would be in their interest to follow them.)²⁵

There is, moreover, an altogether different way of understanding the rules of *jus in bello*. They might not be rules that hold independently of their utility but might instead be *conventions* that, when observed by both sides, serve everyone's interest in limiting or containing the ferocity of war.²⁶ But, if the rules of *jus in bello* are conventions, the fact that they govern unjust war does not show that participation in an unjust war is morally permissible. General recognition that the conventions apply to all combatants could have the intended effect of moderating the action of unjust combatants even if that action is morally wrong. Of course, if the rules of war were conventions agreed upon for reasons of self-interest and there was no morality of war independent of the conventions, then participation in an unjust war would not be wrong. But neither would it be permissible, for on this view war would be an essentially amoral activity.

So the fact that even unjust warfare is constrained by rules does not imply that participation in it is permissible. Yet commonsense morality supports the view of the traditional theory of the just war that unjust combatants are not necessarily, or even usually, wrongdoers; no one, certainly, regards them as murderers for killing enemy soldiers in the course of an unjust war. What reasons are there, then, other than appeals to the subjective conception of justification or the idea that unjust war is a rule-governed activity, for thinking that unjust combatants act permissibly?

One argument appeals to epistemological considerations. It is often noted that ordinary soldiers cannot have access to all the information and arguments relevant to the justification for war, and even if they could, they could not be held responsible for reasoning successfully about subtle and contested matters of *jus ad bellum*; therefore it is reasonable for them to defer to the judgment of their leaders and permissible for them to fight. But the assumption that soldiers are more likely to do right by following the judgment of their political leaders seems false. Consider how often in the past soldiers have followed their leaders into unjust wars, either because they were deceived or because their leaders were themselves mistaken. It seems that by exercising their own judgment rather than deferring to that of their leaders, soldiers

25. In some societies there have been rules of robbery. Derek Parfit recounts that "when my mother was traveling on a Chinese river in the 1930's, her boat was held up by bandits, whose moral principles permitted them to take only half of anyone's property. These bandits let my mother choose whether they would take her engagement ring or her wedding ring" ("Reasons, Goodness, and Morality" [unpublished manuscript, p. 2]).

26. For a defense of this view, see George I. Mavrodes, "Conventions and the Morality of War," in Beitz et al., eds., pp. 75–89.

would be substantially less likely to participate in unjust wars. But, given that people are more likely to mistake an unjust war for a just war than to think a just war unjust, these soldiers would not be significantly less likely to participate in just wars. If, therefore, their aim is to participate in just wars but not in unjust wars, it does not seem reasonable for soldiers to trust their leaders about matters of *jus ad bellum*. But even if it were reasonable, a soldier's submission to the judgment of his leaders would seem only to excuse his participation in an unjust war rather than to justify it.

Another argument is pragmatic. It is commonly thought that a military organization can function in a disciplined, cohesive, and effective manner only if soldiers surrender their private judgment and submit to the judgment of their leaders. It is therefore justified for soldiers to trust their leaders and to fight when told to do so. If, however, it is true that genuinely just wars (many or most of which are defensive) seldom seem unjust to more than a few of those who are asked to fight them, it would be only minimally disruptive of a country's ability to fight just wars if its soldiers were to exercise their judgment about matters of *jus ad bellum*. It might, however, significantly hinder a country's ability to fight unjust wars. But this is hardly an objection.

While the epistemological and pragmatic arguments may have little force on their own, they have a subordinate role in a larger argument that is more persuasive. This larger argument focuses on institutional considerations. There are institutions that are necessary to achieve certain important social goods—for example, coordinated decision making, security, and so on. We therefore have moral reason to support these institutions. But they cannot operate to produce social goods unless people are willing to participate in them even when they require that people do what they believe to be wrong, and may actually *be* wrong. For example, democratic decision making may require voting, but voting is pointless unless people will abide by the outcome of the vote, even if it commits them to support policies or participate in activities they believe to be wrong. Similarly, domestic security requires laws that, to be effective, must be enforced. Police, judges, prison officials, and others must therefore enforce the laws, including those they believe, perhaps rightly, to be unjust. For the legal system could not function if individuals were permitted selectively to enforce only those laws they believed to be just.

Similar considerations apply to participation in military institutions. And it is at the institutional level that the epistemic and pragmatic considerations I have identified become important. It may be rational both epistemically and practically to establish an institutional division of moral labor that assigns responsibility for important decisions such as whether to go to war to those who have access to the relevant infor-

mation, are positioned to coordinate an effective response to external threats, and can be held accountable for their decisions. The institution itself may thus demand that only those with the assigned authority should make decisions pertaining to *jus ad bellum*. If the institution is to survive and carry out its functions, others within it must fulfill their assigned roles even if they disagree with the decisions reached by those responsible for matters of *jus ad bellum*.

By participating in such institutions as the legal system and the military, individuals risk becoming instruments of injustice. But if the institutions are sufficiently important, this is a risk that individuals morally ought to take.

This argument, while forceful, cannot vindicate the traditional view that unjust combatants do wrong only if they violate the rules of *jus in bello*. For it grounds an unjust combatant's justification for fighting in his duty to support certain institutions and in his duties to his fellow participants in these institutions, but these duties arise only in the case of institutions that are genuinely just and important. Thus when unjust combatants are compelled by governments or military organizations that lack legitimacy to fight in wars that lack democratic authorization, they have no institutional obligations that can justify their fighting. According to this argument, therefore, some unjust combatants are justified in fighting while others are not. And this is not what the traditional view claims.

Can the appeal to institutional obligations show that at least *some* unjust combatants are justified in fighting? It seems clear that there are cases in which such considerations as the importance of an institution in securing social goods, the importance of the individual's contribution to the survival and integrity of the institution, and the individual's obligations to other participants in the institution together make it permissible, all things considered, for the individual to do what would otherwise be wrong, and may be unjust to those who are victims of the action. In such cases, the conflict between the individual's duties is resolved in favor of the institutional duties, though the individual may also be morally required to call attention to and protest against the malfunctioning of the institution.

There are, however, some types of act that are so seriously objectionable that they cannot become permissible even if they are demanded by institutions that are both just and important. For example, while it may be permissible or even obligatory for agents of a legal system that is just overall to enforce an unjust law (especially when people can choose whether to accept the risks involved in violating that law), it may not be permissible for them to punish, and would certainly be impermissible for them to execute, a person they know to be innocent of violating the law, even if that is what their institutional role requires. The same is true of

the sorts of acts required by participation in an unjust war, namely, killing people who have done no wrong, collaborating in the destruction of their political institutions and way of life, and so on. These acts are beyond the limits of what can be made permissible by a person's institutional obligations. This is in part because of the gravity of the harms inflicted, but it is also, and equally essentially, because of the moral status of the victims. Just combatants, in taking up arms in a just cause—most commonly, defense against unjust aggression—do nothing to lose their right not to be attacked or killed or to make themselves morally liable to attack; they are innocent in the relevant sense. Merely posing a threat to the unjust combatants who have attacked them is, as we have seen, not enough to make them liable. So in fighting against just combatants, unjust combatants would be attacking and killing the innocent. It is generally believed to be wrong, except in the direst circumstances, to kill the innocent even as a means of averting a greater evil. How, then, could it be permissible to kill the innocent as a means of achieving aims that are unjust?

It is often suggested that if some soldiers or draftees refuse on moral grounds to fight in an unjust war, this could compromise the efficient functioning and perhaps even threaten the survival of valuable institutions to which these people would rightly be committed. But even if this is true, those who create, serve, and are served by valuable institutions must themselves bear the burdens when those institutions malfunction, thereby causing or threatening unjust harm to others. It would be unjust to impose the costs of their own mistakes or wrongdoing on others.

Yet the consequences for just institutions of people refusing to fight in unjust wars are unlikely to be calamitous. If the refusal to cooperate were sufficiently extensive or widespread, it could seriously degrade the ability of the aggressor (as I will call a country that fights an unjust war) to prosecute the unjust war and could even contribute to its defeat. This might be bad for the aggressor overall, but there are reasons for doubting whether it would be bad for the aggressor's just institutions—and it is just institutions rather than overall national self-interest that is the focus of the argument we are considering. Victory in an unjust war may serve the national interest but is likely on balance to have a corrupting effect on just institutions. Would just institutions in Germany, for example, have benefited from victory in World War II?

In most cases the level of noncooperation that might reasonably be expected in an unjust war would be unlikely to incapacitate or imperil the viability of just democratic or military institutions. Indeed, it seems that those who refuse to fight in an unjust war might in the long term actually benefit their country's institutions by setting a precedent that would help to deter those in positions of authority within the institutions

from initiating further unjust wars. It is also possible that those who refuse to participate in an unjust war could prompt the institutions to shield themselves from the instability that such challenges can cause by adapting themselves to anticipate and accommodate instances of conscientious refusal to fight. The enhanced institutional flexibility would almost certainly be healthy and would presumably involve more generous provisions for conscientious refusal to fight.

It also seems unlikely that allowing or even encouraging conscientious refusal would seriously impair a country's ability to fight just wars. History, including recent history, confirms how easy it is to persuade people that a war in which they are ordered to fight is just. It is therefore most improbable that a significant proportion of soldiers or draftees would ever misperceive, or persist in misperceiving, a just war as unjust. Nor is it likely that more liberal provisions for conscientious refusal would prompt malingering in the guise of moral scruple. Even liberal allowances for conscientious objection or refusal would have to carry penalties to ensure accountability. Given, moreover, how easy it is to get people to fight in even the most unjust wars, it is hard to believe that a legitimate government would have trouble convincing its citizens to fight in just, defensive wars. A state whose citizens were unwilling to defend it against unjust aggression would presumably be so decadent as to be scarcely worth defending.

The one kind of just war in which provisions for conscientious refusal might be exploited by malingerers is humanitarian intervention. This may not, however, be as great a problem as it initially seems, for humanitarian intervention ought not to be left to individual states acting on their own initiative. Rather, it must become the responsibility of international institutions with their own standing, professional military force created and maintained specifically for this purpose. Of course, even these soldiers would have to be granted rights of conscientious refusal (rights that are even more important in international military units than in national armies), but assuming that the force would be voluntary and its purposes clear to those who joined, and assuming also that an international body would be less likely than individual states to intervene unjustly, it is unlikely that these rights would be widely exercised.

It remains possible, of course, that there are instances in which the duties that people owe to an institution and to the other participants in it outweigh their duty not to act in ways demanded by participation in an unjust war. In such cases, if there are any, what would these people's status be? Although they would act with justification, they would nevertheless be unjust combatants, and the threat they would pose to others would be unjust. Their institutional obligations might make their action permissible but could not make it just. They would therefore be morally

liable to defensive attack by those whom their action would wrong.²⁷ But because they would act with justification and might even be morally required to fight, they would retain their own right of self-defense. Hence both they and the opposing just combatants would be justified in fighting. There would be a certain moral symmetry in warfare resembling, though not quite equivalent to, Walzer's moral equality of soldiers.

Because I think this possibility is merely hypothetical, I will proceed on the assumption that institutional obligations are insufficiently weighty to override the duty not to kill the innocent as a means of achieving unjust aims. But even if it were true that some unjust combatants could be justified in fighting, so that they would not do wrong, all things considered, merely by participating in an unjust war, it would not follow that they could fight, as Walzer says, "in strict accordance with the rules." I will now argue that in fact an unjust war cannot be fought in accordance with the rules of *jus in bello*. If that is right, then if unjust combatants could be justified in fighting, their institutional obligations would have to override their violations not only of the principles of *jus ad bellum* but also of the rules of *jus in bello*.

V. WHY *JUS IN BELLO* CANNOT BE INDEPENDENT OF *JUS AD BELLUM*

Recall that the *jus ad bellum* requirement of just cause is a constraint on the type of good that may permissibly be pursued by means of war. Just cause is an extrapolation into the domain of war of the insistence that one may not seriously harm or kill another person except for certain highly specific reasons, such as to defend oneself or another against an unjust threat of extreme gravity. Just as one may not kill a person as a means of promoting certain goods, no matter how great those goods would be, so there are many goods—for example, economic growth—that may not be pursued by means of war, no matter how effective war would be in promoting them.²⁸

Just cause is the most important of the requirements of *jus ad bellum* in that, unless it is satisfied, several of the other requirements cannot be satisfied even in principle. For example, at least part of what is demanded by the traditional requirement of right intention is that the war be intended to achieve the just cause. Similarly, a war can satisfy the requirement of necessity only if it is necessary for the achievement of a just cause. The *jus ad bellum* requirement of proportionality holds that the war must not have bad effects that are out of proportion to

27. I will say more about this below in Sec. VII.

28. Here I draw on the argument in Jeff McMahan and Robert McKim, "The Just War and the Gulf War," *Canadian Journal of Philosophy* 23 (1993): 502–6, 512–13.

the good that it would achieve.²⁹ But the good effects that may weigh against the bad effects are limited to those specified by the just cause, for only those types of good that may permissibly be pursued by means of war can contribute to the justification for war. It makes no sense to suppose that part of the justification for war is that it would achieve certain goods that cannot be permissibly pursued by means of war.

It is tempting to think that there must be a parallel argument to show that the *jus in bello* requirement of proportionality also cannot be satisfied in the absence of a just cause. This requirement holds that for an act of war to be permissible, its bad effects must not be out of proportion to the good. But if the only goods that can contribute to the justification for war are those specified by the just cause, then it seems that only those goods can count in the proportionality calculation for an individual act of war. For if other goods cannot contribute to the justification for *war*, they cannot figure in the justification for the individual *acts of war* that are together *constitutive* of the war. Therefore in the absence of a just cause, there are *no* goods that an act of war could produce that could appropriately weigh against the bad effects; thus no act of war by an unjust combatant can satisfy the *jus in bello* requirement of proportionality. Since the satisfaction of each of the *jus in bello* requirements is a necessary condition of permissible conduct in war, no act of war by an unjust combatant can be permissible.

This argument, which I will call the “parallel argument,” must be mistaken. For there are counterexamples to its conclusion. I will briefly note two merely apparent counterexamples, three possible counterexamples, and, finally, one clear and unambiguous type of counterexample.

It is sometimes suggested that even if unjust combatants do wrong by fighting, it is genuinely good if they act with restraint and obey the rules of engagement. There is, it is said, virtue in that. This is true but does not show that their action can satisfy the proportionality requirement. For the good of (for example) resisting the temptation to act with brutality is not a positive good that can serve to justify an otherwise wrongful act by offsetting the bad features or effects of the act.

A more plausible suggestion is that an unjust combatant can produce goods that weigh against the harms he causes if his action deliberately impedes his country’s prosecution of an unjust war—for example, by misleading his own forces to attack less rather than more important targets.³⁰ But this is not actually a counterexample, for, although this person wears the uniform of an unjust combatant, he is not

29. For discussion of certain complexities in the notion of proportionality, see *ibid.*, pp. 506–18; and Thomas Hurka, “Proportionality in the Morality of War” (unpublished manuscript).

30. I owe this suggestion to Henrik Ahlenius.

in fact an unjust combatant but an invisible collaborator with the opposing just combatants. He is doing what an infiltrator from the opposing side would do, namely, subverting the unjust war from within. Because he acts in support of the opposing side's just cause, he is in effect a just combatant.³¹ (It is perhaps a condition of the permissibility of his action that his continuing in the role of unrecognized collaborator is more effective in promoting the other side's just cause than his surrendering or refusing to fight would be—a condition that is likely to be satisfied given that if he were to refuse to cooperate, someone else would presumably fill his position and pursue his side's unjust aims effectively.)

The first possible counterexample arises in cases in which neither side in a war has a just cause. In these cases, all participants in the war are unjust combatants. And it is not implausible to suppose that, if an unjust combatant on one side is fully excused for his participation (for example, because he is a deceived conscript) while his enemy is culpable (because he is a fully informed mercenary), it is permissible for the former to attack the latter in self-defense. If this is right, the conclusion of the parallel argument would have to be restricted to acts of force or violence directed against just combatants.

Here is a second possible counterexample. Suppose that an unjust combatant discovers a just combatant preparing to rape a woman in an occupied village. It is clearly permissible for the unjust combatant to use violence, if necessary, to defend the woman and presumably also to defend himself against a counterattack by the marauding just combatant. But this is not obviously a counterexample to the parallel argument because it is not clear that the unjust combatant's act is an act of war. Because the rape would not be an act of war, the unjust combatant's intervention to prevent it may be seen as a private act of enforcing morality rather than as a contribution to the unjust war—though it might have the effect of facilitating the unjust war effort.

A third possible counterexample arises from a long-standing objection to the traditional theory of the just war, which is that some people who are not soldiers nevertheless make direct contributions to the war effort and therefore should, according to the traditional theory, be legitimate targets. Suppose, for example, that a medic treats a wounded unjust combatant, alleviating his pain, saving his life, and enabling him

31. Variants of this case raise familiar problems about intention and responsibility that I cannot take up here. What if, for example, the unjust combatant subverts his country's war aims not by intention but through incompetence? Or what if he does not subvert his country's aims at all but merely participates to the minimal possible extent, knowing that if he were to refuse to fight he would be replaced by someone who would fill his role more effectively?

to return to combat. This is an act that directly thwarts the military action of the opposing just combatants, whose goal is to eliminate the threat posed by unjust combatants. The medic neutralizes the effect of their defensive action, reestablishing the unjust threat to them that they have sought to eliminate. His action is the ex post equivalent of shielding the unjust combatant from the just combatants' defensive action.

The medic's action does, however, seem permissible. If it is, it seems that it must be proportionate; therefore, the good it achieves—saving a life—must weigh in the proportionality calculation against the harm it does to just combatants by reexposing them to the threat posed by the unjust combatant.³² Yet the good of saving the unjust combatant's life is no part of the justification for initiating or continuing the war. It is not part of a just cause. Hence this case seems to be a counterexample to the parallel argument.

It is tempting to reply that the medic's act is not an act of war and, hence, not governed by the *jus in bello* requirement of proportionality, because the effect it has in promoting the unjust war is unintended. The intended effect is only to heal a wounded human being. But this seems to be the wrong explanation. It seems that the medic's act would be permissible even if his sole intention were to return the unjust combatant to combat.

A more plausible claim is that although the medic's act is a causal condition of the unjust combatant's continuing to pose an unjust threat, its causal contribution is too remote for it to be an act of war subject to the proportionality requirement. The medic does not cause the unjust combatant to fight but merely enables him to do so. His act is in the same category with other acts, such as providing food for soldiers, that causally contribute to the war but are not part of it. It is effectively no different from the act of a civilian doctor who saves a man's life, thereby enabling him to enlist to fight in an unjust war—an act that, it seems, would be permissible even if the doctor's intention were to make it possible for the man to enlist. In sum, the good that the medic's act produces does not weigh against the bad effects in a proportionality calculation because the act itself is not subject to the proportionality requirement. This requirement does not apply to all acts that causally contribute to a war, however indirectly or remotely. (Note, however, that even if the medic's act is permissible, it may make him to some extent responsible for the subsequent action of the unjust combatant. Whether it does may depend on the intention with which the medic acts, for intention may be relevant to responsibility even when it is not relevant to permissibility. If the medic intends to return the unjust combatant to battle, he may be to some extent responsible, and therefore liable,

32. I am grateful to Frances Kamm for pressing me on this point.

for the unjust combatant's subsequent action. I will return to this issue in Sec. VIII.)

None of the five examples I have canvassed thus far has been a clear counterexample to the claim that no act of war by an unjust combatant directed against a just combatant can satisfy the proportionality requirement, which is an acknowledged condition of the permissibility of action in war. But there are clear counterexamples. They are acts of military force that are necessary to prevent just combatants from engaging in acts of war that would be wrong. There are two basic ways in which just combatants may act wrongly in fighting. One is to pursue their just cause by wrongful means—that is, by force or violence that is unnecessary, excessive, disproportionate, or indiscriminate. The other is to pursue a subordinate aim that is unjust within a war that is just overall because its guiding aims are just. As an example of the former, suppose that just combatants were to attempt to coerce the surrender of their opponents by attacking a population of innocent civilians. It would be permissible, if necessary, for unjust combatants to use military force against the just combatants to prevent this. By posing an unjust threat by their own belligerent action, the just combatants would, as I will argue later, make themselves liable to attack. In these circumstances, the good that the unjust combatants' action would achieve—saving the lives of innocents—would weigh against the harm it would cause to the just combatants, thereby making the action proportionate. This, therefore, is an act of war by unjust combatants against just combatants that is proportionate and permissible.

This counterexample requires qualification. If the unjust combatants could avert the wrongful action of the just combatants by surrendering, thereby ending their unjust war, they ought to do that rather than attack the just combatants. The problem in such cases is that even if those unjust combatants who are in a position to prevent the wrongful action by military means are themselves prepared to surrender, they probably could not effect the coordinated surrender of their entire country and certainly could not do so in time to forestall the wrongful action. So, while it may be permissible for them to attack the just combatants in these circumstances, it is nevertheless important to note that the permissibility of their doing so is conditional on their being unable to avert the wrongful action by terminating their own unjust war.

Despite the qualification, this is a genuine counterexample to the conclusion of the parallel argument. So where is the flaw in that argument? My diagnosis is that the problem stems from the traditional theory's tendency to treat just cause as a single, univocal aim, so that either a country has a just cause or it does not. This, I think, is a mistake. It is possible for a state to have various just aims—that is, aims of the right types—in going to war, no one of which is sufficient on its own

to make war proportionate, but all of which together justify the resort to war. And given the obvious fact that a single war can have numerous aims, either serially, simultaneously, or both, it seems equally obvious that some of these may be just while others are unjust. (It would be absurd to say of these cases that the state is simultaneously fighting various different wars, some just and some unjust.) For example, a war may begin with a just cause but become unjust, or begin unjust and become just, by a shift in its goals. Or, as I noted above, a war can be just overall because its dominant aim or aims are just, yet also have subordinate aims that are unjust. Similarly, a war can be unjust overall and yet have some aims, which may arise only after the war has begun, that are just and may permissibly be pursued given that war is already in progress. These possibilities raise questions I will not attempt to answer here, such as whether an act of war can be permissible if it simultaneously advances both just and unjust aims. The relevant point here is that, even if the overall aims of their war are unjust, the unjust combatants in my example have a subordinate aim that is just, namely, preventing soldiers from committing an atrocity. This is an aim of a sort that is in principle capable of justifying war—though in this case the aim would never have arisen had the unjust combatants not resorted to war in the first place. That they have this just aim, even in the context of a war that is unjust overall, is what makes it possible for their use of military force in this instance to be proportionate and permissible.³³ It remains true, in short, that an act of war cannot be proportionate in the absence of a just aim, or just cause, but the just cause need not be an aim that, on its own or even in conjunction with other aims, justifies the war as a whole.

This understanding of just cause tends to erode the traditional theory's distinction between *jus ad bellum* and *jus in bello*. For on this understanding, the requirement of just cause applies not just to the resort to war, or to the war as a whole, but also to individual acts of war. It seems, moreover, that the requirement of just cause, and indeed all the other *jus ad bellum* requirements as well, must be continuously reapplied to the continuation of war as circumstances evolve throughout the course of a war (though the reapplication of certain conditions might have to differ from their initial application in order to take into account

33. That these combatants have an aim that they may permissibly pursue by means of war makes it problematic to refer to them, at least on this one occasion, as unjust combatants. And a parallel problem of nomenclature arises when combatants whose overall aims are just pursue a subordinate aim that is unjust. Perhaps one could stipulate that the label 'just combatant' applies to combatants whose dominant aims are just while 'unjust combatant' applies to those whose dominant aims are unjust. This would leave us without a term for those whose just and unjust aims are finely balanced. But these are merely terminological rather than substantive problems, and I will not pursue them here.

various investments and commitments made during the course of the fighting). For these and other reasons, I am skeptical that a sharp distinction between *jus ad bellum* and *jus in bello* can be maintained. But I cannot pursue this matter here.

What is the significance of the recognition that some acts of war by unjust combatants against just combatants can be proportionate and therefore permissible? I believe that it is negligible. For an unjust war cannot consist entirely, or even predominantly, of acts of this sort, namely, acts that prevent wrongful acts of war by just combatants. In practice only a small proportion of the acts constitutive of an unjust war could be of this sort. Indeed, just combatants can have the opportunity to engage in wrongful acts of war only if they are already justified in fighting in response to unjust threats posed by the wrongful action of unjust combatants.

If this is right, then an unjust war cannot be fought “in strict accordance with the rules.” For except in the limited range of cases in which unjust combatants act to prevent wrongful acts by just combatants, their acts of war cannot satisfy the proportionality requirement, and satisfaction of this requirement is a necessary condition of permissible conduct in war.³⁴ In general, therefore, unjust combatants cannot participate in war without doing wrong. Since this is not true of just combatants, *jus in bello* cannot be independent of *jus ad bellum*. In short, the first two foundational tenets of the traditional theory are mistaken.

It may be that the categorical form these claims take is unwarranted. It may be possible, in principle, to fight an unjust war without violating the rules of *jus in bello*. Suppose, for example, that an invading army has crossed its neighbor’s border and is marching toward the capital with the aim of conquest. But thus far it has met no resistance and has therefore not yet deployed any military force. The commander of this army receives reliable intelligence that the defending forces are preparing to launch a nuclear weapon against the invader’s largest city as a means of stopping the aggression. The invading army therefore launches a single preemptive but conventional strike to destroy the defending county’s sole nuclear missile site and then aborts the invasion, retreats to its base within its own borders, and sues for peace.

Assume that the unjust combatants’ destruction of the nuclear missile site was proportionate and permissible. As that was their only use of military force and therefore in a sense their only real act of war, they have not violated the rules of *jus in bello*, at least as traditionally un-

34. I believe that in the same cases in which they cannot satisfy the requirement of proportionality, unjust combatants also cannot satisfy the requirement of discrimination. But this claim presupposes a conception of the requirement of discrimination different from the orthodox conception. I will defend the alternative conception in Sec. VI.

derstood.³⁵ It does not follow that they acted permissibly, for they did pose an unjust threat. But in doing so, perhaps they contravened only the principles of *jus ad bellum*.

This, of course, is a highly anomalous case. Even if it shows that in principle an unjust war can be fought in accordance with the rules, it does not show that unjust wars as they must actually be fought—that is, in realistic conditions—can be waged in conformity with *jus in bello*.

If the range of goods that can make the action of unjust combatants proportionate is restricted to the prevention of harms that would otherwise be unjustly inflicted by just combatants, what have just war theorists been assuming when they have claimed that acts of war by unjust combatants can be proportionate in the same way that acts of war of just combatants can? What goods have they thought might weigh against the harms caused?

Sidgwick gives a neutral statement of the requirement of proportionality, one he assumes can be satisfied by just and unjust combatants alike. He states that the “moral combatant” will seek as his end “to disable his opponent, and force him into submission,” but that he must not “do him . . . any mischief of which the conduciveness to the end is slight in comparison with the amount of the mischief.”³⁶ Walzer interprets this passage as claiming that the “mischief” caused by an act of war must be weighed against the act’s contribution to “the end of victory.”³⁷ And this is the orthodox view: the harm caused must be weighed against the “military value” of the act, which is measured by its contribution to the defeat of the enemy.

But one cannot weigh the bad effects that one would cause against the contribution one’s act would make to the end of victory without having some sense of what the good effects of victory would be. Without that, it is hard to see how there can be any constraint at all. One cannot evaluatively weigh the “mischief” caused by an act of war against the contribution the act would make to the probability of a mere *event*; one must also have some sense of the importance or value of the event. If one’s cause is unjust, the value of the event—victory—would presumably be negative, not positive. How, for example, could a Nazi soldier weigh the harms he would cause to enemy combatants against the end of victory by the Nazis without assigning any value to that victory? If he believes a Nazi victory would be a great good, he is mistaken.

35. Matthew Liao suggested to me a different case in which an aggressor army invades and withdraws without ever using military force. These unjust combatants, too, would not violate *jus in bello*. But it is unclear whether they have been engaged in anything more than a pantomime war.

36. Sidgwick, p. 254.

37. Walzer, p. 129.

Perhaps the assumption that just war theorists have been making is that, because unjust combatants typically believe their cause is just, all the requirement of proportionality can demand is that combatants weigh the good they *believe* their acts will achieve against the bad effects that they believe those acts will cause.³⁸ This is, in effect, to reintroduce the subjective conception of justification. And again the appropriate response is that at best this form of justification could succeed only in cases in which an unjust combatant's beliefs about the good effects of his acts were reasonable. It has no application to those whose beliefs are unreasonable or those who recognize, or even seriously suspect, that their cause is unjust.

Perhaps some have assumed that, given the inevitable uncertainties about just cause, it is important to encourage all combatants to exercise restraint by keeping their action proportionate to what they believe will be its good effects. This is indeed plausible, but, so understood, the requirement of proportionality is not a genuine moral requirement but merely a device that serves the moral purpose of limiting the violence of those who ought not to be engaged in warfare at all.

Another possibility is that what proportionality requires is just a neutral comparison between the harm an act of war inflicts and that which it averts *on the battlefield*. It is not concerned with the larger aims of the war at all but weighs the harms inflicted on enemy forces against the magnitude of the threat they pose to one's own forces in combat.

This view does not, however, match most people's intuitions—even though these intuitions favor the view that proportionality is a neutral requirement that can be satisfied or violated by just and unjust combatants alike. Most people believe, for example, that it would be permissible to kill ten enemy combatants (or twenty, or 100) to prevent the killing of a single member of one's own forces. This is in part because the threat from enemy combatants is not confined to the threat they pose to one's own forces; they also threaten the aims one has in fighting.

This view is tantamount to the claim that the good to be weighed in the proportionality calculation is the self-preservation of the unjust combatants themselves. But unjust combatants are entitled to weigh the good of their own preservation against the harms they might cause only if this good is one that it is permissible for them to pursue in the circumstances. And the assumption that it is permissible for them to use force even in self-defense is precisely what I have challenged. Those they have attacked, and who in consequence now threaten them in return, have done nothing to lose their right not to be attacked. Recall

38. It might make a difference, on this proposal, whether the unjust combatant's mistake is one of fact—for example, what his country's cause is—or evaluation—for example, whether his country's actual cause is just. I will not pursue this here.

that in the individual case a culpable attacker has no right of self-defense against the defensive force of his victim. This should be true of unjust combatants as well unless the circumstances of war fundamentally alter the morality of defensive force.³⁹ I believe that the morality of defense in war is continuous with the morality of individual self-defense. Indeed, justified warfare just *is* the collective exercise of individual rights of self- and other-defense in a coordinated manner against a common threat.⁴⁰

Two further points deserve mention here. First, self-defense by unjust combatants in general fails to meet the necessity requirement for permissible self-defense. They need not kill in order to avoid harm to themselves when they have the option of surrender. They are unjustified in killing in self-defense when they could preserve their lives simply by stopping their own wrongful action.

Second, even if acts of war by unjust combatants could in some instances be proportionate because the goods secured by self-defense would outweigh the harms caused, it remains true that no unjust war could consist entirely in justified acts of individual self- and other-defense. While a series of acts of individual self-defense might in combination count as war, it would in the nature of the case be a just rather than unjust war. Even if there can be just wars of aggression, an unjust war of defense would involve resistance to the aggressor's just cause and not just the defense of individual lives.

In summary, it is still rather mysterious what traditional just war theorists have been assuming in their supposition that unjust combatants can satisfy the requirement of proportionality in the same way that just combatants can. If, as I have argued, unjust combatants can satisfy that requirement in only a narrow range of cases, and if, as just war theorists assert, the satisfaction of the proportionality requirement is a necessary condition of permissible conduct in war, it follows that in practice no unjust war can be fought in a permissible manner, that in general unjust combatants do wrong merely by fighting, and that because a just war

39. In "Innocence, Self-Defense, and Killing in War," I claimed that "a case can perhaps be made" for the view that morally innocent unjust combatants can be "justified in engaging in self-defense against the defensive counterattack by the victims of their initial attack" (p. 206). Because I now attribute less significance than I did earlier to the distinction between moral innocence and moral culpability, I believe that this earlier claim is mistaken. Two philosophers who have argued persuasively against my earlier position on self-defense by morally innocent unjust combatants against just combatants are Richard Arneson ("Just Warfare Theory and Noncombatant Immunity" [unpublished manuscript]); and McPherson.

40. This is, of course, a controversial claim that I lack space to defend here, though I do so in a manuscript in progress called *The Ethics of Killing: Self-Defense, War, and Punishment* (New York: Oxford University Press, forthcoming). I defend the claim against important objections in "War as Self-Defense," *Ethics and International Affairs* 18 (2004): 75–80.

can be fought entirely in a permissible manner, *jus in bello* cannot be independent of *jus ad bellum*.

VI. THE REQUIREMENT OF DISCRIMINATION

The arguments I have advanced also challenge the third foundational tenet of the traditional theory: the requirement of discrimination. They do not challenge that requirement in its most generic formulation, which is simply that combatants must discriminate between legitimate and illegitimate targets. Rather, they challenge the assumption that the distinction between legitimate and illegitimate targets coincides with that between combatants and noncombatants. For I have argued that it is not permissible for unjust combatants to attack just combatants, except to stop just combatants from engaging in wrongdoing that makes them morally liable to attack. For unjust combatants, therefore, there are, with few exceptions, no legitimate targets of belligerent action. In general, just combatants and noncombatants are alike impermissible targets for unjust combatants.

What, then, is the correct interpretation of the requirement? There must be one, for even if in general there are no legitimate targets for unjust combatants, there must, unless pacifism is true, be legitimate targets for just combatants but also limits to what they may permissibly attack. That a just combatant's action may serve a just cause does not mean that he or she may treat anyone as fair game.

One possibility is that even if the traditional requirement is unacceptable in its application to unjust combatants, it is nevertheless correct in its application to just combatants. It might be, in other words, that just combatants are permitted to attack unjust combatants but not to conduct intentional attacks against noncombatants.⁴¹ This view has, moreover, an obvious foundation in a more general and seemingly compelling principle. This principle is a significantly qualified variant of the principle rejected earlier that asserts the permissibility of defensive force. The qualified principle holds that, if other things are equal, it is permissible to use defensive force against anyone who poses an *unjust* threat. Because unjust combatants pose an unjust threat (except on those occasions when they are defending themselves or others against wrongful action by just combatants) but enemy noncombatants do not, it follows from the qualified general principle that enemy combatants are in general legitimate targets for just combatants but that enemy noncombatants are not.

41. I believe, contrary to the traditional assumption, that there can be rare instances in which both sides in a war have a just cause and are justified in fighting. For present purposes I leave it an open question what the requirement of discrimination should say about attacks by just combatants against just combatants in such cases.

This position has the clear advantage of being able to recognize the impermissibility of self-defense against what I have elsewhere called a “Just Attacker,” that is, a person who is justified in attacking another and whose victim lacks a right not to be attacked by him and is therefore not wronged by the attack.⁴² Thus, whereas the more orthodox view of Walzer and most others in the just war tradition has to assert that the conditions of war fundamentally alter the morality of defensive force, this alternative position holds that the same basic principle—the permissibility of defensive force against unjust threats—applies equally and without modification both in domestic society and in war. And although this alternative view is fundamentally antagonistic to the more orthodox view because it offers no justification for most acts of war by unjust combatants, it, or at least something very close to it, is not unfamiliar in the just war tradition.⁴³

I will, however, argue against this alternative understanding as well, despite its greater plausibility. I will argue that even in its application to just combatants, the requirement of discrimination cannot take the relevant distinction to be that between combatants and noncombatants.

This alternative understanding of the requirement of discrimination asserts that it is posing an unjust threat that makes a person morally liable to defensive force or, to put it another way, makes the person lack a right not to be attacked in self- or other-defense. I claim, by contrast, that posing an unjust threat is neither necessary nor sufficient for liability. It is possible to pose an unjust threat without being liable to attack and possible to be liable to attack without posing an unjust threat and, indeed, without posing a threat at all.⁴⁴

How could it be that one could pose an unjust threat to another without losing one’s right not to be attacked, that is, without it becoming permissible for one’s potential victim to attack in self-defense? I believe—though I concede that the implications are counterintuitive—that one does not lose one’s right not to be attacked by posing an unjust threat to another if one is in no way morally responsible for this fact.

Consider an example drawn from science fiction:

The Implacable Pursuer: A person is drugged and kidnapped while sleeping by a villain who then implants a device in her brain that irresistibly directs her will to the task of killing you. As a result,

42. See n. 15.

43. See, e.g., Elizabeth Anscombe, “War and Murder,” in her *Ethics, Religion, and Politics*, Collected Philosophical Papers, vol. 3 (Minneapolis: University of Minnesota Press, 1981), esp. p. 53.

44. See my “Self-Defense and the Problem of the Innocent Attacker,” pp. 258–59, and “Innocence, Self-Defense, and Killing in War,” pp. 200–205.

she will implacably pursue your death until she kills you, at which time the device will automatically deactivate itself.

Let us stipulate that the original person will continue to exist throughout the period in which her will is controlled by the device. Indeed it seems coherent to suppose that, while she pursues you, a part of her conscious mind could observe her own behavior with horror but be powerless to exert control over the movements of her body.

I claim that the Pursuer, who is what I call a “Nonresponsible Threat,” has done nothing to lose any rights or to make herself morally liable to attack. Although she is causally implicated in the threat to you, that is a wholly external fact about her position in the local causal architecture. It has no more moral significance than the fact that an innocent bystander might, through no fault of her own, occupy a position in the causal architecture that makes your killing her the only means by which you could save your own life. If you would not be permitted to kill the innocent bystander as a means of self-preservation, you are also not permitted to kill the Nonresponsible Threat in self-defense. For a Nonresponsible Threat is morally indistinguishable from an innocent bystander.⁴⁵ (There are lesser harms you could permissibly inflict on an innocent bystander as a means of self-preservation. Whatever harms you would be permitted to inflict on an innocent bystander in order to save your life, you would also be permitted to inflict on a Nonresponsible Threat in self-defense.)

The claim that one may not kill a Nonresponsible Threat in self-defense is contrary to common sense. It is not, however, directly relevant to the requirement of discrimination or to the morality of war, since unjust combatants are almost invariably morally responsible agents. Nevertheless, the case of the Pursuer does suggest that moral responsibility is important to liability. If the Pursuer were in some measure responsible for the unjust threat she poses, that would establish an obviously relevant moral asymmetry between you and her and would constitute a sufficient basis for the permissibility of your killing her if that were necessary to defend your life.

We ought not to conclude, however, that it is a person’s being responsible for posing an unjust threat that makes it permissible to use

45. A mistaken variant of this claim is defended in my “Self-Defense and the Problem of the Innocent Attacker.” A better argument is given in my *The Ethics of Killing: Problems at the Margins of Life*, pp. 405–6. Others who argue that there is no right of self-defense against a Nonresponsible Threat are Larry Alexander, “Justification and Innocent Aggressors,” *Wayne Law Review* 33 (1987): 1177–89; Noam Zohar, “Collective War and Individualistic Ethics: Against the Constriction of ‘Self-Defense’,” *Political Theory* 21 (1993): 606–22; Michael Otsuka, “Killing the Innocent in Self-Defense,” *Philosophy & Public Affairs* 23 (1994): 74–94; and Rodin, *War and Self-Defense*, pp. 79–83.

force against that person in order to eliminate the threat. For a person may be morally liable to such force simply by virtue of being morally responsible for an unjust threat, even if he does not himself pose the threat. Consider again the case of the Pursuer. Suppose that the person who programmed and implanted the mind-control device—call him the “Initiator”—has suffered an accident and is now bedridden and tethered to a respirator. You go to plead with him only to discover that he is powerless to stop the Pursuer.⁴⁶ At that point, you see the approach of the Pursuer, who has followed you to the Initiator’s house. You have only two options for saving yourself. One is to shoot the Pursuer as she approaches. The other is to flee in the Initiator’s car. This car, however, is battery powered, and the only available battery is the one that is supplying power to the respirator. In order to flee the Pursuer, you must remove the power supply from the Initiator’s respirator, thereby killing him.

What ought you to do: allow yourself to be killed; kill the Pursuer, who poses an unjust threat but is not responsible; or kill the Initiator, who now poses no threat but is morally responsible for the threat posed by the Pursuer? It would be permissible for you to allow yourself to be killed, but in the circumstances that is not morally required. The view that asserts the permissibility of defense against unjust threats implies that you may kill the Pursuer but not the Initiator. Intuitively, however, it seems that if you must kill one or the other to save your life, you must kill the Initiator rather than the Pursuer. Because the Initiator is the one who is morally responsible for the fact that someone must die, he should, as a matter of justice, bear the costs of his own voluntary and culpable action. (We can assume that, if you evade the Pursuer on this occasion, she can be subdued by the police, and the device can then be removed from her brain.)

In summary, what the case of the Implacable Pursuer suggests is that posing an unjust threat is neither necessary nor sufficient for moral liability to force or violence that is necessary to eliminate the threat. Rather, what makes a person morally liable to force or violence that is necessary to eliminate an unjust threat is moral responsibility for initiating or sustaining the threat (or perhaps, in some cases, for failing to eliminate the threat).

This is the core of what I believe to be the most plausible account

46. I am indebted to Monsignor Stuart Swetland and to Richard Arneson for making me see the importance of this detail. If the Initiator could eliminate the threat to you, he could be regarded as continuing to pose the threat by having set it in motion and then refusing to stop it. For an ancestor of this kind of case that differs from it in that the person in the position of the Initiator remains a necessary cause of the threat, see Larry Alexander, “Self-Defense and the Killing of Noncombatants,” in Beitz et al., eds., pp. 98–105.

of the foundations of the rights of self- and other-defense and self- and other-preservation. (Because the Initiator does not himself pose a threat to you, your killing him cannot literally be an act of self-defense. It is instead an act of self-preservation.) There are, however, ways in which this core might be extended. It is possible, for example, that it can be permissible to attack someone who unsuccessfully attempts to create an unjust threat if the same threat, or a similar threat, then arises independently of this person's action, and the threat can be averted only by attacking him.⁴⁷ Or perhaps, in order to avert an unjust threat, it can be permissible to attack someone who is not responsible for the threat but who *would* have created the threat, or would now create a similar threat, if he could.⁴⁸ There is in fact a spectrum of possible bases for liability ranging from the possibilities just noted to responsibility for a different unjust threat of the same type in the past or present, responsibility for a different type of threat in the past or present, being willing or disposed to create an unjust threat, possession of a bad moral character, and so on. I will not pursue these possible extensions here, despite their relevance to issues of *jus in bello*. It will be enough in the remainder of this article to explore a few implications of the core account of self- and other-defense for the morality of war.

VII. THE CRITERION OF LIABILITY AND ITS APPLICATION TO UNJUST COMBATANTS

The principal implication is for the nature of the requirement of discrimination. If it is moral responsibility for an unjust threat that is the principal basis of liability to defensive (or preservative) force, it seems to follow that what makes a person a legitimate target in war is moral responsibility for an unjust threat. This assumes that permissible force in war always involves defense against an unjust threat, but it may be that there are some types of just cause for war that are not defensive, such as offensive action to recover territory or other goods that were lost to previous unjust aggression. To accommodate these possibilities, our claim should be broadened to assert that what makes a person a legitimate target in war is moral responsibility for an unjust threat or, more generally, for a grievance that provides a just cause for war. The requirement of discrimination should then hold that combatants must discriminate between those who are morally responsible for an unjust threat, or for a grievance that provides a just cause, and those who are

47. I owe this suggestion to Eric Wampler.

48. I owe this suggestion to correspondence with Richard Arneson and conversations with Larry Temkin. While this extended criterion of liability may have plausible implications in certain cases, Saul Smilansky cautions that it could have horrendously permissive implications for war.

not. It should state that while it is permissible to attack the former, it is not permissible intentionally to attack the latter—or if, more plausibly, we think that the requirement should not be absolute, it should state that there is a strong moral presumption against the permissibility of intentionally attacking those who are not responsible for an unjust threat or for a grievance that provides a just cause.

According to this understanding of the requirement of discrimination, all unjust combatants who are morally responsible agents and who pose an unjust threat are legitimate targets of defensive or preservative attack by just combatants. This means that virtually all unjust combatants are legitimate targets because virtually all are moral agents, and because even those who are in rear areas or are asleep and are therefore not presently attacking nevertheless pose a threat by virtue of their participation in a continuing attack that has many phases coordinated over time.

It is important for understanding these claims to note that the understanding of “responsibility” employed here is eccentric.⁴⁹ Responsibility—for an unjust threat, for instance—is often assumed to require some degree of culpability, which involves both fault in the act and fault in the agent. As I will use the term, however, ‘responsibility’ does not presuppose or entail culpability. If a morally responsible agent—that is, an agent with the capacity for autonomous deliberation and action—creates an unjust threat through voluntary action that is wrongful but fully excused, she is to some extent responsible for that threat even though she is not blamable. In such a case there is fault in the act but not in the agent. I believe, moreover, that there can be responsibility even in the absence of fault in the act, that is, even when a person acts permissibly. If, for example, a person voluntarily engages in a permissible but foreseeably risk-imposing activity, such as driving a car, that person will be responsible if, contrary to reasonable expectation and through no fault on the part of the agent, that activity creates a threat or causes harm to which the victim is in no way liable. It is important to bear these points in mind, for it is sometimes thought that if we reject the view that the innocent in war are simply those who pose no threat, the alternative must be to accept that innocence means *moral* innocence, which contrasts with moral guilt or culpability. According to this latter view, it is *culpable* responsibility for an unjust threat that is the basis of moral liability to defensive force. This, however, is not the view defended here.⁵⁰

49. For further elucidation, see *The Ethics of Killing: Problems at the Margins of Life*, pp. 402–3.

50. It is, however, the view I defended in both “Self-Defense and the Problem of the Innocent Attacker” and “Innocence, Self-Defense, and Killing in War.”

Unjust combatants pose an unjust threat. But they may, as we noted earlier, have one or more of a variety of excuses: for example, they may have been deceived, manipulated, indoctrinated, or coerced or compelled by threats, or perhaps they just believed, reasonably but mistakenly, in the moral authority of their government. In some cases, these excusing conditions will be strong enough to absolve an unjust combatant of all culpability for participation in an unjust war. But conditions of this sort are never sufficient to absolve him of all responsibility for his participation, or for the unjust threat he poses. Thus, even if he is morally innocent, he is not innocent in the sense that is relevant to the requirement of discrimination. Only the absence of a capacity for moral agency could absolve him of all responsibility for his action and thus make him innocent in the latter sense.

Moral responsibility, however, is a matter of degree, and the degree of an unjust combatant's responsibility for posing an unjust threat is reduced by such excuses as nonculpable ignorance and duress. And it is reasonable to assume that the extent to which a person is morally liable to defensive force varies with the degree of his responsibility for the existence of, or for posing, an unjust threat. But how are we to understand the idea that liability varies in degree? It seems that either a person is a legitimate target or he is not; either it is permissible to attack him or it is not.

A person becomes a legitimate target in war by being to some degree morally responsible for an unjust threat, or for a grievance that provides a just cause for war. But there are various constraints, such as minimal force and proportionality, that apply even to attacks on legitimate targets. The way that variations in the degree of a person's liability to defensive force are manifested is in variations in the strength or stringency of these constraints. For example, a level of harm that it might be proportionate to inflict on unjust combatants who are culpable might not be proportionate if inflicted on unjust combatants known to be largely innocent.

It may be objected that, while this might be true in principle, it is irrelevant in practice since it is normally impossible to know, of any particular unjust combatant, the degree to which he is morally responsible for the unjust threat he poses or for whatever grievance constitutes the just cause for war. This is largely true. But, as in the case of individual self-defense, reasonable agents in war have to act on the basis of presumptions that are as well grounded as possible in the circumstances. And there is occasionally good reason to presume that one group of unjust combatants bears a greater degree of liability than another. In the first U.S. war against Iraq, for example, all Iraqi combatants were unjust combatants because they fought to resist the reversal of their country's unjust invasion and occupation of Kuwait. Yet some bore a

greater degree of responsibility than others. It was reasonable to assume that members of the Iraqi Republican Guard, a highly paid, elite volunteer force loyal to the regime, were responsible for their action to a higher degree than poorly armed conscripts who had been compelled by threats to themselves and their families to take up positions in the desert. I believe that the proportionality requirement applied differently to attacks against these different groups. Forces of the coalition against Iraq were entitled to inflict as much harm on members of the Republican Guard as was necessary to eliminate the threat they posed, but they may have been morally required to accept greater risks to themselves to reduce the harm inflicted on conscripts, in something like the way that combatants are obliged to accept greater risks in order to minimize incidental harm to innocent civilians.

More generally, it is true of most unjust combatants that their conduct is excused to varying degrees by the sorts of consideration Walzer mentions in arguing that they are not criminals and that these excuses diminish their liability to varying degrees. This is in itself an important consideration that affects the way that the requirements of minimal force and proportionality apply to the use of force even in a just war. Even just wars should be fought with more restraint than might be required if it were reasonable to assume that unjust combatants were criminals or villains rather than the victims of duress and delusion.

VIII. NONCOMBATANT LIABILITY

Recall that the example of the Initiator offers intuitive support for the claim that one need not pose an unjust threat or currently be part of that threat in order to be morally responsible for it. And it should be obvious that in war there are some who occupy a position analogous to that of the Initiator, namely, noncombatants who bear significant responsibility for initiating or sustaining an unjust war, or for the wrong whose redress is the just cause for war. Some of these may be responsible to a greater degree than any combatant. In 1954, for example, executives of the United Fruit Company persuaded the Eisenhower administration to organize and direct a coup that overthrew the democratic government of Guatemala and installed a new regime that returned to the company some uncultivated lands that had been nationalized in an effort to aid the peasants. This is a paradigm of an unjust war, and it is reasonable to suppose that the executives bore at least as great a degree of responsibility for the killing and the violation of national self-determination as the soldiers who carried it out.⁵¹ According to the understanding of the

51. For a brief but more detailed description of this episode, see Jeff McMahan, *Reagan and the World: Imperial Policy in the New Cold War* (New York: Monthly Review, 1985), pp. 13–14.

requirement of discrimination I have advanced—which I will refer to as the “responsibility criterion”—the executives were liable; they were legitimate targets. If attacking them would have been as effective as attacking soldiers in preventing the coup, the responsibility criterion implies that, other things being equal, it would have been permissible to attack them and that that might have been preferable to attacking combatants, particularly if it would have meant that fewer people had to be killed.

The responsibility criterion denies both the permission and the prohibition asserted by the traditional requirement. Because it claims that it is in general impermissible for unjust combatants to attack just combatants, it denies the traditional claim that all combatants are permissible targets; because it claims that some noncombatants are permissible targets, it denies the traditional prohibition of intentional attacks on noncombatants.

Perhaps some may not find it appalling to suppose that in the case of United Fruit, certain civilians could be morally liable to attack. But for most people, the general suggestion that civilians can be legitimate targets in war will seem pernicious. The best way to address this understandable reaction is to respond to a few of the more obvious objections to the responsibility criterion.⁵²

One worry is that because moral responsibility is a matter of degree, it is difficult to identify a lower bound or threshold for responsibility for an unjust threat or other grievance that provides a just cause for war. Because of this, the responsibility criterion threatens to be utterly promiscuous in its assignment of liability in war. For in an unjust war, many voters and perhaps all taxpayers must surely bear some degree of responsibility for their country’s action. But if the responsibility criterion implies that a great many or even most ordinary citizens in a country fighting an unjust war are legitimate targets, it can hardly be regarded as a principle of discrimination at all.

The first part of the reply to this objection is that the same objection applies in a more seriously damaging way to the traditional requirement of discrimination. According to the traditional requirement of discrimination, noncombatants are those who are not threatening, who do not contribute to the threat posed by their country. The problem of drawing the line between those who contribute to the threat and those who do not is a familiar one in the just war literature. The typical response is to try to find a basis for drawing the distinction between combatants

52. Some of these responses indicate ways in which the account of the morality of war I have developed in this article is superior to the cruder account I advanced in “Innocence, Self-Defense, and Killing in War,” which invites similar objections but cannot answer them in the ways suggested here.

and noncombatants in a way that limits liability in war to soldiers, those who directly supply them with the instruments of war (including, perhaps, workers in munitions factories, but *only* while they are at work), and those who occupy positions in the military chain of command.⁵³ It is sometimes said, for instance, that if a person who makes a material contribution to the war is doing the same thing she would be doing if war were not in progress, she is not a combatant. But such criteria of combatant status never correspond to the tradition's own generic notion of a combatant, which is simply the notion of a person who poses a threat or contributes to the threat his country poses—the latter clause being necessary for the inclusion of military personnel who occupy roles that do not involve participation in combat or the firing of weapons. And the class of those who contribute, even quite directly, to their country's war effort is in fact considerably more extensive than the class of military personnel. It includes, as I noted earlier, doctors who heal wounded soldiers and return them to combat.

So the line-drawing problem is not unique to the responsibility criterion. But on what basis can I claim that this problem is more seriously damaging to the traditional requirement of discrimination? The reason is that on the traditional view, the criterion of liability is all-or-nothing: either one is a combatant or one is not, a legitimate target or not a legitimate target. There are no degrees of liability. The only constraints on attacking legitimate targets (combatants) are the requirements of necessity, minimal force, and proportionality, and the proportionality calculation takes account of only two variables: the gravity of the threat that the combatant poses and the magnitude of the harm that defensive force would inflict. According to the responsibility criterion, by contrast, the proportionality calculation has to take account of three variables: the gravity of the threat, the amount of harm that would be inflicted, and the degree of the potential target's moral responsibility. Thus, a use of force that would be proportionate according to the traditional requirement of discrimination might be disproportionate according to the responsibility criterion if the person at whom it would be directed was only weakly responsible for the threat (or other grievance) that was the basis of his liability. In short, even though the responsibility criterion (like the traditional requirement) implies that many civilians are permissible targets in principle, in the vast majority of cases a civilian's degree of liability will be so low that to attack him or her militarily would be wholly disproportionate. While voters or tax-

53. For representative examples, see Nagel, pp. 69–70; Walzer, pp. 144–46; John Finnis, Joseph Boyle, and Germain Grisez, *Nuclear Deterrence, Morality, and Realism* (Oxford: Oxford University Press, 1987), pp. 86–90; and David Oderberg, *Applied Ethics* (Oxford: Blackwell, 2000), pp. 217–19.

payers might be morally liable, for example, to the effects of certain kinds of economic sanction, they would not be appropriate targets for military force. This conclusion is reinforced by the fact that, in contrast to unjust combatants, even morally responsible noncombatants normally make only a very slight causal contribution to their country's unjust war, so that attacking them would do little to diminish the threat their country poses or to advance the just cause.

A second objection is that, just as it is normally impossible to have accurate information about an unjust combatant's responsibility for the threat he poses, so it is normally impossible to have detailed information about whether and to what extent a particular noncombatant is responsible for her country's unjust war. Again, this is true. But it does not show that noncombatants cannot be liable, but only that just combatants can seldom know which ones are responsible or to what extent they are responsible. And this drastically restricts the practical significance of the responsibility criterion's implication that some noncombatants may be legitimate targets in war. For, while a few noncombatants may bear a high degree of responsibility for their country's unjust war, and many may be responsible to a much weaker degree, there are also many others who are not responsible at all. Because one cannot normally distinguish among the highly responsible, the minimally responsible, and those who are not responsible at all, just combatants should in general err on the side of caution by acting on the presumption that noncombatants are innocent, that is, devoid of responsibility for their country's unjust war (just as just combatants must act on the presumption that unjust combatants are responsible for the threat they pose). And even if, on some occasions, just combatants were to have sufficient information to be able to distinguish between responsible and nonresponsible noncombatants, the responsible ones would normally be intermingled among the nonresponsible, making it impossible to direct force, or even economic sanctions, against the responsible ones only. And this is a further reason why military action can very rarely if ever be proportionate against civilian targets. In this respect, attacks on civilian populations are again importantly different from attacks against groups of unjust combatants, for all of the latter are (or may reasonably be presumed to be) to some degree liable to defensive force.

I have thus far tried to show that the responsibility criterion is in fact highly restrictive in its implications for the permissibility of attacking noncombatants in war. But it does imply that it can be permissible, on occasion, to attack and even to kill noncombatants—and not just, as nonabsolutist versions of the traditional requirement of discrimination concede, because the prohibition against intentionally attacking noncombatants may in extreme circumstances be overridden, but also because noncombatants are in some cases morally liable to force or vio-

lence in war. If, therefore, we accept the orthodox definition of terrorism as intentional attacks on noncombatants as a means of achieving political or other ideological goals, it follows that the responsibility criterion endorses the occasional permissibility of terrorism.

The response to this third objection is simply to reject the orthodox definition of terrorism. This orthodox definition is in fact derived from a more generic understanding of terrorism as intentional attacks, for political or ideological purposes, on people who are innocent in the sense of having done nothing to lose their rights or make themselves liable to attack. If we combine this generic understanding with the traditional requirement of discrimination, which asserts that it is by becoming a combatant that one becomes liable to force in war, we of course get the orthodox definition. But if, as I have argued, the traditional requirement of discrimination has no coherent moral foundation as a criterion of liability, then we should abandon the orthodox definition. If the responsibility criterion is in fact the correct account of the moral basis of liability to defensive force, it would be perverse to apply the term ‘terrorism’ to attacks on those whom this criterion identifies as morally liable and therefore, other things being equal, as legitimate targets. Terrorism ought instead to be defined as the intentional use of force or violence against the innocent—that is, those who have done nothing to make themselves liable to be harmed—as a means of influencing others.⁵⁴

IX. THE LAWS OF WAR

Doubtless most readers retain a strong sense that opening the door to intentional attacks on noncombatants is profoundly dangerous. As with the other three objections I have canvassed, this is true. It is important that combatants should always experience deep inhibitions against attacking noncombatants. As I have argued, it is very seldom permissible, even according to the responsibility criterion, to attack noncombatants. Yet the temptation to attack them is very strong, both among those with political grievances who lack military power and among those who control powerful military forces.⁵⁵ Because most soldiers, just and unjust

54. For present purposes I leave aside such questions as whether violence against property can count as terrorism.

55. In a single article reporting on the aftermath of Israel’s killing of Sheik Ahmed Yassin, Israel’s minister of internal security is quoted as saying “Everyone is in our sights; there is no immunity for anyone,” while Yassin’s replacement as leader of Hamas, Dr. Abdel Aziz Rantisi, who was shortly thereafter the victim of a discriminate “targeted killing” by Israel, is quoted as saying to his followers that “the door is open for you to strike all places, all the time and using all means” (Greg Myre, “After Sheik Is Slain, Hamas Picks Fiery Figure as Its Leader in Gaza,” *New York Times* [March 24, 2004]). The Israeli minister’s claim is open to varying interpretations.

alike, believe their cause is just, they will be strongly disposed to kill civilians if they believe that it is permissible to kill enemy civilians who are responsible for an unjust war. It therefore seems better to discourage even those few attacks on noncombatants that could in principle be morally justified.

This suggests that there is indeed a role for the traditional requirement of discrimination: although it is false as a criterion of moral liability to attack in war, it ought nevertheless to be upheld as a convention to which all combatants are bound. Thus far in this article I have focused on what I will refer to as the 'deep' morality of war: the criterion of moral liability to attack, the relation between just cause and the *jus in bello* requirement of proportionality, and so on. But there is another dimension to the morality of war that I have not explored: the laws of war, which are conventions established to mitigate the savagery of war. It is in everyone's interests that such conventions be recognized and obeyed. But, although the conventions have their point in considerations of consequences, they can have a role even in a nonconsequentialist account of the morality of war, such as the one I offer here. Given that general adherence to certain conventions is better for everyone, all have a moral reason to recognize and abide by these conventions. For it is rational for each side in a conflict to adhere to them only if the other side does. Thus if one side breaches the understanding that the conventions will be followed, it may cease to be rational or morally required for the other side to persist in its adherence to them. A valuable device for limiting the violence will thereby be lost, and that will be worse for all.

It is important to understand that the account I have developed of the deep morality of war is not an account of the laws of war. The formulation of the laws of war is a wholly different task, one that I have not attempted and that has to be carried out with a view to the consequences of the adoption and enforcement of the laws or conventions. It is, indeed, entirely clear that the laws of war must diverge significantly from the deep morality of war as I have presented it. Perhaps most obviously, the fact that most combatants believe that their cause is just means that the laws of war must be neutral between just combatants and unjust combatants, as the traditional theory insists that the requirements of *jus in bello* are. Consider, for example, the question of punishment in the aftermath of a war. I have argued that according to the deep morality of war, unjust combatants in general cannot obey certain requirements of *jus in bello* and therefore act wrongly by participating in an unjust war. While many are fully excused, some may be culpable to varying degrees, and some may even deserve punishment, even if they have confined their attacks to military targets. But it would be counterproductive and indeed disastrous to permit the punishment of

ordinary soldiers merely for their participation in an unjust war. This is so for several reasons.

First, it is simply impossible for one country, or even an international body, to provide fair trials for all the members of an army. Second, there is the problem of “victor’s justice”: the winning side will declare its war to have been just and will be tempted to seek reprisals or vengeance against vanquished soldiers under the guise of punishment. Finally, if all combatants have to fear this fate, they may be deterred from surrendering, and it is irrational to establish incentives to protract wars rather than to terminate them.

It is, however, important to be able to punish just combatants who act wrongly in the way they conduct a war. The solution, it seems, must be to reserve punishment for infractions of the conventions or laws of war, which must be neutral between just and unjust combatants, rather than for violations of the deeper principles of *jus in bello*, which are not neutral.

It is possible that the traditional rules of *jus in bello* coincide rather closely with the laws that would be optimal for regulating conduct in battle. These rules have evolved over many centuries and have been refined, tested, and adapted to the experience of war as the nature of war has itself evolved. They may, in particular, be well suited to the regulation of the conduct of war in conditions in which there are few institutional constraints, so that the restraining effects have to come from the content of the rules rather than from institutions in which the rules might be embedded.⁵⁶

But it is also possible that these rules are not ideal. They are the products not only of modern battlefields but also of ancient chivalric engagements, religious wars, and Medieval Catholic philosophy. (Just war theory is unique in contemporary practical ethics in two respects: it is widely and uncritically accepted and differs very little in content from what Western religious thinkers have believed from the Middle Ages to the present.) The account of the deep morality of war I have sketched provides a basis for the reevaluation of the rules we have inherited. Ideally we should establish laws of war best suited to get combatants on both sides to conform their action as closely as possible to the constraints imposed by the deep morality of war. Yet it is dangerous to tamper with rules that already command a high degree of allegiance. The stakes are too high to allow for much experimentation with alternatives.

There are, moreover, objections to the idea that we can distinguish between the deep morality of war and the laws of war. One such objection has been forcefully stated by Walzer: “No limit is accepted simply

56. I am indebted here to Allen Buchanan.

because it is thought that it will be useful. The war convention must first be morally plausible . . . it must correspond to our sense of what is right."⁵⁷

This may not be a problem for some of the conventional laws of war. The idea that it is wrong to attack noncombatants, for instance, already corresponds to most people's sense of what is right. Moreover, it does seem that people can accept limits, even in war, on the ground that respect for these limits serves everyone's interests. It is not obvious, for example, that poison gas is inherently more objectionable morally than artillery, provided that its use is confined to the battlefield; yet the convention that prohibits its use is widely obeyed, mainly because we all sense that it would be worse for everyone, ourselves included, were the taboo to be breached.

Suppose, however, that I am wrong about this and that, in general, if combatants are to be sufficiently motivated to obey certain rules in the conduct of war, they will have to believe that those rules really do constitute the deep morality of war. If it is imperative to get them to respect certain conventions, must we present the conventions as the deep morality of war and suppress the genuine deeper principles? Must the morality of war be self-effacing in this way?⁵⁸ I confess that I do not know what to say about this, though my inclination is to think that what is most important is not that the correct account of the morality of war should meet the publicity condition, or that combatants not be deceived, but that wars, when inevitable, should be fought as decently and with as little harm to the innocent as possible.

One further objection to distinguishing between the deep morality of war and the laws of war is that there are bound to be circumstances in which the deeper morality and the conventions will conflict, for example, when morality requires an attack on noncombatants while the conventional requirement of discrimination forbids it. How ought such conflicts to be resolved? In order for morality to require the violation of the convention in a particular case, it must take into account not only the positive reasons for attacking noncombatants but also the effect that the violation of the convention would be likely to have on general respect for the convention. For it is widely accepted that the violation of a convention by one side tends to release the other side from its commitment to respect the convention. If, however, this consideration is factored in and morality still requires the violation of the convention, it seems that the convention ought to be violated. Yet there is so much

57. Walzer, p. 133.

58. I have been helpfully pressed to confront this and related problems by Charles Beitz, Gilbert Harman, Philip Pettit, and Peter Singer. They will be disappointed by my anemic and noncommittal response.

scope for self-deception in these matters that this is a conclusion that one ought never to accept with complacency.

If, despite these problems, it is right that there must be laws of war that diverge from the deep morality of war, then war is in fact rule-governed to an even greater extent than Walzer imagines. It is governed by two sets of principles that operate at different levels. It may seem, however, that it is really the conventions that must be action-guiding in the conduct of war, and, if so, that raises the question whether the deeper morality of war has any practical significance at all. Are the judgments it issues of merely academic interest?

I think not. If nothing else, the deep morality of war is a guide to individual conscience. It demands of potential volunteers, potential conscripts, and active military personnel that they consider with the utmost seriousness whether any war in which they might fight is just and refuse to fight unless they can be confident that it is. The effects of this demand are hard to predict. It might simply prompt governments to become ever more subtle and clever in the lies they tell their citizens. If so, it is a corollary of the account I have offered that greater efforts must be made to ensure openness in government. Yet I think, as I suggested earlier, that the main effect would be to make it harder for governments to fight unjust wars.