

**Method and the Morality of War**

by

Ian Fishback

A dissertation submitted in partial fulfillment  
of the requirements for the degree of  
Doctor of Philosophy  
(Philosophy)  
in the University of Michigan  
2021

Doctoral Committee:

Professor Elizabeth Anderson, Chair  
Professor Sarah Buss  
Professor Jeff McMahan, University of Oxford  
Professor William Ian Miller

Ian Fishback

[ifis@umich.edu](mailto:ifis@umich.edu)

ORCID iD: [0000-0002-9652-8998](https://orcid.org/0000-0002-9652-8998)

© Ian Fishback 2021

This dissertation is dedicated to the innocent victims of the Central Intelligence Agency.

## Table of Contents

Dedication .....	ii
Abstract .....	iv
Chapter One: Introduction .....	1
Chapter Two: Necessity and Institutions in Self-Defense and War .....	13
1. Proportionality in Self-Defense .....	15
2. Necessity and Institutions in Personal Self-Defense .....	20
3. Implications for the Ethics of War .....	26
4. Concluding Remarks.....	33
Chapter Three: Rule of Law, Cultural Adaptation, and Moral Judgments about Doing and Allowing Harm .....	34
1. Introduction.....	34
2. The Doing/Allowing Inversion and Just War Theory.....	38
3. Social Psychology and Non-moral Explanations for the Doing/Allowing Inversion.....	45
4. Social Psychology and Moral Intuitions about Doing and Allowing .....	56
Chapter Four: The Internal Consistency of the Conventional Morality of War: Military Necessity, Command Responsibility, and the Duty to Obedience .....	62
1. The Internal Inconsistency Argument.....	64
2. The Structure of the Law of War .....	68
3. Reconceptualizing the Categories of <i>Jus Ad Bellum</i> and <i>Jus In Bello</i> .....	75
Selected Bibliography .....	80

## Abstract

My argument consists of three interdisciplinary chapters, each of which is a distinct prong that contributes to the overall project. The first interdisciplinary chapter, which is primarily philosophy, discusses the analogy between war in international relations and self-defense in domestic society. This argument, which is sometimes referred to as the domestic analogy, takes the following form: resort to war in international relations is sufficiently similar to resort to lethal self-defense in domestic society that the morality of the latter tells us a great deal about the morality of the former. The domestic analogy is a lynchpin of the most influential version of the traditional just war theory framework outlined in Michael Walzer's *Just and Unjust Wars*. Revisionists criticize Walzer's domestic analogy by using intuitions about hypothetical cases of self-defense to 'discover' moral principles through rational intuitionism. The moral principles revisionists generate appear to be inconsistent with various aspects of the traditional just war framework. Therefore, revisionists argue that the traditional just war framework is mistaken and ought to be revised. I use the principle of necessity applied to the real-world case of Bernhard Goetz's 1984 New York City subway shooting to demonstrate that it is possible to 'discover' moral principles from cases of self-defense that are more consistent with the traditional just war framework than revisionists claim. The second interdisciplinary chapter is primarily legal. According to the most widely accepted beliefs about the legality and morality of war, there is a conceptual distinction regarding duties to obey orders. On the one hand, politicians are morally responsible for ordering combatants to resort to war, but combatants are not morally responsible for following politicians' orders to resort to war. On the other hand, combatants are almost always morally responsible for

following orders to commit crimes during the conduct of war. In other words, there is almost always a respondeat superior (let the commander answer) justification for a combatant's participation in war even though there is almost never a respondeat superior justification for a combatant's conduct during war. I will challenge this conceptualization of a combatant's duty to obey orders, arguing that the respondeat superior defense is often available to combatants who violate rules that regulate conduct in war. In situations where the law and morality are unclear, (1) commanders who issue orders almost always bear sole moral and legal responsibility and (2) subordinates almost never bear moral and legal responsibility. Rather than being revisionist, my view is represented in case law. Therefore, many of the most widely accepted moral beliefs about combatants' duties to obedience are contrary to legal and historical precedent. The third interdisciplinary chapter, which is primarily psychological, is about a principle that distinguishes between doing harm and allowing harm. Rational intuitionist revisionists use intuitions about particular cases to justify a moral principle that distinguishes between doing harm and allowing harm such that doing harm is morally worse than allowing harm (DDA). Experimental philosophy, social psychology, and moral psychology often seem to support this sort of argument. However, some psychological experiments seem to cut the other way, undermining the epistemic status of the DDA. I'll review the force of these critiques and argue that they overstate their case.

## Chapter One

### Introduction

...there are certain considered judgments, best enunciated by Michael Walzer, to which many hold. Only combatants may be intentionally targeted in war; unintended harms to noncombatants must be minimized; wars of national defense and humanitarian intervention can be justified. Then there is the theory. Walzer's own loose attempt to synthesize these judgments has been largely discredited. In recent years, philosophers from a more austere ethical tradition have argued that these theoretical failings demand reevaluation of the considered judgments with which Walzer began. Foremost among them is Jeff McMahan, whose recent book *Killing in War*, synthesizes and develops his fifteen-year-long critique of Walzerian just war theory.<sup>1</sup>

This quote from Seth Lazar summarizes the generally held view among philosophers about the current state of just war literature. Michael Walzer's attempt to defend the mainstream moral beliefs about war that correlate closely with contemporary legal prescriptions in war, once widely accepted within the sub-discipline, are now viewed as 'loose' and 'largely discredited.' Attention, therefore, shifted to a group of philosophers known as revisionists, led by Jeff McMahan, who supposedly hail from 'a more austere ethical tradition' and argue for revision of the mainstream moral beliefs about war that Walzer articulated and defended. A review of the burgeoning contemporary corpus on just war theory reveals just how pervasive McMahan's approach is. It dominates the revisionist dialogue and the revisionist dialogue is the overwhelming voice in top journals and peer reviewed books.<sup>2</sup> What are the reasons for this movement, though? What is *so*

---

<sup>1</sup> Seth Lazar, "The Responsibility Dilemma for *Killing in War*: A Review Essay," *Philosophy & Public Affairs* 38.2 (2010): 180-1.

<sup>2</sup> Examples of revisionist literature include David Rodin, *War and Self-Defense* (Oxford: Clarendon Press, 2002); Jeff McMahan, *Killing in War*; "Innocence, Self-Defense and Killing in War," *Journal of Political Philosophy* 2 (1994): 193-221; "The Ethics of Killing in War," *Ethics* 114 (2004): 693-732; "Who I Morally Liable to Be Killed in War?" *Analysis* 71 (2011): 544-59; Tony Coady, "The Status of Combatants, in *Just and Unjust Warriors: The Moral and Legal Status of Soldiers*, ed. David Rodin and Henry Shue (Oxford: Oxford University Press, 2012); Seumas Miller, "Civilian Immunity, Forcing the Choice, and Collective Responsibility," in *Civilian Immunity in War*, ed. Igor Primoratz (Oxford: Oxford University Press, 2007), pp. 113-35.

bad about Walzer? What is *so* good about the revisionist critique? My worry is that the move away from Walzer's methodology (it is complete rubbish!) and towards McMahan's (it is the *only* way to do rigorous work on the ethics of war!) is too extreme. Walzerian methodology has much to commend it, even though it was imperfectly implemented by Walzer himself. Revisionist methodology has serious disadvantages of its own. Its ubiquitous acceptance contributes to pervasive mistakes in the contemporary corpus. Treating these possibilities will be the focus of my dissertation, but, before I do that, a more thoroughgoing summary of some of the distinctions between Walzerian and revisionist methodologies is in order. The remainder of this section is dedicated to that task.

Let us begin with Walzer. What was his particular method and why did he choose it? In order to understand Walzer, one must first understand his principal motivation for writing *Just and Unjust Wars* was to argue against the US military intervention in Vietnam. He wrote, "I did not begin by thinking about war in general, but about particular wars, above all about the American intervention in Vietnam."<sup>3</sup> Many apologists for the Vietnam War espoused a political theory known as political realism, according to which states either do or should act in their own self-interest in international relations. The basic idea is that war is characterized by anarchy, a social condition in which there are no overarching security institutions that can reliably enforce arbitration between parties. There are two species of political realism, each of which makes a claim about the relationship between anarchy and morality. Descriptive political realists claim that moral standards have normative authority to prescribe other-regarding conduct in anarchy, but no agents observe other-regarding norms in anarchy because they always act in their own self-interest. Prescriptive political realists claim that the moral thing to do in anarchy is to always act

---

<sup>3</sup> Ibid, xxiii.



in one's self-interest. According to both views, moral talk about war is usually just a charade, a thin veneer that masks naked self-interest. Therefore, the idea of justice of or in war is a chimera.

Walzer was trying to disprove political realism, and, in order to do so, he turned to history, literature, and, above all, social and legal conventions to prove that the moral terminology used in war actually has non-egoistic meaning.<sup>4</sup> In an important sense, a large portion of his work was empirical, for he was trying to describe the shared moral norms that regulated war throughout history and across cultures.

But the truth is that one of the things most of us want, even in war, is to act morally. And we want that, most simply, because we know what morality means (at least, we know what it is generally thought to mean).

It is that meaning that I want to explore in this book- not so much its general character, but its detailed application to the conduct of war. I am going to assume throughout that we really do act within a moral world; that particular decisions really are difficult, problematic, agonizing, and that this has to do with the structure of that world; that language reflects the moral world and gives us access to it; and finally that our understanding of the moral vocabulary is sufficiently common and stable so that shared judgments are possible.<sup>5</sup>

It is through such analysis that he expects to find a shared morality of war. Walzer's project was not entirely descriptive, though. He also sought to articulate a moral theory that unified and explained the moral norms he described. For example, he noted that a duality of war exists in the conventions on war, according to which war is separated into two distinct categories: *jus ad bellum* and *jus in bello*. *Jus ad bellum*, justice of war, consists of the principles germane to the resort to

---

<sup>4</sup> If one doubts the link between Walzer's preoccupation with Vietnam, his preoccupation with political realism, and his methodology, then one should review Chapter 1 of *Just and Unjust Wars*. In that chapter, titled "Against 'Realism,'" Walzer explicitly sets up his own argument as a response to political realism with an extensive treatment of the Melian Dialogue. The Melian Dialogue was an event from Thucydides that political realists often used to draw an analogy with the American intervention in Vietnam. Melos, a weak city-state, was supposed to be analogous to Vietnam, and Athens, a powerful empire, was supposed to be analogous to the United States. Walzer, who was undoubtedly aware of this apology for the American intervention, took it on directly by using the Melian dialogue to demonstrate the injustice of Athens' actions against Melos.)

<sup>5</sup> Walzer, *Just and Unjust Wars*, 20.

war. It refers to whether or not an overall war, say the German involvement in World War II, was just or unjust. *Jus in bello*, justice in war, consists of the principles germane to the conduct of warfare. Following the relevant conventions, Walzer argued that soldiers are only responsible for *jus in bello*, not *jus ad bellum*. According to this view, it is possible for a soldier to fight justly in a war that is overall unjust. A Nazi soldier did no wrong in World War II, so long as he fought according to the rules that regulate warfare at the level of *jus in bello*, even though the Nazi cause was horrifically immoral at the level of *jus ad bellum*. In defense of this view, Walzer cites the societal pressures placed upon soldiers and invokes a right of symmetrical self-defense that purportedly exists between enemy combatants. In this way, he portrays soldiers as mutual victims in a manner analogous to gladiatorial combat.

Revisionists claim that Walzer's theory, especially the independence of *jus ad bellum* from *jus in bello*, is absurd. They use the methodology of reflective equilibrium. According to reflective equilibrium, one's considered moral judgments about cases, beliefs about moral principles, and non-moral beliefs ought to comprise an internally consistent, mutually supporting set of beliefs. Such a set is said to be 'coherent' or 'in reflective equilibrium' and, if it incorporates an appropriately wide set of beliefs, each moral belief in the set is presumed to be epistemically justified. If the set is 'incoherent' or 'not in reflective equilibrium,' then the moral beliefs are presumed to be epistemically unjustified and the incoherence is taken as evidence that one or more of the beliefs in the set ought to be modified until coherence is achieved. This is exactly how revisionists consider Walzer's just war theory. It is incoherent. Therefore, one or more of its elements should be revised.

Revisionists go much farther than merely claiming that Walzer's theory ought to be revised, though. They claim that the conventional morality of war itself is hopelessly incoherent

and ought to be revised. The mere fact that Walzer's theory is incoherent need not imply that it is impossible to construct a different coherent theory that explains the mainstream morality of war. Yet, revisionists believe that constructing such a theory is impossible. The epicenter of their arguments concerns the *jus ad bellum/jus in bello* distinction in the mainstream morality of war, especially the belief that a soldier does not commit a wrong by participating in an unjust war. According to revisionists, this belief leads to two types of incoherence: 'internal incoherence' and 'external incoherence.' They argue that the mainstream morality of war is internally incoherent when they claim that certain aspects of it cannot be reconciled with each other by a consistent application of uniform moral principles. One example of this is the *jus ad bellum/jus in bello* distinction. Revisionists claim that the mainstream morality of war is internally incoherent because it permits soldiers to follow orders to participate in an unjust war, but it requires soldiers to disobey orders to participate in unjust wartime conduct. They argue that the mainstream morality of war is externally incoherent because it cannot be reconciled with mainstream moral beliefs about self-defense outside of war. Although there is no necessary connection, most revisionists are reductivists. They claim that the same moral principles apply to war that apply to self- and other-defense outside of war and war can be justified by those moral principles. They go on to argue that these principles cannot explain the mainstream morality of war, so the mainstream morality of war must be mistaken.

It is in their arguments about external incoherence that the revisionist methodology is the most striking. In order to prove external incoherence, revisionists employ a contrast strategy, which is a particular species of reflective equilibrium. Revisionists rigorously analyze hypothetical cases of self-defense in order to determine generalizable moral principles. They do this by constructing a set of hypothetical cases of self-defense that are identical in all respects

except for one variable. If intuitions about prescriptions vary between the cases, then the variable is taken to be morally relevant in a way that explains the divergent judgments of the cases. This phenomenon is then articulated as a moral principle that applies to defensive violence in all contexts: personal self-defense in ordinary society and war (importantly, policing is relatively neglected). Revisionists generally apply those principles to the circumstances of war in order to criticize mainstream moral beliefs about war. Take, for example, the revisionist critique of the moral equality of combatants, a mainstream moral belief that combatants are moral equals, regardless of the justice of the cause for which they fight. The first move in the critique is to construct a series of hypothetical cases in which two persons, a defender and an attacker, are in conflict. The variance between the cases is the degree of symmetry between the defender's and attacker's culpability for posing a threat to each other. Revisionists tend to argue that in personal self-defense it is impermissible to attack a truly innocent threat, unless killing the innocent threat is necessary to achieve an extremely morally valuable goal. It supposedly follows from this that it is also impermissible to attack a truly morally innocent threat in war, unless it is necessary to achieve some extremely morally valuable goal. Since the doctrine of the moral equality of combatants permits combatants who are fighting for an unjust war (e.g. Axis soldiers in WWII) to kill combatants fighting in a just war (e.g. Allied soldiers in WWII), the moral equality of combatants must be false. The combatants fighting for an unjust cause would be killing innocent people without any positive moral reason for doing so. In fact, by definition, they would be killing innocent people in order to further some morally disvaluable unjust war aim.<sup>6</sup>

One supposed strength of the contrast strategy is its use of 'clean' cases (when it is properly employed). The use of hypothetical thought experiments about self-defense is supposed to rid the

---

<sup>6</sup> See Jeff McMahan, *Killing in War*; and "Innocence, Self-Defense and Killing in War."

reader of any nefarious influences (e.g. racism) that might taint intuitions about the ethics of war. Furthermore, by focusing on clean hypothetical cases of self-defense, which is taken to be a purer activity unlikely to be affected by the same biases as war, revisionists hope to provide a foundation with which to criticize the mainstream moral beliefs about war for being tainted. This is an important part of their critique of Walzer, for revisionists claim that the mainstream morality of war is tainted by conventionalism. For the revisionists, many of the mainstream moral beliefs about war rest on a conventionalist mistake, whereby people tend to conflate the law and morality. That is, general habits of law abidingness tend to encourage the view that if something is legally permissible, then it is also morally permissible.<sup>7</sup> It is one of the tasks of philosophers to challenge these deeply held beliefs in order to overcome injustices that have become entrenched as the status quo. The revisionists' choice of term – 'orthodox' – to describe Walzer's theory and mainstream moral beliefs about war is indicative of this attitude. The term orthodox means "conforming to what is generally or traditionally accepted as right or true," and the way revisionists use the term carries the additional negative connotation: even though it is not true.

Revisionists might draw a parallel between the laws of war and municipal laws in the antebellum United States that permitted slavery. There were some legal restrictions on the practice of slavery, just as there are now some legal restrictions on participation in an unjust war. However, neither set of legal restrictions goes nearly as far as it ought to, for neither practice was absolutely prohibited. To the contrary, both practices were generally permitted in a wide range of circumstances. In the antebellum Southern United States there were laws that permitted slavery but prohibited killing slaves. A Southerner was legally permitted to own slaves, but prohibited from murdering them. Morality would still prohibit owning slaves, though, even though the

---

<sup>7</sup> See, for example, McMahan, *Killing in War*, Section 3.1.1, "The Conflation of Morality and Law," pp. 104-110.

practice was legal. Furthermore, the mere fact that there are laws that made the unjust practice of slavery less bad (e.g. laws prohibiting murdering slaves) does relatively little to ameliorate the terrible injustice of enslaving another human being. The revisionist holds a similar view with respect to the contemporary laws of war. For example, the laws of war permitted Germans to fight for the Third Reich during World War II so long as they abided by the rules that restrict the conduct of war (*jus in bello*). Abiding by those restrictions arguably made the Nazi wars of aggression less bad than they might have been, but they still permitted German soldiers to kill over 1 million Allied soldiers that resisted Nazi aggression. Sure, revisionists say, the laws of war may have restricted the injustice of Nazi aggression (although sometimes this was in principle, rather than in practice), but they still permitted German soldiers to intentionally kill over 1 million innocent people and that is a grave moral wrong, even if it was legal. To argue otherwise is to commit a conventionalist mistake. In this instance, the law and morality come apart. Morality is often more restrictive than the law.

Revisionists are concerned with more than conventionalism, though. They are also concerned with jingoism, an extreme form of patriotism associated with war-mongering. Jingoism, like racism, is regarded as an arbitrary preference that cannot ground the moral distinctions that it purports to make. The mere fact that someone belongs to a different nationality or race is not grounds to make a significant distinction between her moral status and the moral status of someone's own nationality or race. Yet, this is exactly what revisionists argue the mainstream morality of war does when it asserts that combatants do no wrong when they may permissibly kill enemy soldiers, regardless of the justice of the overall war. According to revisionists, the mainstream morality of war permits killing enemy combatants, in large part, because they are foreigners. I believe that jingoism often affects the way people think about war,

but it is hard to see how it could be one of the principle motivations underlying principles like distinction and the moral equality of combatants. Why would jingoism motivate prescriptions to avoid intentionally harming foreign civilians or treat foreign enemy combatants as moral equals? Perhaps the idea is that jingoism affects thinking about war generally and better motivations curtail the jingoism through the law of war, but they do not curtail jingoism as much as they ought to. Revisionists point to the differences between moral beliefs about killing in war and moral beliefs about killing in domestic self-defense as proof that this is the case.

It is a real possibility, but other explanations exist for the disparity between mainstream moral beliefs about war and mainstream moral beliefs about domestic self-defense. For example, there may be morally relevant differences between war and personal self-defense in domestic society. Recall that Walzer focused on responding to political realism, a set of theories that claim war is morally different because it takes place in the context of anarchy. Walzer did not deny that war takes place in anarchy. Nor did he deny that this non-moral social fact is morally important. To the contrary, it plays a central role in his theory. He just disagrees with political realists about the nature of anarchy's implications. Political realists and orthodoxists stand in stark contrast with revisionists, who treat the anarchical nature of war hardly at all. It is not that revisionists disagree about anarchy's existence or its moral relevance. They simply neglect it.

Rather than being a one-off problem, I believe that the revisionist neglect of the anarchical nature of war is a token instance of a deeper methodological problem. Revisionists, unlike orthodoxists, are insularly intra-disciplinary and loathe to draw upon experiences of soldiers, who they sometimes see as tainted by their proximity to war. It is fair to see much of their work as profoundly fantastic to the point there is a real hazard that it is divorced from the reality of war. Revisionists rarely attempt to construct even hypothetical cases of war in their work, yet they argue

that their conclusions are the only factors that explain the morality of war. The problem here is two-fold. First, it is not clear why we should assume that revisionist conclusions should generalize to war because they might incorporate factors that do not apply in the context of war. Second, they are likely to miss important features of war and fail to incorporate those features into their conclusions. The first problem is one of adding things that are inappropriate for the enterprise. The second problem is one of neglecting things that are appropriate for the enterprise. Here is just one reason for these worries. Hypothetical cases ordinarily consist of, at most, a short paragraph that only describes some aspects of the situation a reader is asked to consider. Wittingly or not (and usually not), all people, including professional philosophers have a tendency to ‘fill in the blanks’ with facts that reflect their own upbringing and the circumstances they are most accustomed to. Most revisionists are not trained in, are not accustomed to, and do not make a strong effort to familiarize themselves with the circumstances of war. Therefore, they are probably prone to ‘fill in the blanks’ incorrectly in rather systematic ways. As a result, they could be guilty of their own conventionalist mistake, albeit unwittingly. The notion that they have of the morality of self-defense correlates strongly with the laws they are most familiar with from their own well-ordered liberal societies. It is possible that their own intuitions about self-defense are the result of conventions that they internalized, but that are only appropriate for the context of their own societies. It is to these kinds of possibilities that I orient my dissertation.<sup>8</sup>

---

<sup>8</sup> Walzer contrasts his focus with the literature of war against the revisionist neglect in *Just and Unjust Wars*, 338. “War is a long-standing human practice (however uncomfortable we are with it), which represents a radical break with our ordinary social activities. The practice of war has been argued about and reflected on over many centuries, and it has its own law and even its own morality – which have been produced through the adaptation of ordinary law and morality to the peculiar circumstances of war. If we want to understand why that adaptation was necessary and what it has produced, we need to turn first to war itself. We need to understand what wars and battles are, how they have been experienced over the years, and how their moral and legal rules have been worked out. That’s the point of reading military history and soldiers’ memoirs... We can learn a lot about the rules and the tensions and the possibly necessary revisions by reading what earlier international lawyers and just war theorists have written, but some of their key arguments will seem strange and incomprehensible unless we begin with the literature of war itself.”



This will be a three paper dissertation in which I will offer a partial vindication of some of the mainstream moral beliefs revisionists criticize, using new arguments or arguments that build upon existing orthodox arguments in substantive ways. “Necessity and Institutions in Self-Defense and War” is a paper about the interaction of the two moral principles of proportionality and necessity, non-moral facts about anarchy, and differences between moral prescriptions for individual self-defense in anarchy from prescriptions for individual self-defense in societies with reliable police. The substantive conclusion is that considered moral judgments about individual self-defense in anarchy ought to be different than corollary judgments in societies with reliable police because of non-moral differences between anarchy and societies with reliable police. The difference in considered moral judgments is not attributable to unique moral principles that only apply to anarchy. “Rule of Law, Cultural Adaptations, and Moral Psychology and Moral Judgments about Doing and Allowing Harm” is a paper about the role of the doctrine of doing and allowing (DDA) in contemporary just war theory. Revisionists rely on a particularly strong version of the DDA according to which doing harm is morally much worse than allowing harm. My substantive conclusion in this paper is that this particularly strong version of the DDA is inappropriate for the context of war. “The Internal Consistency of the Conventional Morality of War: Military Necessity, Command Responsibility, and Duties to Obedience,” is a paper about combatants’ legal responsibility. It is standardly thought that in International Humanitarian Law (IHL), combatants are always responsible for their conduct in war, *jus in bello*, but they are never responsible for the overall justice of the wars in which they fight, *jus ad bellum*. My substantive conclusion in this paper is that there are conditions that obtain in *jus in bello* and *jus ad bellum* that vitiate combatant responsibility. Those conditions only obtain some of the time in *jus in bello*,

but they always obtain in *jus ad bellum*. Therefore, there is nothing special about *jus ad bellum* that vitiates combatant responsibility.

## Chapter Two

### Necessity and Institutions in Self-Defense and War

In war, soldiers are frequently legally required to kill people who are not imminent threats.<sup>9</sup> Outside of war, though, killing in self-defense is only legally permitted against imminent threats of harm.<sup>10</sup> This is one of several ways that laws of war differ from laws of self-defense. Mainstream moral beliefs are mostly coincident with these laws, raising this question: What is one to make of the apparent inconsistencies between mainstream moral beliefs about killing in war and mainstream moral beliefs about killing in self-defense? Moral philosophers frequently argue that many apparent moral restrictions in self-defense, such as the imminence requirement, reduce to one of two principles, *proportionality* or *necessity*.<sup>11</sup> These same philosophers argue that mainstream moral beliefs about killing in war are deeply mistaken, mainstream moral beliefs about self-defense are correct, and morality forbids much of the violence that mainstream moral beliefs about war permit. In other words, they claim to resolve the apparent inconsistencies between

---

<sup>9</sup> If the legal requirement, rather than the legal permission, for soldiers to kill is not readily apparent, note that while International Humanitarian Law (IHL) merely permits the killing, military law usually requires soldiers to obey laws from superior officers that do not violate IHL. Therefore, if an officer orders a sniper to kill an enemy in time of war, that soldier is usually legally required to do so.

<sup>10</sup> George Fletcher, *Basic Concepts of Criminal Law* (Oxford: Oxford University Press, 1998), 133. There is some disagreement about whether or not battered women should receive an exception to the imminence requirement in law. See Kim Ferzan, "Defending Imminence: From Battered Women to Iraq," *Arizona Law Review* 46 (2004): 213-262.

<sup>11</sup> For an example of an argument that the imminence requirement reduces to the necessity requirement, see David Rodin, *War and Self-Defense* (Oxford: Clarendon Press, 2002), 41. For an example of an argument that the imminence requirement reduces to the proportionality requirement, see Jeff McMahan, "War as Self-Defense," *Ethics in International Affairs* 18.1 (2004), 75-80. McMahan is a bit vague about whether or not these restrictions reduce solely to proportionality, but I will treat this point at greater length throughout this essay.

mainstream moral beliefs about war and self-defense by revising the ‘flawed’ mainstream morality of war so that it is consistent with the ‘true’ morality of self-defense.<sup>12</sup>

In this paper, I will argue that imminence and two other apparent moral requirements in self-defense, prohibitions on responses to conditional threats and duties to retreat, almost never reduce to proportionality, but they often reduce to necessity in societies with reliable police. However, in anarchic societies without reliable police, necessity usually permits defenders to violate these apparent principles. The context of international relations in which war takes place is more analogous to an anarchic society than it is to a society with reliable police. Therefore, *ceteris paribus*, necessity usually permits soldiers in war to violate these apparent principles. This is a good reason to believe that mainstream moral beliefs about war are a closer fit with ‘true’ morality than many moral philosophers claim. Sections 1 and 2 use the case of Bernard Goetz to illustrate that proportionality usually cannot explain the imminence requirement, restrictions on responses to conditional threats, or duties to retreat (section 1) and necessity can explain these apparent moral requirements, but only in societies with reliable police (section 2). Section 3 explores implications for the ethics of war. Namely, the morality of war is less restrictive than revisionists claim but more restrictive than orthodox just war theorists claim.

Before proceeding, I declare my neutrality in a disagreement over whether or not a fact-relative or an evidence-relative approach is appropriate for evaluating the morality of war and self-defense. The fact-relative approach assumes an omniscient or ‘God’s-eye’ point of view and assesses that an act satisfies a moral principle only if it does so in light of all of the morally relevant facts. According to the evidence-relative approach, an act satisfies a moral principle when it is

---

<sup>12</sup> See David Rodin, *War and Self-Defense*; Jeff McMahan, *Killing in War* (Oxford: Clarendon Press, 2009); and the majority of essays in ed. David Rodin and Henry Shue, *Just and Unjust Warriors: The Moral and Legal Status of Soldiers* (Oxford: Oxford University Press, 2008), especially Jeff McMahan, “The Morality of War and the Law of War,” 19-43.

likely to do so according to the evidence available to the agent carrying out the action.<sup>13</sup> An agent deciding how to act or evaluating an act cannot know all the morally relevant facts for certain. If ‘ought implies can,’ then, in at least some important sense, acts of defense should be assessed according to evidence-relative, not fact-relative, morality. There are, however, meta-ethical worries about the evidence-relative approach. Rather than take a stand about which approach is superior, I will evaluate whether or not self-defense satisfies a moral principle according to whether or not it satisfies that principle from a fact-relative perspective.<sup>14</sup>

### 1. Proportionality in Self-Defense

On 22 December 1984, Bernard Goetz boarded the New York City subway and took a seat at the far end of a car near four young men. Two of the four youths, Troy Canty and Barry Allen, approached Goetz and demanded five dollars while a third, James Ramseur, prominently displayed a bulge in his jacket pocket that appeared to be a gun. Goetz responded by reaching into his own pocket, pulling out a previously concealed pistol that he was carrying illegally, and shooting the four threatening teenagers. Goetz then walked over to the seated fourth member of the group, Darrell Cabey, and shot him again. This last shot, inflicted while Cabey was apparently defenseless and unthreatening, paralyzed Cabey.<sup>15</sup> According to many, Goetz violated

---

<sup>13</sup> For more on the difference between the fact-relative and evidence-relative moral perspectives, see Derek Parfit, *On What Matters: Volume One* (Oxford: Oxford University Press, 2011), 150-1. For examples of species of objections to fact-relative analysis of self-defense, see Kim Ferzan, “Justifying Self-Defense,” *Law and Philosophy* 24.6: 711-749; Helen Frowe, “A Practical Account of Self-Defence,” *Law and Philosophy*, Vol. 29, No. 3 (May 2010), 245-72; and Seth Lazar, “Necessity in Self-Defense and War,” *Philosophy and Public Affairs* 40 (2012): 3-44.

<sup>14</sup> I am actually decidedly committed to the evidence-relative view, but I regrettably do not have space to defend that stance here. For a full articulation of my argument that self-defense is best understood as an evidence-relative claim right that leaves no room for rights infringements (that I presented at Bowling Green in 2013), see “The Common Defense Paradigm.” A similar view is also advanced by one of the participants at Bowling Green in two forthcoming papers. See Jonathon Quong, “Rights Against Harm,” *The Proceedings of the Aristotelean Society* (forthcoming in 2015) and Jonathon Quong and Rebecca Stone, “Rules and Rights,” in *Oxford Studies in Political Philosophy*, Vol. 1 (forthcoming in 2015).

<sup>15</sup> George P. Fletcher, *A Crime of Self-Defense: Bernard Goetz and the Law on Trial* (Chicago: University of Chicago Press, 1990).

proportionality because the moral value of the harm (hereafter, referred to simply as ‘moral harm’) inflicted by the act,  $h_i$ , was greater than the moral harm prevented by the same act,  $h_p$ , and proportionality is only satisfied if  $h_p \geq h_i$ .<sup>16</sup>

Proportionality frequently does not explain mainstream moral beliefs about self-defense. Take the imminence requirement, for example. In Goetz’s case, one might argue that the four youths would not have done anything to Goetz in the subway car had Goetz done nothing to them, but it is probably false that the youths would not have harmed anyone. Six months after Goetz shot him on the subway, Ramseur helped brutally rape and rob an eighteen-year-old pregnant woman.<sup>17</sup> Would Goetz have violated imminence, but not proportionality, by killing Ramseur on the subway in order to prevent this rape from occurring six months afterward? On the one hand, lethal self-defense is ordinarily a proportionate response to prevent a rape. Killing Ramseur to prevent rape would have been other-defense, not self-defense, but proportionality is sensitive to moral harm prevented to one’s self and others. This seems to indicate that it was probably proportionate for Goetz to kill Ramseur in the subway car.<sup>18</sup> On the other hand, it is ordinarily considered disproportionate to kill an innocent person to prevent rape, and Ramseur may have been innocent of threatening rape at the time he encountered Goetz on the subway. It is doubtful that Ramseur had formed an intention to rape at that time, so he probably lacked *mens rea*. This seems to indicate that killing Ramseur on the subway to prevent the rape would have been disproportionate, but killing Ramseur later, after he had a culpable intention, would have been proportionate. If so, proportionality explains the imminence requirement in the Goetz case.

---

<sup>16</sup> See, for example, McMahan, *Killing in War*, 20-21.

<sup>17</sup> Malcolm Gladwell, *The Tipping Point* (New York: Little, Brown and Co., 2000), 147.

<sup>18</sup> Of course, perhaps Ramseur would never have raped the pregnant woman if he had not been traumatized by the Goetz shooting. This just proves the inaccessibility of God’s-eye facts from an omniscient perspective.

Even if killing Ramseur probably would have been disproportionate, it does not follow that proportionality explains the imminence requirement in all cases of self-defense. If someone intends to commit rape at some time in the future, that agent would be morally responsible for the future threat of rape, and a defender could satisfy proportionality by killing that person to prevent future rape in violation of the apparent imminence requirement. Even though this is unlikely to be true of Ramseur in the Goetz case, it is often likely to be true in real-world cases of defense. Many criminals, such as serial killers, serial rapists, or those who generally disrespect the rights of others in a variety of egregious ways, are morally responsible for posing continuing threats of severe unjust harm. Killing such criminals to defeat the continuing threat they pose could satisfy proportionality, regardless of whether the harm they threaten is imminent or not. Therefore, one cannot always explain the imminence requirement by appeal to proportionality.

It is also dubious that proportionality explains other mainstream moral beliefs about self-defense, such as restrictions on responses to conditional threats and duties to retreat. Conditional threats consist of a demand  $x$  coupled with a conditional threat of harm  $y$  if the demand goes unmet, taking the form ‘do  $x$  or I will inflict  $y$ .’ Many argue that when an unjust demand is a relatively slight injustice, such as demanding five dollars, that can only be prevented by inflicting serious moral harm, such as killing, then the only proportionate response is appeasement. In this way, mainstream morality asserts there are restrictions on responses to conditional threats. Additionally, mainstream morality asserts that there are duties to retreat when a person can either suffer the relatively slight injustice of retreat or inflict serious moral harm, such as killing, in order to protect his or her right to be in a particular place.

Extortion, such as the four youths’ implied threat to Goetz in the subway, is a common form of unjust aggression that takes the form of a conditional threat. The four youths unjustly

threatened to harm Goetz unless he gave them five dollars. Jeff McMahan argues that proportionality explains restrictions on the use of deadly force in response to conditional threats in the Goetz case. He writes:

If [Goetz] had instead given [the four youths] the five dollars they demanded, they probably would have left him unharmed; and even if he had refused to give them anything, the probability was low that they would have seriously harmed him. It therefore seems that the harm caused by shooting them was excessive in relation to the harm to which they might have been liable.<sup>19</sup>

According to McMahan, shooting the four youths was a disproportionate means to protecting Goetz's right to five dollars.

One problem with McMahan's argument is that there was probably more at stake than Goetz's property right to five dollars. The youths' unjust conditional threat on Goetz's life was evidence that they should not be trusted to respect his rights or others' rights, even if Goetz appeased them. Confronting the four youths probably protected Goetz and others from the continuing threat that the four youths posed (e.g. Ramseur's future rape). Since inflicting severe harm to defeat continuous threats can be proportionate, proportionality and restrictions on responses to conditional threats can come apart. Additionally, by threatening unjust harm, the four youths probably encouraged others to commit unjust harm, compromising deterrence. Therefore, shooting the four youths probably protected others indirectly by generally deterring unjust aggression. Appeasement of conditional threats invites aggression, and standing up to conditional threats prevents aggression.<sup>20</sup> Importantly, the four youths were probably morally

---

<sup>19</sup> McMahan, *Killing in War*, p. 20.

<sup>20</sup> McMahan, "War as Self-Defense." If it seems odd that I am citing McMahan in "War as Self-Defense" in order to critique McMahan in *Killing in War*, keep in mind that I am deliberately doing this to point out inconsistencies between those two works. I will treat that point in section 3.



responsible for compromising deterrence. If so, this moral responsibility vitiated the moral disvalue of the harm inflicted on them as a means to achieve deterrence.<sup>21</sup> The aggregated moral harm prevented and the vitiation of the moral harm inflicted may have been sufficient to make Goetz's act proportionate. Thus, restrictions on responses to conditional threats are not reducible to proportionality. The duty to retreat cannot be explained by proportionality for many of the same reasons. Standing one's ground and even proactively seeking confrontation are often proportionate means to defeat continuing threats and deter injustice.<sup>22</sup>

At this point, some may find my argument about restrictions on responses to conditional threats and duties to retreat profoundly counterintuitive. They might worry that defenders, such as Goetz, cannot satisfy proportionality if they violate these apparent requirements, because defenders should call the police or run away. McMahan, for example writes:

The mistake here is to see the requirement of retreat as a corollary of necessity when it is in fact a requirement of proportionality. If one can retreat in safety from confrontation with an attacker, that does not mean that defensive action is unnecessary. It may be unnecessary in order to defend one's safety, but it is necessary to defend one's right to be where one is. It is simply that to kill a person, even an unjust aggressor, would be disproportionate to the importance of one's being able to remain where one is (though in many jurisdictions the legal duty to retreat does not apply if one is in one's home). In short, retreat normally involves loss, though loss that is insufficiently grave to justify killing in order to avoid it.<sup>23</sup>

McMahan's argument that the duty to retreat is a corollary of proportionality rests on a conceptual mistake, because proportionality compares two aspects of the same act. Proportionality does not

---

<sup>21</sup> Daniel M. Farrell, "The Justification of Deterrent Violence," *Ethics* (1990): 301-317.

<sup>22</sup> McMahan, "War as Self-Defense."

<sup>23</sup> McMahan, "War as Self-Defense," 77.

compare the harm inflicted by two acts, each of which is capable of achieving the same defensive end. Note that, in McMahan's passage, he argues that the requirement to retreat is a corollary of proportionality, but he actually appeals to necessity to explain the requirement to retreat. Standing one's ground is always a proportionate means to preserve one's life from an attacker, but it is an unnecessary means if other, less harmful, means are available, such as an opportunity to retreat. In McMahan's argument, killing the attacker would protect one's life, but running away will, too. Both are proportionate, but only running away is necessary. Therefore, the requirement to retreat is explained by necessity, not proportionality.

The conceptual point is that proportionality does not make comparisons between different acts capable of achieving the same end, such as the harm inflicted by self-defense and the harm inflicted by calling the police. In order to determine whether or not an act is proportionate, one should ask whether or not it would be permissible if there are no other means capable of achieving the same defensive end, not whether or not it is the least harmful among several means capable of achieving a specified defensive end. This does not entail that defenders are never morally required to retreat. Rather, it entails that the requirement to retreat is not reducible to proportionality. It might be explained by other moral principles, such as necessity. It is to that point that we now turn.

## **2. Necessity and Institutions in Personal Self-Defense**

Proportionality cannot explain mainstream moral beliefs about self-defense, such as the imminence requirement, the duty to yield to a violation of one's rights in response to conditional threats, and the duty to retreat. Perhaps, however, necessity can explain these requirements. Necessity compares all possible defensive acts according to two criteria. First, each defensive act is evaluated according to its ability to prevent a specific moral harm, *x*. Only defensive acts that

are capable of preventing  $x$  can be necessary to prevent  $x$ . Second, all of the acts that are capable of preventing  $x$  are compared to each other according to how much moral harm each act inflicts. Among the acts capable of preventing  $x$ , only the one that inflicts the least moral harm is necessary to prevent  $x$ . An act can be proportionate without satisfying necessity and vice-versa. Even if killing a murderer to prevent a murder is proportionate, it can still be unnecessary to do so if punching the murderer will also prevent the same murder. Even if killing a thief is necessary to protect one's property right to five dollars, it can still be disproportionate, if the moral disvalue of killing the thief is excessive relative to the moral value of protecting one's right to five dollars.<sup>24</sup>

A plausible explanation of mainstream moral beliefs about self-defense is that these beliefs reflect necessity applied to situations where reliable security institutions provide an alternative defensive means. Consider CONTINUOUS THREAT and IMMINENT THREAT:

CONTINUOUS THREAT: At the time Goetz encounters the four youths on the subway, Ramseur is probably a serial rapist who, if left unchecked, will go on to rape many people in the future and undermine deterrence. Goetz probably only has two options to prevent the rapes and maintain deterrence – *shoot* and *call police*.

*shoot* – If Goetz shoots, he will probably kill Ramseur, preventing future rapes and achieving deterrence. Shooting will probably inflict more moral harm than *call police*.

*call police* – If Goetz calls the police, they will probably arrest Ramseur, who will go on trial and be incarcerated, preventing future rapes and achieving deterrence. It will probably inflict less moral harm than *shoot*.

IMMINENT THREAT: At the time Goetz encounters the four youths on the subway, Ramseur is probably a serial rapist who, if left unchecked, will immediately rape a subway

---

<sup>24</sup> My sincere thanks to Jeff McMahan and Jonathon Parry for helping to illuminate the conceptual differences between proportionality and necessity over several hours of discussions in Fall 2013. Over that same time, I reciprocated by illuminating the moral importance of institutions and deterrence, and demonstrating that the correct analogy is between war and self-defense in anarchy, rather than between war and self-defense in well-policed society.

passenger, commit many future rapes, and undermine deterrence. Goetz probably only has two options – *shoot\** and *call police\**.

*shoot\** – If Goetz shoots, he will probably kill Ramseur on the subway, preventing the imminent rape, preventing future rapes and achieving deterrence. It will probably inflict more moral harm than *call police\** because it will probably kill Ramseur.

*call police\** – If Goetz calls the police, they will probably arrest Ramseur but arrive too late to prevent the imminent rape. Ramseur will probably go on trial and be incarcerated, preventing many future rapes and achieving deterrence. It will probably inflict less moral harm than *shoot\** because it probably will not kill Ramseur.

In CONTINUOUS THREAT, Goetz cannot satisfy necessity if he chooses *shoot*, because *call police* is probably capable of achieving the same defensive end (preventing future rapes and achieving deterrence) and will probably inflict less moral harm than *shoot*. Therefore, Goetz is morally required to call the police. However, in IMMEDIATE THREAT, Goetz can only satisfy necessity to prevent the imminent rape by choosing *shoot\**. *Call police\** can satisfy necessity for preventing the future rapes and achieving deterrence, not for preventing the imminent rape. As a result, necessity appears to be a plausible reason why imminence is morally important in personal self- and other-defense in societies with reliable police. Reliable police ordinarily inflict less moral harm carrying out self- and other-defense than private citizens do, and police are effective if they have enough time to respond to the threat. However, police cannot usually defend others from imminent threats of harm. Therefore, acts of self-defense by private citizens are ordinarily unnecessary against non-imminent threats and necessary against imminent threats. Of course, this is not always the case. Sometimes, police are ineffective at defending others from non-imminent threats, and sometimes they inflict more moral harm than private citizens. However, imminence ordinarily reduces to necessity where there are reliable police.

Necessity also provides a plausible moral reason for duties to yield to conditional threats, such as the requirement to retreat in self-defense for private citizens in societies with reliable security institutions. Recall that confronting conditional threats and standing one's ground can be important to achieving deterrence and maintaining order, thus it is often proportionate to inflict severe harm in order to do so. In societies with reliable security institutions, however, police and criminal justice systems achieve deterrence and inflict less moral harm than self-help. Consequently, it is unnecessary and, therefore, morally impermissible for private citizens with reliable security institutions to violate imminence, respond to conditional threats by inflicting serious harm, or stand their ground. Thus, the following principle is true:

*necessity/institutions*: the imminence requirement, restrictions on responding to conditional threats, and the requirement to retreat in personal self- and other-defense usually reduce to necessity for private citizens in societies with reliable security institutions

*Necessity/institutions* does not entail that the law and mainstream morality are always explained by necessity, for the law and mainstream morality are not always sensitive to the effectiveness of police. Goetz lived in New York at a time when the city was arguably in anarchy – the security institutions were relatively ineffective at defeating or deterring wrongful aggression. For example, the New York Police Department probably would not have responded effectively had Goetz called them. The New York City police and criminal justice institutions were obviously ineffective in 1984, and Goetz had first-hand evidence of their impotence. Much of the controversy surrounding the Goetz case concerned this point.<sup>25</sup> Consider CONTINUOUS THREAT IN ANARCHY:

CONTINUOUS THREAT IN ANARCHY: At the time Goetz faced the four youths in the subway, the four youths, if left unchecked, would probably go on to harm others in the future and undermine deterrence. Goetz probably has the following two options:

---

<sup>25</sup> Gladwell, *The Tipping Point*, 148.

*shoot\*\** – If Goetz shoots the youths, he will probably seriously harm them, thereby preventing serious future harm to others and achieving deterrence. This act will probably inflict more moral harm than *call police\*\**, by seriously harming the four youths.

*call police\*\** – If Goetz calls the police, they will probably not even attempt to arrest the four youths. The four youths will probably go on to rob, rape, and commit other serious harm in the future, undermining deterrence. This act will probably inflict less moral harm than *shoot\*\**.

In CONTINUOUS THREAT IN ANARCHY, Goetz can choose *shoot\*\** and satisfy necessity with respect to their future infliction of harms, even if he cannot satisfy imminence. *Call police\*\** cannot prevent any of the harm that the four youths threaten to inflict. This is typical of anarchic situations, where necessity often permits private citizens to inflict severe harm as a means to defeat and deter non-imminent threats because there are no less harmful means of achieving the same defensive end, even though private citizens would not be permitted to inflict such severe harm if reliable security institutions existed.

At first glance, it seems as though necessity is only a close fit with ‘mainstream’ moral beliefs when there are reliable security institutions. This, however, is a mistake, for these ‘mainstream’ moral beliefs, such as restrictions on responses to conditional threats and the requirement to retreat, are actually quite controversial. Within the Northern United States, for example, most people believe that there are duties to yield to conditional threats, including requirements to retreat. In the Southern United States, however, most people believe that there is a right to stand one’s ground against apparently slight harms and conditional threats by inflicting severe harm. Why should one arbitrarily consider Northern beliefs to be the ‘mainstream’ morality of self-defense instead of Southern beliefs?

One of the most influential empirical explanations for the difference between Northern and Southern moral beliefs is cultural adaptation. Southern ancestors hail from herdsman of anarchic regions in Scotland and Ireland, and Northern ancestors hail from relatively more orderly regions. Southern beliefs are believed to be a cultural adaptation to a relative lack of security institutions, and Northern beliefs are believed to be a cultural adaptation to a relatively strong set of security institutions.<sup>26</sup> In societies with effective police, the police defeat continuing threats and achieve deterrence, and standing one's ground is unnecessary to achieve the same ends. In anarchic societies, however, there are no police or police are ineffective, and standing one's ground is necessary to defeat aggression and achieve deterrence. Acquiescing to conditional threats or running away invites aggression in anarchic environments. Cultures gradually develop norms accordingly, and moral intuitions usually reflect the culture from which the individual hails. Supposedly 'mainstream' Northern moral beliefs about self-defense are actually parochial cultural adaptations that are ordinarily a close fit with necessity in societies with effective security institutions. Contrary beliefs, such as the Southern belief in a duty to stand one's ground, are also parochial cultural adaptations, but they are normally a close fit with necessity in anarchy. Thus, *necessity/institutions* should be amended as follows:

*necessity/institutions*: the imminence requirement, restrictions on responding to conditional threats, and the requirement to retreat in personal self- and other-defense usually reduce to necessity for private citizens in societies with reliable security institutions, but these same apparent requirements do not usually reduce to necessity in anarchic societies without reliable security institutions. In anarchy, necessity ordinarily permits defenders to 'violate' these apparent 'requirements' and inflict more harm than necessity ordinarily permits in societies with effective security institutions.

---

<sup>26</sup> Richard E. Nisbett and Dov Cohen, *Culture of Honor: The Psychology of Violence in the South* (Westview Press, 1996).

### 3. Implications for the Ethics of War

Michael Walzer, the foremost apologist for mainstream moral beliefs about war, builds his argument around a domestic analogy between war and personal self-defense.<sup>27</sup> Revisionist just war theorists criticize Walzer in many illuminating ways and argue that the mainstream morality of war wrongly permits a great deal more harm than the ‘true’ morality of war.<sup>28</sup> They overlook an important aspect of Walzer’s domestic analogy, though. Walzer argues that war takes place in the anarchic conditions of international relations, where there are not reliable cosmopolitan security institutions to protect political communities from unjust aggression. In this way, war is analogous to self-defense in anarchic societies where there are not reliable security institutions to protect individuals from unjust aggression. The necessity to engage in self-help to deter and defeat aggression is one reason that the morality of war appears to be so different than the morality of self-defense *in societies with reliable police*. A corollary is that personal self-defense in societies with effective police is disanalogous from war.<sup>29</sup> If Walzer is correct about this point (and I think he is), then it ought to be properly accounted for in any plausible just war theory.

Unfortunately, revisionists overlook this aspect of the domestic analogy. This should generate concern regarding revisionists’ claims about the ethics of war. Such worry is exacerbated once one appreciates the degree to which revisionists rely on intuitions generated by cultural norms

---

<sup>27</sup> Michael Walzer, *Just and Unjust Wars: A Moral Argument with Historical Illustrations* (New York: Basic Books, 2006).

<sup>28</sup> Revisionist literature includes Jeff McMahan, “Innocence, Self-Defense, and Killing in War,” *Journal of Political Philosophy* 2 (1994): 193-221; “The Ethics of Killing in War,” *Ethics* 114 (2004): 693-732; *Killing in War* (Oxford: Clarendon Press, 2009); “Who is Morally Liable to Be Killed in War?” *Analysis* 71 (2011): 544-59; Tony Coady, “The Status of Combatants,” in *Just and Unjust Warriors: The Moral Legal Status of Soldiers*, ed. David Rodin and Henry Shue (Oxford: Oxford University Press, 2008), 153-75; Cecile Fabre, *Cosmopolitan Wars* (Oxford: Oxford University Press, 2012); Helen Frowe, “Equating Innocent Threats and Bystanders,” *Journal of Applied Philosophy* 25 (2008): 277-290; Lionel McPherson, “Innocence and Responsibility in War,” *Canadian Journal of Philosophy* 34 (2004): 485-506; Seumas Miller, “Civilian Immunity, Forcing the Choice, and Collective Responsibility,” in *Civilian Immunity in War*, ed. Igor Primoratz (Oxford: Oxford University Press: 2007): 113-35; Gerhard Overland, “Killing Civilians,” *European Journal of Philosophy* 13 (2005): 345-63; David Rodin, “The Moral Inequality of Soldiers: Why Jus in Bello Asymmetry is Half Right,” in Rodin and Shue, *Just and Unjust Warriors*.

<sup>29</sup> Michael Walzer, *Just and Unjust Wars*, 58-63.



adapted to societies with effective police. Revisionists tend to treat these intuitions as infallible ‘foundational’ moral intuitions, against which all other moral beliefs should be compared and evaluated for consistency. For revisionists, if supposedly ‘non-foundational’ moral beliefs, such as mainstream moral beliefs about war, are inconsistent with supposedly ‘foundational’ intuitions, then the ‘non-foundational’ moral beliefs are judged to be deficient and in need of reform. The supposedly ‘foundational’ intuitions are considered beyond reproach. This is a serious mistake, for *necessity/institutions* gives good reason to believe that ‘mainstream’ intuitions about self-defense are not ‘foundational’ at all. Rather, they are parochial manifestations of norms adopted by societies in environments radically disanalogous to anarchical social contexts, such as war. This fundamental mistake is the progenitor to a great deal of (but not all) revisionist overstatement about the degree to which the ‘true’ morality of war comes apart from mainstream moral beliefs about war. In this section, I sketch a preliminary rectification of this mistake by analyzing some of the more important contemporary just war literature with an eye towards the relevance of *necessity/institutions*.

In *War and Self Defense*, David Rodin argues that mainstream moral beliefs about war are not analogous to and cannot be reduced to the same principles as mainstream moral beliefs about self-defense, such as the imminence requirement, the manifold restrictions placed on responses to conditional threats, and the requirement to retreat. Throughout the book, Rodin arbitrarily privileges his own culture’s norms (i.e., norms of self-defense adapted to societies with police) without addressing *necessity/institutions* as an objection, despite the importance of anarchy in Walzer’s analogy between war and self-defense and anarchy’s ability to provide a reasonable explanation for at least some of the differences between mainstream moral beliefs about war and supposedly ‘mainstream’ moral beliefs about self-defense. Rodin goes so far as to argue that war

could only be morally permissible if it were more like policing in a liberal, minimally just state. Supposedly, since war is not and has never been so, one should adopt contingent pacifism.<sup>30</sup>

Jeff McMahan's brief response to Rodin is noteworthy for several reasons. First, McMahan's essay, "War as Self-Defense," is a linchpin for all reductivist theories. Like me, reductivists argue that war can be justified by the same moral principles that justify self-defense, an argument that Rodin explicitly critiques. To my knowledge, McMahan's is the only compelling reductivist response to Rodin and, therefore, the only compelling defense of the foundational premise for reductivism, the most influential approach to contemporary just war theory. Second, McMahan defends reductivism by arguing that "conditions of war are different from ... situations in domestic society" because, in domestic society, unlike war, defenders can call upon the police.<sup>31</sup> This difference supposedly affects proportionality in ways that explain the imminence requirement, restrictions on responses to conditional threats, and the requirement to retreat in domestic society, even though proportionality usually permits acts that violate all of these 'requirements' in war. Other than conflating proportionality with necessity, McMahan's response to Rodin is strikingly similar to my argument for *necessity/institutions* and Walzer's analogy between war and self-defense in anarchy. Third, even though something akin to *necessity/institutions* is central to this definitive defense of reductivism, reductivists, including McMahan himself, do not properly incorporate the implications of *necessity/institutions* into their arguments about the morality of

---

<sup>30</sup> Rodin argues that justifications for police action are distinct from justifications for acts of war because police actions rely on an 'institutional justification' that does not obtain in wartime environments. By claiming that police action enjoys an institutional justification that does not obtain in war, he implies that it is easier for police officers in domestic contexts to justify defensive violence than it is for combatants in war. Thus, he distinguishes between situations with institutions (domestic policing) and situations without institutions (war), but does so in a way that is exactly the opposite of and without accounting for *necessity/institutions*. Even if there is such a thing as an 'institutional justification,' this does not entail that it is harder for combatants to justify acts of violence than police officers because combatants enjoy the implications of *necessity/institutions*, a point that is largely overlooked in contemporary arguments about the morality of war. Rodin, *War and Self-Defense*, 173-179; McMahan, *Killing in War*, 66-79.

<sup>31</sup> McMahan, "War as Self-Defense," 76.

war. As a result, reductivists overstate the degree to which ‘true’ morality prohibits a great deal of the harm permitted by mainstream moral beliefs about war.

McMahan, for example, failed to incorporate his own arguments from “War as Self-Defense” into any of his subsequent work, including his book, *Killing in War*. I deliberately chose the case of Bernard Goetz for this paper in order to highlight this point. In *Killing in War*, McMahan claims that Goetz’s act was morally impermissible because, “If [Goetz] had instead given them the five dollars they demanded, they probably would have left him unharmed; and even if he had refused to give them anything, the probability was low that they would have harmed him. It therefore seems that the harm caused by shooting them was excessive...”<sup>32</sup> Here, without any treatment of 1) the plausible and well-documented claim that Goetz acted in an anarchical environment and 2) McMahan’s own argument in “War as Self-Defense” that restrictions on responding to conditional threats permit inflicting more harm in anarchy, McMahan argues that Goetz wrongly responded to the four youths’ conditional threat. As a result, McMahan’s treatment of Goetz’s act in *Killing in War* is consistent with Rodin’s anti-reductivist, parochially biased argument in *War and Self-Defense* and inconsistent with McMahan’s own reductivist response to Rodin in “War as Self-Defense.” Even if McMahan believed that Goetz acted impermissibly despite the ineffectiveness of the NYPD in 1984, an analysis of the implications of the ineffectiveness of security institutions would have provided an excellent opportunity to explain how reliable police affect moral restrictions on self-defense, a point that is fundamental to his reductivist approach and entirely omitted in *Killing in War*.

---

<sup>32</sup> McMahan, *Killing in War*, 20.

The omission of the argument for reductivism found in “War as Self-Defense” would not be so problematic if it were not germane to some of the core arguments in *Killing in War*, especially McMahan’s treatment of evidence-relative justifications for a prospective combatant. McMahan acknowledges that the prospective combatant faces moral risk whether she participates or abstains; she acts wrongly if she participates in an unjust war and if she fails to participate in a just war. However, McMahan emphatically argues that the prospective combatant should presume not to participate in war unless she has overwhelming evidence that the war is just. It is difficult to overstate McMahan’s presumption in favor of abstention from war, which is much closer to pacifism than it is to mainstream moral beliefs about war. He writes:

My argument that the moral risks involved in participation in war may exceed those of nonparticipation exerts pressure in the direction of a contingent form of pacifism. But this pressure can be resisted, and successfully overcome, when war is just... There was little uncertainty, for example, that the Allied war against Nazi Germany and the war against imperial Japan, were just wars.<sup>33</sup>

McMahan goes on to argue that prospective combatants should be especially reluctant to 1) participate in wars to protect other political communities or 2) fight for countries that are involved in many wars, such as the United States and Great Britain. It is fair to say that McMahan would have prescribed participation in the U.S. involvement in WWII, but not Korea, the 1991 Persian Gulf War, or combat operations in Afghanistan against the Soviets or the Taliban. My problem with this argument is not McMahan’s claim that prospective combatants are morally responsible for deliberating the justice of the cause for which they fight. McMahan’s argument convinces me that, contrary to mainstream moral beliefs, there are reasons for prospective combatants to consider abstaining from war. However, he fails to treat *necessity/institutions* or his own argument for

---

<sup>33</sup> McMahan, *Killing in War*, 153.

reductivism at all in *Killing in War*, both of which imply that the anarchical nature of international relations permits combatants to inflict more defensive harm in war than individuals are permitted to inflict in domestic society because it is necessary to do so in order to achieve deterrence. As a result, he overstates the strength of the presumption for abstaining from particular wars. Indeed, *necessity/institutions* may provide a powerful reason for prospective combatants to presume in favor of participating in war that normally outweighs McMahan's reasons for abstention. I will not thoroughly treat that possibility here. However, I am confident that his failure to acknowledge *necessity/institutions* entails that McMahan overstates the degree to which 'true' morality deviates from mainstream moral beliefs about war.

Although I will not attempt to thoroughly analyze the degree to which *necessity/institutions* affects prospective combatants' decisions, I will comment on the importance of such analysis in arguments for reductivism. Recently, Seth Lazar wrote the following criticism of reductivism:

If we apply the necessity constraint appropriate to individual self-defense to combatants in war, it will standardly be too stringent for them to satisfy it. Not only do they risk more harm than self-defenders, but the moral weight attached to the harm they risk is greater; not only are their actions less likely to succeed in averting the threat, but uncertainty over their justification under the conditions of self-defense means that reductions in risks to combatants and those they protect are less morally important.

This leaves reductive individualists forced to choose between three unpalatable alternatives. The first is to apply the necessity constraint appropriate to individual self- and other-defense to killing in war. This allows them to retain their commitment to reductive individualism, but will render killing in war implausibly difficult to justify. Second, they could apply the necessity constraint appropriate to killing in war to killing in individual self- and other-defense. This would provide scope for permissible killing in war, but would yield an excessively permissive account of individual self- and other-defense. Third, they can endorse a more permissive necessity standard in war than in individual self- and other-defense: this would mean conceding that the moral content of the

principles governing killing in war differs from that governing self-defense, hence reductive individualism is false.<sup>34</sup>

Lazar's argument against reductionism addresses four factors: (1) the probability that a defender will inflict moral harm, (2) the magnitude of the moral harm that a defender is likely to inflict, (3) the likelihood that the defender will avert a threat, and (4) the likelihood that the defender is justified. All of these factors are supposedly different in killing in war than they are ordinarily in self-defense, so war supposedly cannot reduce to the same moral principles as self-defense.<sup>35</sup> Reductivists have a plausible response to Lazar's dilemma. Lazar is guilty of assuming that his beliefs about self-defense, which reflect cultural norms adapted to societies with effective security institutions, reflect the correct moral prescriptions in all social contexts. However, according to *necessity/institutions*, which Lazar neglected, it is necessary to inflict more moral harm in anarchy, including war, to defeat continuous threats and achieve deterrence than the social conditions that Lazar's intuitions are adapted to. Therefore, so long as defeating continuous threats and achieving deterrence is sufficiently morally valuable, it could offset (1) and (2). Furthermore, even lost wars can achieve deterrence so long as they inflict harm, such as Belgium's resistance to Germany's invasion in WWI. Therefore, (3) is moot. The only remaining question is whether or not defeating continuous threats and achieving deterrence is valuable enough to offset (4). If it is, that permits combatants to take a much greater risk of being unjustified in war than individuals acting in self-defense in societies with reliable police. It would follow that *necessity/institutions* is a powerful reason for prospective combatants to presume that they are morally permitted to participate in war, even when there is a significant risk that the war is unjust. Adopting this position would preserve

---

<sup>34</sup> Seth Lazar, "Necessity in Self-Defense and War," 28-9.

<sup>35</sup> Many thanks to Seth Lazar for gracious comments on "The Common Defense Paradigm" in Fall 2012.

reductivism, but it would entail that ‘true’ morality is a closer fit with mainstream moral beliefs about war than reductivists currently claim.

#### **4. Concluding Remarks**

I argued that many apparent restrictions in self-defense, such as the imminence requirement, restrictions on responses to conditional threats, and duties to retreat are actually cultural adaptations that reflect the deep moral principle of necessity applied to societies with reliable police. In societies with reliable police, these apparent restrictions generate morally correct prescriptions and evaluations. However, in anarchy, they are overly restrictive, forbidding acts that are actually morally permissible. War is more analogous to self-defense in anarchy than it is to self-defense in societies with reliable security institutions. Therefore, *ceteris paribus*, we should expect the deep moral principle of necessity to permit acts of war that inflict more harm and violate some of the apparent restrictions on self-defense in well-policed societies. It is important to clearly delimit my claims. I did not claim that the mainstream morality of war is wholly correct. Rather, I argued that it is a closer fit with true morality than revisionist reductivists and anti-reductivists claim, because they completely fail to treat the significance of *necessity/institutions*. If they do treat it, they will have to soften some of their claims about the degree to which the mainstream morality of war is too permissive. My argument leaves it undetermined just how close of a fit there is between mainstream moral beliefs about war and true moral principles applied to the anarchic context of war. Furthermore, I did not treat ways that mainstream moral beliefs about war seem less restrictive than mainstream moral beliefs about self-defense (e.g. the controversial principle of distinction, according to which combatants are permitted to target enemy combatants, but not civilians). That task is possible, but it requires a separate argument and is far too large for this essay.

## Chapter Three

### Rule of Law, Cultural Adaptation, and Moral Judgments about Doing and Allowing Harm

#### 1. Introduction

Conventional moral judgments, defined as those coincident with law, appear to distinguish between doing harm and allowing harm in opposite ways, depending on whether or not the harm takes place in war. In war, allowing harm seems worse than doing harm. Outside of war, this distinction inverts: doing harm seems worse than allowing harm. The ‘doing’ aspect of the inversion manifests itself in the stringency of the proportionality principle, which requires the harm prevented by a defensive act to be at least equal to the harm inflicted by the same act.<sup>36</sup> Conventional morality asserts that acts of war frequently satisfy proportionality despite killing many innocent people, even though self-defense outside war almost never satisfies proportionality if it kills even one innocent person. As a result, it appears that there are two different proportionality judgments in conventional morality: proportionality for war with much less stringent restrictions against doing harm to the innocent, and proportionality for contexts other than war with much more stringent restrictions against doing harm to the innocent. The ‘allowing’ aspect of the inversion manifests itself in judgments about the stringency of duties to assume

---

<sup>36</sup> This is actually a crude over-simplification of proportionality. Many believe that proportionality incorporates a number of deontological principles that interact in complicated ways to affect the moral weight attached to harm *simpliciter* inflicted by an act of war or self-defense. The moral weight, not the harm *simpliciter*, is what counts in proportionality calculations. A full treatment of this point is unnecessary for my argument, although I will treat the interaction of proportionality and necessity to some degree in section 2. For a sample of more thoroughgoing discussions of proportionality, see the following: Thomas Hurka, “Proportionality in the Morality of War,” *Philosophy & Public Affairs* 33:1 (2005): 34-66; Hurka, “Proportionality and Necessity,” in ed. Larry May, *War: Essays in Political Philosophy* (New York: Cambridge University Press, 2008): 127-144; Jeff McMahan, “Proportionality and Time\*,” *Ethics* 125:3 (2015): 696-719; McMahan, *Killing in War* (Oxford: Clarendon Press, 2009): 15-37; Helen Frowe, “Non-combatant Liability in War,” in ed. Frowe and Gerald Lang, *How We Fight* (Oxford: Oxford University Press, 2014): 172-187; Suzanne Uniacke, “Proportionality and Self-Defense,” *Law and Philosophy* 30:3 (2011): 253-272; Saba Bazargan, “Proportionality, Territorial Occupation, and Enabled Terrorism,” *Law and Philosophy* 32:4 (2013): 435-457.



personal risk in order to protect others. Conventional morality regards the extraordinarily dangerous task of war-fighting to be an involuntary duty that can justify military conscription, even though it regards the relatively less dangerous task of law enforcement to be a voluntary professional obligation. Furthermore, in peacetime society, individuals who do not freely volunteer for law enforcement are not required to take great personal risks in other-defense. They are permitted to risk themselves on behalf of others, but such action is considered supererogatory, above and beyond duty or obligation. It appears that there are two different conventional judgments about duties to other-defense: a duty to other-defense for war with much more stringent requirements to assume personal risk and a duty to other-defense for peacetime society with much less stringent requirements to assume personal risk. The differences between conventional restrictions and stringency of duties to other-defense appear to suffer from an inconsistency that I will refer to as the ‘doing/allowing inversion’: In war, the apparently less stringent restrictions against killing and more stringent requirements to protect conjoin to make it appear that doing harm is morally better than allowing harm. Outside war, the apparently more stringent restrictions against killing and less stringent requirements to protect conjoin to make it appear that doing harm is morally worse than allowing harm.

The apparent inconsistency of the doing/allowing inversion is unsettling for coherentists who believe that one’s moral beliefs and justified non-moral beliefs should be consistent with and mutually support each other. This state, which they often refer to as coherence or reflective equilibrium, supposedly epistemically justifies one’s moral beliefs. On the other hand, the presence of apparently irreconcilable conflict between one’s moral beliefs is strong evidence that

one or more of one's beliefs are mistaken.<sup>37</sup> When such a situation arises, one is supposed to look for previously neglected knowledge that reasonably explains the apparent inconsistency. If this is possible, the apparent inconsistency is set aside as a chimera and one's existing moral beliefs are accommodated. Such is the form of coherentist apologies for apparently inconsistent moral beliefs. If such an apology proves ill-fated and the inconsistency is recognized as actual, one should reconsider one's moral beliefs with an eye towards identifying which are most suspect and which are most likely to be justified. Typical sources of suspicion are parochial bias, such as arbitrarily favoring one's own race or culture in an unjustly partial manner. The beliefs that are most likely tainted by such bias are jettisoned or appropriately revised until they cohere with one's other, less dubious beliefs. Such is the form of coherentist arguments for reforming apparently inconsistent moral beliefs.

Coherentist arguments about the doing/allowing inversion tend to overlook non-moral explanations for the apparent inconsistencies between the conventional morality of war and the conventional morality of defense outside war. Instead, arguments turn on whether or not there are moral principles *sui generis* to war that explain the apparent inconsistency. Distinctivists argue that such principles exist, coherently explain the doing/allowing inversion, and justify the conventional morality of war. Reductivists deny such claims, arguing that the moral principles germane to war are exactly the same as the moral principles germane to defense in contexts other than war and the doing/allowing inversion is incoherent. Reductivists believe that the conventional morality of war is tainted by parochial bias, such as jingoism. Therefore, reductivists typically call for radical revisions in the conventional morality of war, including the application of the

---

<sup>37</sup> Rawls is often viewed as the origin of the use of reflective equilibrium in moral philosophy, but, as we shall see, his method is notably different from the methodology employed in contemporary applied ethics. John Rawls, *A Theory of Justice*, revised ed. (Oxford: Oxford University Press, 1999), section 4.

distinction between doing and allowing (DDA) that one finds outside of war. According to DDA, doing harm is morally worse than allowing harm *ceteris paribus*. Since DDA seems more consistent with the conventional morality of defense outside war than the conventional morality of war, reductivists argue that the conventional morality of war is mistaken.

I will offer a reductivist argument for the doing/allowing inversion that relies on non-moral facts common to war, rather than moral principles *sui generis* to war in order to achieve coherence in the doing/allowing inversion. In Section II, I will outline contemporary arguments germane to the doing/allowing inversion. In Section III, I use social psychology to point out that the so-called conventional moral beliefs about defense outside of war are hardly ubiquitous and that there is considerable moral disagreement about doing and allowing harm in self-defense outside of war. The disagreement tends to cluster around two sets of moral judgments that create a doing/allowing inversion within the ethics of self-defense. Members of societies adapted to living without centralized police and courts tend to believe that allowing is relatively worse than doing and members of societies adapted to living in societies with centralized police tend to believe that doing is worse than allowing. Since war is characterized by a lack of centralized police and courts, this suggests that this non-moral social fact provides a reasonable and coherent explanation of the doing/allowing inversion. In Section IV, I will take a deeper look at two non-moral psychological facts about the nature of the apparently inconsistent beliefs about doing and allowing harm in order to argue against the application of the contrast strategy to the ethics of war, a methodology that pervades the contemporary literature. The different beliefs about doing and allowing manifest themselves in different intuitions, not merely differences in moral judgments. Therefore, there is good reason to believe that the prolific reliance on intuitions about hypothetical cases by philosophers likely to be adapted to societies with centralized police and courts generates a

ubiquitous parochialism in their literature on the ethics of war. In Section IV, I will outline limitations for my argument for the doing/allowing inversion and argue that the conventional morality of war is probably a mistaken vestige of anachronistic social facts, but the degree of that mistake is much less than reductivist revisionists ordinarily claim.

## 2. The Doing/Allowing Inversion and Just War Theory

With the notable exception of Michael Walzer, philosophers working on the ethics of self-defense and war tend to treat the doing/allowing inversion in a skewed manner, placing great emphasis on the apparent inversion of restrictions on doing harm and mostly neglecting the apparent inversion of the stringency of obligations to avoid allowing harm.<sup>38</sup> This myopic focus

---

<sup>38</sup> The apparent inversion of proportionality restrictions on doing harm to the innocent is a core desideratum in contemporary just war theory. Justifying the principle of discrimination, according to which combatants may intentionally kill enemy combatants but not civilians, is arguably a second and related core desideratum. My argument will deal with proportionality and duties to protect, but I will not treat the discrimination principle. As for widespread neglect of the inversion of obligations to avoid allowing harm, Jeff McMahan devoted over a decade of work to explaining the stringency of negative duties to refrain from killing the innocent and appears to have devoted very little work on the stringency of positive duties to protect in war, despite the fact that he emphatically urges individuals to risk not fulfilling those positive duties. In *Killing in War*, he briefly acknowledges a related phenomenon, the tendency to favor participation in one's country's wars when one is uncertain of the justice of the war. However, he only treats it shallowly and is explicitly critical of judgments in favor of participating in war. A possible exception is "The Just Distribution of Harm Between Combatants and Noncombatants," *Philosophy & Public Affairs* 38.4 (2010): 342-379, but that essay does not treat the inversion of duties to protect. Duties to protect do feature prominently in two sub-genres of just war literature, but neither focuses on the apparent inversion of duties to protect. Work on trade-offs between risks combatants avoid by imposing a risk of doing harm to civilians is not primarily about the duty to assume risk to avoid allowing harm. It is primarily about the duty to assume risk to avoid doing harm. See, for example, Noam Zohar, "Risking and Protecting Lives: Soldiers and Opposing Civilians," in Helen Frowe & Gerald Lang, *How We Fight* (Oxford: Oxford University Press, 2014): 155-171; David Luban, "Risk Taking and Force Protection," in Yitzhak Benbaji and Naomi Sussman, *Reading Walzer* (London: Routledge, 2014): 277-301; Asa Kasher and Amos Yadlin, "Military Ethics of Fighting Terror: An Israeli Perspective," *Journal of Military Ethics* 4/1 (2005):3-32; "Military Ethics of Fighting Terror: Principles," *Philosophia* 34 (2006):75-84; "Israel and the Rules of War: an Exchange," *New York Review of Books* 11 June 2009; Michael Walzer, *Just and Unjust Wars: A Moral Argument with Historical Illustrations*, 4<sup>th</sup> edition, (Basic Books: New York, 2006), 155; Walzer and Avishai Margalit, "Israel: Civilians and Combatants," *New York Review of Books* 56/8:21-22, 14 May 2009. Work on armed humanitarian intervention (AHI) assumes that AHI is mandatory if it requires slight costs at the state level, but is otherwise supererogatory. None of this literature acknowledges, let alone treats, the apparent inversion of the stringency of duties to protect in conventional morality. The fact that individual combatants will be required to assume great personal risk even though nations will not be considered a paradox, and literature on AHI tends to echo literature on the Rescue Principle, such as Peter Singer, "Famine, Affluence, and Morality," *Philosophy & Public Affairs* (1972): 229-243; T.M. Scanlon, *What We Owe to Each Other* (Harvard University Press: Cambridge, 1998); Peter Unger, *Living High and Letting Die: Our Illusion of Innocence* (Oxford University Press: New York, 1996); Ernest Weinrib, "The Case for a Duty to Rescue," *The Yale Law Journal* (1980): 247-293; and John Mikhail, *Moral Cognition: Rawls' Linguistic Analogy and the Cognitive Science of Moral and Legal Judgment* (Cambridge University Press: Cambridge, 2011), 194; For an excellent example of such an approach in just war literature, see Cecile Fabre, "Mandatory Rescue Killings," *The Journal of Political Philosophy*, Vol. 15, No. 4 (December 2007), 363-384. Most literature on national self-defense focuses on whether it is permissible, not whether it is a duty. A notable exception is Walzer, *Just and Unjust Wars*, 51-73.

is peculiar, for it is quite possible that one factor or bundle of factors, let us call it  $x$ , could provide a reasonable explanation of the entire doing/allowing inversion. If  $x$  ordinarily exists in cases of war and ordinarily does not exist in cases of domestic self-defense,  $x$  might provide a reasonable explanation of the doing/allowing inversion.

This is intuitively plausible in comparisons between different cases of domestic other-defense. If Adam is going to step on Bob's toe unjustly, almost no one thinks that it is permissible for a third party, Charlee, to prevent the injustice by breaking an innocent bystander's arm. Nor do most people think Charlee is morally obliged to suffer a broken arm to protect Bob from Adam. Judgments become more controversial as we change the case so that more is at stake morally. If Adam is going to kill Bob unjustly, more people believe that it is permissible for Charlee to break an innocent bystander's arm to prevent the murder. There will also be more people who believe that Charlee is obliged to suffer a broken arm to save Bob's life. As the case is modified so that the stakes are raised ever higher (e.g. Adam is threatening to kill ten people instead of only Bob), judgments become less controversial and more people believe that (1) Charlee is permitted to break an innocent person's arm to prevent Adam's unjust act and (2) Charlee is obligated to suffer a broken arm to prevent Adam's unjust act. I do not wish to take a stand on the specific harm that must be averted to justify Charlee's permission to harm an innocent or Charlee's obligation to suffer harm. Rather, my point is the general claim that when more is at stake morally in a case of defense, that factor can simultaneously justify a defender inflicting more harm on innocents and oblige a defender to suffer more harm.

The doing inversion of conventional proportionality restrictions is arguably one of two core controversies in contemporary just war theory. Most philosophers working on the intersection of the ethics of self-defense and war espouse a moral principle known as the distinction between

doing and allowing (DDA), according to which doing harm is worse than allowing harm, *ceteris paribus*, and argue that DDA casts considerable doubt on conventional permissions to kill in war. Killing innocent people is almost always believed to be disproportionate outside war, and killing innocent people on a massive scale is often believed to be proportionate in war. The former judgments seem unproblematic because they seem consistent with DDA, but the latter judgments seem to contradict DDA. How, then, can conventional proportionality judgments about war be justified? There are two species of responses, both of which claim that something, let us call it *x*, other than DDA influences conventional moral judgments about war but does not influence conventional moral judgments about defense outside war. Differences between arguments hang on what that *x* is and whether or not *x* debunks or reifies the epistemic justification for conventional proportionality judgments about war.

On one side of the debate, reductivist revisionists argue that *x* is a combination of legal orthodoxy and the jingoistic bias that often influences moral judgments about war. Since the law and morality are often radically different, as evinced by the legalization of slavery in many societies across history, conflating the two is an epistemic mistake.<sup>39</sup> Since jingoism is an arbitrary bias, like racism, it undermines the epistemic justification of moral judgments. If *x* is only or mostly comprised of legal orthodoxy and jingoism, it follows that conventional judgments about doing harm in war rest on mistaken moral beliefs.<sup>40</sup> The critical moves in this argument are (1) the reductivist claim that the moral principles germane to acts of war are exactly the same as the moral principles germane to acts of individual defense outside war and (2) the claim that *x* is only

---

<sup>39</sup> McMahan, Killing in War and “The Law of War and the Morality of War”

<sup>40</sup> Differences within reductivism are largely a matter of the degree to which conventional proportionality diverges from true *proportionality*. Some reductivists are pacifists (e.g. Rodin), others argue that war can be justified but doing so is much harder than conventional proportionality claims (e.g. McMahan).

or mostly attributable to legal orthodoxy and jingoism, rather than a morally relevant difference between defense in war and defense outside war.<sup>41</sup> If both claims are true, conventional proportionality restrictions on individual defense outside war reflect a deep objective moral principle, *proportionality*, that could not possibly permit the large-scale killing of the innocent condoned by the conventional proportionality of war and moral judgments about killing in war ought to be revised accordingly.

On the other side of the debate, distinctivist conventionalists argue that *x* is comprised of or mostly comprised of deep moral principles that are germane to war, but not germane to individual defense outside war. Therefore, war is morally distinct from other social contexts. If *x* is only or mostly comprised of the justified principles that are *sui generis* to war, it follows that conventional judgments about doing harm in war rest (at least mostly) on justified moral beliefs. The critical moves in this argument are (1) the distinctivist claim that at least some moral principles germane to acts of war are not germane to acts of individual defense outside war and (2) the claim that these distinctivist principles explain the relatively permissive proportionality restrictions against killing in the conventional morality of war. If these claims are correct, *proportionality* can permit the large-scale killing of the innocent in war because the moral principles uniquely germane to war entail that war prevents more moral harm than individual defense outside war. The *sui generis* moral nature of war supposedly explains why seemingly different conventional

---

<sup>41</sup> The burgeoning reductivist revisionist literature is far too vast to provide a complete citation here. For a discussion about whether or not reductivism can justify war, see the interaction between David Rodin, *War and Self-Defense* (Oxford: Clarendon Press, 2002) and Jeff McMahan, "War as Self-Defense," *Ethics in International Affairs* 18.1 (2004), 75-80. Other prominent reductivist works include Jeff McMahan, *Killing in War* (Oxford: Clarendon Press, 2009); Helen Frowe, *Defensive Killing* (Oxford: Oxford University Press, 2014); and Cécile Fabre, *Cosmopolitan War* (Oxford: Oxford University Press, 2012). The term 'reductivist' was coined by David Rodin, *War and Self-Defense*.

proportionality prescriptions within and outside war are consistent with *proportionality*.<sup>42</sup> The conventional proportionality of war is at least mostly justified.

Somewhat inexplicably and in striking contrast to the attention that the doing inversion receives, the allowing inversion is mostly overlooked. A notable exception is Michael Walzer, who suggests that the doing/allowing inversion is explained by a ‘domestic analogy’ between war and domestic self-defense, according to which war is analogous to self-defense in societies without police and disanalogous from self-defense in societies with police.<sup>43</sup> The heart of the analogy is the claim that in war and domestic individual defense in societies without police, it is necessary for most members of society to inflict more harm and suffer more harm in order to defend rule of law (i.e. deter, defeat, demand compensation for, and punish wrongful aggression) than it is in societies with police.<sup>44</sup> This morally justifies permitting individuals to inflict relatively more harm and requiring relatively more of individuals in acts of self- and other-defense. In this way, the domestic analogy highlights the contrast between (a) moral judgments of individual domestic

---

<sup>42</sup> Seth Lazar, “Necessity in Self-Defense and War,” *Philosophy & Public Affairs* (2012): 3-44; “War and Associative Duties,” PhD thesis, submitted 2009 at St. Peter’s College, Oxford University; Michael Walzer, *Just and Unjust Wars: A Moral Argument with Historical Illustrations*, 4<sup>th</sup> edition, (Basic Books: New York, 2006). I have neglected a third camp, who claims that war is bad and conventional morality makes it less bad without necessarily justifying it. See for example, Janina Dill and Henry Shue, “Limiting the Killing in War: Military Necessity and the St. Petersburg Assumption,” *Ethics & International Affairs* (2012): 311-333.

<sup>43</sup> In *Just and Unjust Wars*, Walzer mentions three conventional moral judgments about war that seem inconsistent with corresponding conventional moral judgments about self- and other- defense outside war. According to the first set of judgments, (1) acts of war that kill innocents are often proportionate responses to aggression, even though the conventional morality of domestic self-defense asserts that such killing is almost always a disproportionate response to aggression. According to the second set of judgments, (2) individuals are morally obligated to accept greater risk of more serious harms to confront all types of aggression in war than they are required to accept to confront aggression outside war. According to the third set of judgments, (3) proportionality in war is not sensitive to distinctions between different types of aggression as proportionality in domestic self-defense often is. The large-scale killing that ordinarily occurs in war is treated as a proportionate response to a whole host of ‘lesser’ international aggressions, such as theft of land, but lethal self-defense that kills anyone is usually a disproportionate response to instances of ‘lesser’ interpersonal aggression, such as theft of personal property. Although Walzer never frames it so explicitly, these three sets of judgments are related to the doing/allowing inversion. (1) concerns how much harm an act may inflict (i.e. ‘do’ harm) and still satisfy proportionality, (2) concerns how much harm individuals are expected to bear in order to carry out self- and other-defense (i.e. avoid ‘allowing’ harm), and (3) concerns how little harm an act may avert in order to satisfy proportionality and justify obligations of self-sacrifice; Walzer, 51-124.

<sup>44</sup> *Ibid*, 58-9.



defense in societies with a very specific ‘thin’ type of rule of law, where individuals must rely heavily on most members of society to sustain it (for syntax, I will always refer to this specific feature when I refer to ‘thin’ rule of law, even though the word can connote different characteristics), and (b) moral judgments of self- and other-defense in societies with ‘thick’ rule of law, where the successful implementation of institutions, such as highly professionalized police, ameliorate the need for individuals to act in order to achieve the same end.<sup>45</sup> There are no effective overarching cosmopolitan security institutions in international relations and states must rely on war to enforce international law. *Ergo*, international law is thin rule of law and, as the enforcement mechanism for sustaining international law, war is analogous to self-defense in thin rule of law and disanalogous from self-defense in thick rule of law.

For Walzer, *x* consists to a large degree in the domestic analogy, which has explanatory power for the entire doing/allowing inversion, not just proportionality permissions to kill in war. In that respect, it is decidedly conventionalist. It is, however, unclear whether it is a reductivist or a distinctivist explanation, though. On the one hand, Walzer is an unabashed distinctivist conventionalist who claims that collectivist moral principles apply to war and do not apply to domestic self-defense. He also explicitly claims that the domestic analogy only provides explanatory power for *jus ad bellum* judgments regarding the resort to war, not *jus in bello* judgments regarding combatants’ conduct of war. On the other hand, he also seems to claim that the domestic analogy explains individuals’ moral judgments to participate in war, which, according to his own account, is a decidedly *jus in bello* matter. For these reasons, I interpret

---

<sup>45</sup> Some will undoubtedly be unhappy with my use of ‘thin rule of law’ and ‘thick rule of law’ to connote one specific differentiating feature when, in fact, jurists draw many distinctions. I ask the reader for some patience, for I actually think the other distinctions also explain differences between the conventional morality of defense in war and the conventional morality of defense outside war, but I do not have space to treat them fully here.

Walzer to be inconsistent on whether the domestic analogy is reductivist or distinctivist. It seems to me that the correct way to interpret the domestic analogy is as a reductivist argument, for it is essentially an account of how a non-moral factor (type of rule of law) affects moral judgments about some cases of self-defense differently than other cases of self-defense. The core claim is that when the same type of rule of law is present in self-defense and war, moral judgments about doing and allowing are similar. A given non-moral factor affects moral judgments about domestic self-defense and war in the same way. I believe that Walzer mistakenly claims that the domestic analogy only applies to *jus ad bellum*, because he wants to make a broader argument that *jus ad bellum* and *jus in bello* are morally different. This is unnecessary, though, for the broader claim does not require the domestic analogy to be distinctivist.

None of Walzer's critics adequately treats his point about the moral significance of the distinction between thin and thick rule of law.<sup>46</sup> However, the mere fact that these critics all strawman the argument does not offer positive support for it. In fact, it suffers from major analytical weaknesses at the level of non-moral facts, moral principles, meta-ethics, and the relation between the three. Walzer assumes, probably correctly, that most readers' moral judgments about self-defense are similar to those associated with thick rule of law and dissimilar from those associated with thin rule of law. He therefore invites readers to imagine how thin rule of law would be different than the more familiar thick rule of law, imploring: should not these

---

<sup>46</sup> In *War and Self-Defense*, David Rodin distinguishes between the analogical approach (an analogy between war and individual self-defense) and the reductivist approach (war is simply an aggregation of many individual acts of self- and other-defense) and argues that neither can justify conventional moral judgments about war because they are irreconcilable with conventional moral judgments about self-defense. In response to Rodin's criticism, McMahan defends the domestic analogy by arguing that intuitions about the morality of self-defense are different depending on whether or not the act occurs in a society with police. Regrettably, however, McMahan fails to integrate that argument, which is a foundational linchpin for the reductivist approach, into any of his other work, including his book-length criticism of Walzer, *Killing in War*. For a more thorough treatment of this point see 'citation omitted for blind review.'

differences affect our judgments about the morality of self-defense?<sup>47</sup> Many are convinced by this approach. Upon considering the thought experiment, they decide that moral judgments in thin rule of law should be different. Others, however, consider the hypothetical and are unmoved. They decide that their initial moral judgments about self-defense are appropriate for thin and thick rule of law. A reasonable stalemate ensues. Those who respond to the thought experiment and modify their moral judgments are amenable to the domestic analogy; those who do not are critical of it.

### **3. Social Psychology and Non-moral Explanations for the Doing/Allowing Inversion**

I now turn to the task of providing a stronger positive argument for the domestic analogy that Walzer did. If the domestic analogy is correct and sustaining rule of law is sufficiently morally valuable, then the consistent application of DDA to cases of self-defense will generate different doing and allowing prescriptions, depending on whether the case takes place in thick or thin rule of law. Consider the following two cases:

*Thin Self-defense* – Albert lives in thin rule of law and must kill someone in order to defend himself. Due to facts about thin rule of law institutions, doing so is also necessary to sustain rule of law. DDA stipulates that killing one to save five is morally permissible, but killing one to save any less than five is impermissible. Sustaining rule of law is morally worth one hundred lives.

*Thick Self-defense* – Bob lives in thick rule of law and must kill someone in order to defend himself. Due to facts about thick rule of law institutions, doing so is not necessary to sustain rule of law. DDA stipulates that killing one to save five is morally permissible, but

---

<sup>47</sup> Walzer, 58-9; McMahan, “War as Self-Defense.” Walzer and McMahan both employ this strategy, and each account is remarkable in its own way. Walzer’s is remarkable because he normally inveighs against the use of hypothetical thought experiments and his argument for the moral reality of war is an empirical account of the convergence of moral judgment on the conventional morality of war. One might wonder why Walzer does not use an empirical-based account to argue for convergence of moral judgments about self-defense in thin rule of law, as I do later in this essay. McMahan’s is remarkable because he completely fails to account for and integrate his own argument for the domestic analogy in any of his other criticisms of the war convention.

killing one to save any less than five is impermissible. Sustaining rule of law is morally worth one hundred lives.

The two cases apply the same DDA to self-defense, but it is permissible to kill in *Thin Self-defense* and impermissible to kill in *Thick Self-defense*. The reason for the different moral judgments is necessity applied to rule of law institutions, but the difference in judgments is such that it is permissible to kill more people in *Thin Self-defense* than it is in *Thick Self-defense*. It is easy to focus on the difference in judgments and mistakenly perceive that the reason for the difference is inconsistent application of DDA, even though that is not the case. If individuals' moral judgments are sensitized to particular cases through socialization and socialization only prepares an individual to make good judgments about self-defense in thick rule of law, that individual would not perceive the effect that differences in rule of law can have on prescription. It would be very easy for such an individual to perceive that self-defense is always restricted in the way that it is in thick rule of law.

If these assumptions are true, then it will ordinarily be permissible for an individual in thin rule of law to kill in self-defense and it will ordinarily be impermissible for an individual in thick rule of law to kill in self-defense even though the same DDA applies to both contexts. The necessity of killing to preserve thin rule of law and the lack of necessity to do so in thick rule of law conjoin to make it appear that there are different moral judgments for doing harm in the two contexts, but this is not due to the DDA, it is due to necessity. If sustaining rule of law is morally valuable enough to justify killing five innocent people and acts of self-defense it is unnecessary for private individuals to kill anyone to sustain thick rule of law, then in those contexts, killing one to save four is impermissible. However, if it is necessary for individuals to kill five in order to sustain thin rule of law and it is proportionate, then it is permissible. In order to respond to this criticism, one must demonstrate that either (1) it is not necessary for defenders to inflict more harm

and suffer more harm to sustain thin rule of law than it is for defenders to sustain thick rule of law or (2) sustaining rule of law is not morally valuable enough to offset DDA . To my knowledge, no critic of the doing/allowing inversion has advanced either argument. Instead, they focus on contrasting their own judgments about cases of self-defense, which they believe reflect universal moral truths, with conventional moral judgments about war, which they believe are tainted by jingoistic bias.<sup>48</sup> When there is a conflict between the two sets of judgments, they recommend reforming the conventional morality of war so that it is consistent with their own moral judgments about self-defense. This methodology is specious, at best. Given the core premise of the domestic analogy, one might worry that philosophers' moral judgments about doing and allowing in self-defense could be the result of their good fortune to be raised in cultures one would expect to be adapted to thick rule of law. If so, their judgments could be apt for defense in thick rule of law and inappropriate for defense in thin rule of law, including acts of war. The basis for their criticisms of judgments about doing and allowing in war might be tainted by parochial cultural bias, rather than grounded in universal moral truth.

Does this parochialism concern have any empirical support? Despite the convergence of moral intuitions about doing and allowing in self-defense among philosophers, there is considerable divergence of such intuitions among ordinary folk. One need only take a cursory look at disagreements about 'stand your ground laws' in the contemporary United States to appreciate the fact that many people believe it is permissible to inflict a great deal of harm, such as homicide, in order to avert relatively slight harms, such as petty theft or moving from a place one has a moral and legal right to be.<sup>49</sup> If considerable disagreement casts doubt on the justification

---

<sup>48</sup> See, for example, McMahan's critique of Wittgenstein's participation in WWI in the introduction to *Killing in War*.

<sup>49</sup> There is a vast popular and legal literature on this phenomenon. See, for example, Catalfamo, Christine. "Stand Your Ground: Florida's Castle Doctrine for the Twenty-First Century." *Rutgers Journal of Law & Public Policy* 4 (Fall 2007); Drake,

for moral judgments, then philosophers' reliance on their own judgments about doing and allowing in self-defense is questionable. To my knowledge, no philosopher has provided a good argument for choosing their own judgments about doing and allowing in self-defense over the judgments of those who support stand your ground laws. Instead, these philosophers implicitly assert that their own judgments are *prima facie* justified.<sup>50</sup>

Perhaps critics could turn to moral psychology to substantiate (a) and (b). Many deontological intuitions originate in unconscious psychological traits.<sup>51</sup> It is unclear, however, whether or not any of these traits are the origin of intuitions that reduce or aggregate to the DDA.<sup>52</sup> There appears to be an analog in moral psychology, where a number of psychological traits tend to correlate with intuitions about DDA, but the correlation is far from perfect.<sup>53</sup> Furthermore, even

---

Denise M. "The Castle Doctrine: An Expanding Right to Stand Your Ground." *St. Mary's Law Journal* 39 (2007-2008); Holliday, Wyatt. "The Answer to Criminal Aggression is Retaliation: Stand-Your-Ground Laws and the Liberalization of Self-Defense." *University of Toledo Law Review* 43 (2011-2012); Jaffe, Mchelle. "Up In Arms Over Florida's New 'Stand Your Ground' Law." *Nova Law Review* 155 (2005-2006); Megale, Elizabeth B. "Deadly Combination: How Self-Defense Laws Pairing Immunity with a Presumption of Fear Allow Criminals to 'Get Away with Murder.'" *American Journal of Trial Advocacy* 34 (2010); and Levin, Benjamin. "A Defensible Defense?: Reexamining Castle Doctrine Statutes." *Harvard Journal on Legislation* 47 (2010).

<sup>50</sup> This problem is ubiquitous in the contemporary literature on the ethics of self-defense, but David Rodin, *War and Self-Defense* is a paradigmatic example.

<sup>51</sup> Mikhail, *Moral Cognition*; Jonathon Haidt, "The Emotional Dog and Its Rational Tail: A Social Intuitionist Approach to Moral Judgment," *Psychological Review* 108 (2001): 814-34, and "The New Synthesis in Moral Psychology," *Science* 316 (2007): 998-1002; Joshua Greene, *Moral Tribes: Emotion, Reason, and the Gap Between Us and Them* (Atlantic Books: New York, 2014); Greene, "The Secret Joke of Kant's Soul," in *Moral Psychology*, vol. 3, ed. W. Sinnott-Armstrong (Cambridge, MA: MIT Press, 2008), 35-79; Joshua Greene and Jonathon Haidt, "How (and Where) Does Moral Judgment Work?" *Trends in Cognitive Science* 6 (2002): 517-23; Joshua Greene, Sylvia Morelli, Kelly Lowenberg, Leigh Nystrom, and Jonathon Cohen, "Cognitive Load Selectively Interferes with Utilitarian Moral Judgment," *Cognition* 107 (2008): 1144-54; Cushman, Young, and Greene, "Multi-System Moral Psychology"; Liane Young and Lily Tsoi, "When Mental States Matter, When They Don't, and What That Means for Morality," *Social and Personality Psychology Compass* 7.8 (2013): 585-604; Young, et al., "The Neural Basis of the Interaction Between Theory of Mind and Moral Judgment," *Proceedings of the National Academy of Sciences of the United States of America* 104 (2007): 8235-40; Fiery Cushman, "Crime and Punishment: Distinguishing the Roles of Causal and Intentional Analyses in Moral Judgment," *Cognition* 108 (2008): 353-80.

<sup>52</sup> Cushman and Young, "Patterns of Moral Judgment Derive from Nonmoral Psychological Representations." *Cognitive Science* 35, 6 (2011): 1052-1075; Spranca, M. E. Minsk and J. Baron, "Omission and Commission in Judgment and Choice," *Journal of Experimental Social Psychology* 27 (1991): 76-105.

<sup>53</sup> See, for example, John Mikhail, "Any Animal Whatever? Harmful Battery and its Elements as Building Blocks of Moral Cognition," *Ethics* 124 (2014): 750-786.

if there are psychological traits that instill an intuition like DDA in nearly all of the subjects in these studies, this does not necessarily support critics of the domestic analogy, for almost none of the experimental subjects hail from cultures with thin rule of law. Most of the subjects in the experiments are undergraduate students at US or European universities. Even cross-cultural experiments including, for example, subjects from the US and India do not necessarily test the type of cultural variation that is germane to distinctions between types of rule of law. These subjects' intuitions could still be an artifact of cultural socialization adapted to thick rule of law, rather than species-wide adaptations to more general contexts.<sup>54</sup>

A study by Cushman, et al. provides a specific example of the general concern.<sup>55</sup> In one experiment, subjects were stressed in order to evoke a response in the sympathetic nervous system (a principal function of which is to stimulate the fight or flight response) and given a questionnaire including a supposed doing vs. allowing dilemma:

... imagine being on a lifeboat that would sink – killing all onboard – unless someone is thrown off. One person on the lifeboat is leaning over the side. Is it morally acceptable for you to push this person overboard in order to save the lives of the remaining passengers? How morally acceptable would it be for you to throw this person overboard in order to save the lives of the remaining passengers on a scale ranging from 1 (*completely unacceptable*) to 7 (*completely acceptable*).

Among subjects there was a correlation between stimulation of the sympathetic nervous system and an increased reluctance to opt to push the person overboard, indicating that the subjects may have an unconscious affective aversion to doing harm associated with autonomic threat-response. In a second experiment, subjects were asked to simulate harming researchers with fake weapons

---

<sup>54</sup> Joseph Henrich, Stephen J. Heine, Ara Norenzayan, "Most People are Not WEIRD: To Understand Human Psychology, Behavioural Scientists Must Stop Doing Most of their Experiments on Westerners," *Nature* 466.7302 (2010): 29.

<sup>55</sup> Cushman, Gray, Gaffey, and Mendes, "Simulating Murder: The Aversion to Harmful Action," *Emotion* 12.1 (2012): 2-7.

and to perform similar tasks without weapons (e.g. spraying a bottle instead of shooting a toy pistol). Subjects also witnessed researchers simulating violent harm to each other with fake weapons. Simulating doing harm tended to generate a stress response in subjects, even though they knew that the act would not harm anyone. Neither performing similar tasks without weapons nor witnessing simulated harm generated such strong stress responses. Cushman et al. concluded that subjects experienced an unconscious affective stress response to the harmful act itself, independent of expected outcomes. In other words, the aversion was to means, independent of ends. There was no such means-dependent affective response for acts that allow harm, indicating an asymmetry between outcome-independent aversion to doing and allowing harm. The former is quite powerful; the latter does not exist.

Cushman, et al.'s study provides many useful insights and it might seem like strong evidence for a species-wide psychological mechanism that underlies the moral intuition that doing is worse than allowing, but this is not an externally valid interpretation of the experiments. The dilemma in the questionnaire is hardly an equalized case of doing versus allowing, for it involves both inflicting direct harm and harming another as a means, distinctions that are known to be intuitively significant and, as the vast trolley literature highlights, are not the same as DDA.<sup>56</sup> Even if it were a clean case of DDA, the boat dilemma is not a case of sustaining rule of law. Additionally, as in the majority of moral psychology studies, the test subjects were overwhelmingly undergraduate students from societies with thick rule of law. Therefore, the

---

<sup>56</sup> Mikhail, *Moral Cognition*; Mikhail, "Any Animal Whatever..."; "Joshua Greene, *Moral Tribes*; Greene and Cushman, "Pushing Moral Buttons: The Interaction Between Personal Force and Intention in Moral Judgment," *Cognition* 111.3(2009): 364-371; Fiery Cushman, "Crime and Punishment: Distinguishing the Roles of Causal and Intentional Analyses in Moral Judgment," *Cognition* 108 (2008): 353-80; Cushman, Young, and Hauser, "The Role of Conscious Reasoning and Intuition in Moral Judgment: Testing Three Principles of Harm," *Psychological Science* 17.12 (2006): 1082-1089; Phillipa Foot, "The Problem of Abortion and the Doctrine of the Double Effect," *Oxford Review* 5 (1967): 5-15; J.J. Thomson, "Killing, Letting Die, and the Trolley Problem," *The Monist* 59.2 (1976): 204-217; Thomson, "Self-Defense," *Philosophy & Public Affairs* (1991): 283-310; Thomson, "Turning the Trolley," *Philosophy & Public Affairs* 36.4 (2008): 359-374.



results do not generalize or provide insight into the distinction we are interested in: do subjects from thin rule of law have deontological intuitions about doing and allowing in order to sustain rule of law that are different than subjects' intuitions from thick rule of law? My point is not that Cushman et al.'s study or the field of moral psychology tell us nothing about the psychology of violence. To the contrary, they provide many interesting insights. However, they frequently do not study equalized intuitions about the DDA, do not study intuitions about cases where sustaining rule of law is a witting or unwitting end of action, and use subject pools that lack the type of cultural variation needed to confirm or deny psychological heterogeneity germane to the domestic analogy. Using such studies to criticize the doing/allowing inversion would be a mistake. In order to avoid this pitfall, one should turn to studies that compare (a) intuitions about situations relevant to sustaining rule of law in subjects from cultures that might be adapted to thin rule of law with (b) intuitions about analogous contexts in subjects from cultures that might be adapted to thick rule of law.

Critics of the domestic analogy might then turn to empirical 'research' that claims a large number of combatants in war either refuse to kill enemy combatants or intentionally miss enemy combatants. The linchpin of this research is S.L.A. Marshall's claim that his interviews with US WWII combatants revealed that 75-85% avoided killing enemy combatants, even when they were under direct enemy threat.<sup>57</sup> If true, this might be evidence for a fundamental psychological aversion to harming that manifests itself on the battlefield that is not overridden by a comparable psychological propensity to kill. This 'research', however, is, to put it mildly, specious. The oft-cited study on firing ratios by S.L.A. Marshall has no existing data to support the conclusions,

---

<sup>57</sup> S.L.A. Marshall, *Men Against Fire: The Problem of Battle Command* (Norman: University of Oklahoma Press, 2000).

prompting one historian to argue that Marshall's data "appears to have been an invention."<sup>58</sup> Historical studies do demonstrate that kill rates were much lower than one would expect on many battlefields, but it is a stretch to say that this phenomenon was caused by a psychological aversion to harm, rather than, say, fear-induced inaction or running away.<sup>59</sup> War memoirs and historical accounts report that combatants often feel a blinding hatred for the enemy accompanied by a strong desire to kill, induced by a number of factors common to combat, especially close combat. Until better research substantiates the claim about firing ratios *and* the causal mechanism for the firing ratios (if the truth of the unsupported claim is borne out by the evidence), it is best to treat such 'research' as if it does not exist, for it lacks the scientific rigor to bear the weight of serious scrutiny.

Revising the domestic analogy by turning to actual moral judgments about self-defense within societies adapted to thin rule of law might be a better means to address the concern with jingoism. By isolating the effect of differences between rule of law, a plausibly strong justification for different moral judgments, from the effect of jingoistic bias, a far more specious justification for different moral judgments, it might test the degree to which the doing/allowing inversion reflects epistemically justified moral judgments. To the degree differences between rule of law engender a doing/allowing inversion between judgments about self-defense in thick rule of law and judgments about self-defense in thin rule of law, we should expect the same differences to engender an epistemically justified doing/allowing inversion between judgments about self-defense in thick rule of law and judgments about war. To the degree differences between rule of law do not engender a doing/allowing inversion between moral judgments about self-defense, we

---

<sup>58</sup> Roger Spiller, "S.L.A. Marshall and the Ratio of Fire," *Royal United Services Institute Journal* (Winter 1988): 63-71; for additional critiques, see, Joanna Bourke, *An Intimate History of Killing* (London: Granta, 1999).

<sup>59</sup> John Keegan, *The Face of Battle* (New York: Viking, 1976).

should suspect that other influences, such as jingoistic bias, engender an epistemically unjustified doing/allowing inversion between the conventional morality of self-defense and the conventional morality of war.

The best place to look for such a comparison is social psychology work on cultural norms of violence. Nisbett and Cohen's *Culture of Honor: The Psychology of Violence in the South*, a study of the origins of different cultural attitudes towards violence within the United States, is perhaps the most useful.<sup>60</sup> The US has very different self-defense norms in the North than it has in the South. In the North, most people believe that it is disproportionate to kill in self-defense to protect anything less valuable than one's life. If a victim can retreat or appease an aggressor by suffering slight injustice, then that victim is supposedly obligated to do so. In the South, though, most people believe that it can be proportionate to kill in self-defense to avoid slight injustice, such as giving up one's right to be in a particular place or one's right to five dollars. The apparently radical difference between Northern and Southern beliefs about proportionality in self-defense is reflected in state law – Northern state law tends to require private citizens to retreat, but most Southern states have 'stand your ground' laws that permit private citizens to kill aggressors, even when there are retreat and appeasement options that incur low costs. Although it is not enshrined in law, Southerners also tend to believe that private citizens have a duty to stand up to aggression. The duty is especially stringent for men, who "are expected to lay themselves on the line for noble causes."<sup>61</sup>

Nisbett and Cohen persuasively argue that differences between Northern and Southern beliefs are attributable to cultural adaptation. Northern ancestors predominantly hail from regions

---

<sup>60</sup> Richard Nisbett, *Culture of Honor: The Psychology of Violence in the South* (Boulder: Westview Press, 1996).

<sup>61</sup> Nisbett and Cohen, *Culture of Honor*, 93-4.

of England with thicker rule of law and Southern ancestors hail from areas of Scotland and Ireland with thinner rule of law. In the societies in which Northern ancestors lived, effective police achieved deterrence and defeated continuous threats, such as serial murders and organized crime. Therefore, for private citizens, standing one's ground was unnecessary to defeat, deter, and punish aggression. Northerners' English ancestors culturally adapted to these conditions by developing norms that included relatively more restrictive notions of proportionality and less demanding duties to protect. Individuals in such cultures internalize norms according to which it is only permissible to inflict lethal harm against imminent and grave threats (e.g. a threat to one's life) and assert that it is almost never required for private citizens to assume significant risk in self- and other-defense. In contrast, Southerners' ancestors lived in the thin rule of the law in Scotland and Ireland, where there were no police to defeat, deter, and punish aggression. In such social conditions, appeasing threats of slight harm or running away invites aggression and undermines rule of law. Southerners' Scottish and Irish ancestors adapted by developing a 'culture of honor' that included relatively more permissive notions of proportionality and treated self-defense as a duty. Individuals in such cultures are expected to absorb serious harms, including death, in order to defend themselves against all aggression, no matter how slight.

Hodding Carter's account of jury duty in 1930's Louisiana is representative of the less stringent duty against doing harm in Southern culture. The jury heard a case in which a man who was teased for quite some time shot at the disrespectful hecklers, injuring two and killing a completely innocent bystander. The non-moral facts of the case were not in dispute; the only question concerned the judgment of the act. Carter, was certain the verdict would be guilty, but he was wrong. His account is telling:

“Well, gentlemen,” I said after a quick mental rehearsal, “there's no disagreement over what the verdict should be, is there?”...

“Couldn’t be,” one of the farmer-jurors, said...

“Well,” I said, “Then he’s guilty.”

The responses were, loud, immediate, and confused. The voice of the first juror rose above the others. “Good God Almighty, bub,” he said. “He ain’t guilty. He wouldn’t of been much of a man if he hadn’t shot them fellows.”...

The nine farmers voted for acquittal. One of them patted me on the back and said in a friendly way, “Son, you’re a good boy but you got a lot to learn. You can’t jail a man for standing up for his rights.”<sup>62</sup>

The convergence of moral judgment in this case is fairly widespread in the South, as evinced by the prevalence of ‘stand your ground’ laws.<sup>63</sup> It is not constrained to the Southern US either. Honor cultures with similar moral judgments about doing harm and allowing harm exist among Andalusians, Corsicans, Sardinians, Druze, Bedouins, Kabyle, and Sarakatsani, all of whom have histories with thin rule of law.<sup>64</sup>

The analogy between war and individual defense in thin rule of law and the disanalogy between war and individual defense in thick rule of law now comes to the fore. Honor cultures’ moral judgments about the doing/allowing distinction in self-defense are consistent with the conventional morality of war. The man on trial in Louisiana responded to heckling, a form of lesser aggression, by wounding two and killing an innocent bystander as ‘collateral damage.’ Yet his action was endorsed, not just excused, by the jury. He was not required to accept great personal

---

<sup>62</sup> Hodding Carter, *Southern Legacy* (Baton Rouge: Louisiana State University Press, 1950), 50-1.

<sup>63</sup> *Supra* 15. For more historical evidence, see H.C. Brearley, “The Pattern of Violence,” in ed. W.T. Couch, *Culture in the South* (Westport, Connecticut: Negro University Press, 1970): 678-698.

<sup>64</sup> J. Black-Michaud, *Cohesive Force: Feud in the Mediterranean* (Oxford: Basil-Blackwell, 1975); D. D. Gilmore, *Manhood in the Making: Cultural Concepts of Masculinity* (New Haven: Yale University Press, 1990); J.G. Peristiany, *Honour and Shame: The Values of Mediterranean Society* (London: Weidenfield and Nicolson, 1965); G.O. Fisek, “Turkey: Understanding and Altering Family and Political Violence,” in A.P. Goldstein and M.H. Segall, eds., *Aggression in Global Perspective* (New York: Permagon, 1983). Nisbett and Cohen, *A Culture of Honor*, 6.

cost in this case, but honor cultures consistently demand that individuals accept great personal cost, including death, to confront aggression.<sup>65</sup> Thus, moral judgments about the doing/allowing distinction are similar in cultures adapted to thin rule of law, and there is good empirical evidence that the adaptation occurs because it is necessary to inflict more harm and accept more harm in order to sustain rule of law. It is plausible that the conventional morality of war has similar moral judgments about the doing/allowing distinction for similar reasons.

#### **4. Social Psychology and Moral Intuitions about Doing and Allowing**

Differences in moral judgment do not entail differences in deontological intuitions though. Individuals adapted to thin rule of law may have the same intuitions as those adapted to thick rule of law, because the adaptation could occur solely at the level of considered moral judgment. If this were true, we would expect Southerners and Northerners to have similar unconscious cognitive framing and affective responses to stimuli, but they would consciously deliberate about the stimuli in different ways. The conscious deliberation would lead to different behavior, rather than unconscious cognitive and affective traits. For example, Southerners could be more desensitized to their intuitions than Northerners, facilitating a greater propensity to override intuitions and make a conscious decision to use violence, rather than a subconscious intuitive motivation to resort to violence.

Cultural adaptation probably does influence deliberate moral reasoning at the conscious level, but evidence suggests that it also influences intuitions. Southerners cognitively frame and affectively respond to situations differently than Northerners *at the unconscious level* and these differences motivate Southerners to commit unilateral violence more frequently and in reaction to

---

<sup>65</sup> Ibid.

a much broader set of contexts than Northerners. Southerners were more likely to immediately respond to being bumped with outward signs of aggression, a fast reaction unlikely to result from conscious deliberation. When bumped, Northerners' cortisol (a hormone associated with stress-response) level tended to drop and Southerners' tended to increase dramatically. Both Northerners and Southerners experienced a testosterone (a hormone known to motivate violent aggression) boost, but the latter's was many times greater than the former's. In a questionnaire, Southerners were far more likely to interpret the ambiguous act as an insult and to believe that the scenario would end with aggression. Southerners were also more likely to express a belief that being bumped in a hallway damaged their masculine status.<sup>66</sup> However, Southern subjects did not demonstrate variance in cognition, affect, or behavior depending on the publicity of the act (i.e. whether or not witnesses were present), prompting Nisbett and Cohen to ponder, "This is somewhat problematic, since the presumed reason that members of a culture of honor find an insult so upsetting is that it lowers one's reputation for being able to defend oneself. If the insult occurs in public, reputation is at stake to a much greater degree."<sup>67</sup> I posit that the subconscious cognitive and affective differences provide a plausible answer to the puzzle. If Southerners were overriding intuitions with considered judgment they would act the way Nisbett and Cohen expected them to. However, if cultural adaptation affected Southern cognitive framing and affect at the subconscious intuitive level, then the results make sense. Southerners internalized a culture of honor that cognitively interpret stimuli (e.g. being bumped) and engender affect (e.g.) that motivates the Southerner to respond with violence. These subconscious traits affect the Southerners' moral seemings in faster reactions and slower, deliberate actions, but the influence always occurs at the

---

<sup>66</sup> Nisbett and Cohen, *Culture of Honor*, 41-53.

<sup>67</sup> Nisbett and Cohen, *Culture of Honor*, 53.

unconscious level. More empirical research is needed to illuminate the subtleties of the psychological mechanisms underlying these intuitions and their development, but the evidence clearly suggests that Southerners have different intuitions than Northerners, and the fact that Southerners' reactions are unaffected by publicity suggests intuitive differences do most of the work in producing more violent behavior. This is especially clear when members of honor cultures sacrifice their very lives in the name of honor and for reasons that appear trivial to some people from other cultures. How could that possibly be the result of consciously overriding intuitions in order to achieve deterrence for oneself? It is much more plausible that the culture of honor engenders a very strong unconscious moral seeming that it is better to die honorably than it is to live dishonorably. "Death before dishonor," etc.

Additionally, in cultures adapted to thin rule of law, honor is given and accepted as a *prima facie* justification for violence. Members of the jury with Hodding Carter said the accused would not have been a "true man" had he not confronted the heckling, and Arab and Persian honor cultures frequently use the term *izzat*, which "crops us as a kind of final explanation for motivation, whether for acts of aggression or beneficence."<sup>68</sup> These justifications for violence indicate the presence of moral intuitions that individuals perceive "without argument... are and must be true."<sup>69</sup> One should note the similarity between this phenomenon and what Jonathon Haidt calls 'moral dumbfounding.' Haidt notes that people tend to find certain acts intuitively morally abhorrent, even though they often cannot provide reasons for their intuitions. Rather than revise their intuitions, individuals tend to rationalize the intuitions or simply resort to the brute claim, "I don't

---

<sup>68</sup> D. G. Mandelbaum, *Women's Seclusion and Men's Honor*, found in Nisbett and Cohen, *Culture of Honor*, 5.

<sup>69</sup> J. Harrison, "Ethical Objectivism," in P. Edwards (ed.), *The Encyclopedia of Philosophy*, (New York: Palgrave MacMillan, 1967), 71-75.



know; I can't explain it; I just know it's wrong."<sup>70</sup> Men in honor cultures justify their intuitions about violence in a similarly simple and irreducible manner, "It is required because honor demands it; that is all that need be said," or simply, "*izzat*."

The adaptation of unconscious intuitions also explains an important link between honor cultures and thin rule of law. Nisbett and Cohen frame their explanation of differences between the Northern and Southern psychology of violence as a matter of individual adaptation to anarchy. Without police, individuals must have a reputation for violence and willingness to suffer harm in order to protect the individual and the individual's family. The intuitions in an honor culture do much more than this though, regardless of whether or not individual members are witting. By motivating many individuals to respond to aggression, these intuitions create a society wide expectation that aggression will be met with violent retribution. Acts of self-defense are thus often simultaneously acts of other-defense to the degree they create the expectation that all or most men will respond violently to aggressive acts. Once that expectation achieves a critical mass of credibility, it becomes widely known, accepted, and enforced – establishing thin rule of law. The individual members of the society need not make conscious decisions to establish or sustain thin rule of law, nor do they need to be aware that they are contributing to establishing or sustaining it when they live according to their moral intuitions. Nonetheless, the adaptation often comes about in cultures that inhabit certain types of environments, establishing, sustaining, and becoming partly constitutive of thin rule of law.

Armed with this understanding of intuitions, let us return to philosophical argumentation about the domestic analogy and the doing/allowing inversion. Philosophers almost always have radically different intuitions about doing and allowing harm in self-defense than members of honor

---

<sup>70</sup> Haidt, "The Emotional Dog and Its Rational Tail..."

cultures, and these differences affect moral reasoning in dramatic ways. Philosophers have intuitions about self-defense well-adapted to the necessities of thick rule of law, but when they think about the domestic analogy, they start with those intuitions and pose a hypothetical about what thin rule of law would be like. Then they deliberate the hypothetical and come to a considered moral judgment that either overrides their intuitions or not. They must use their imagination and reasoning to understand that their intuitions are inappropriate for thin rule of law. Members of honor cultures, such as the Bedouin, have the opposite approach. One need not argue for the permissions to kill and duties to die in war and thin rule of law; those norms are intuitive to the Bedouin. However, if the Bedouin are no longer in thin rule of law, if the state establishes thick rule of law institutions, it is very hard to convince them that their intuitions are maladapted for that context. One must explain what thick rule of law is like, how it differs from thin rule of law, and why this should affect moral judgments about doing and allowing harm in self-defense. The Bedouin might then override his intuitions with a considered moral judgment, or he might not.

This empirical fact should give us pause when philosopher use hypothetical thought experiments about self-defense to criticize the conventional morality of war, including the doing/allowing inversion, as they are wont to do. The choice of their intuitions over the Bedouin's is worse than parochially arbitrary, it is parochially misleading, for the philosophers' intuitions are adapted to conditions radically disanalagous from war and the Bedouin's intuitions are adapted to conditions analogous to war. If any preference should be given, it is to the Bedouin. Some may reject the link between any intuitions and moral facts. That is fine. They should still agree that preferring intuitions clearly maladapted to war and claiming that they tell us moral facts about war is inappropriate. It is noteworthy, though, that the doing/allowing inversion is a spectrum, rather than a dichotomy. Moving from doing and allowing in self-defense in thick rule of law as one

extreme, it shifts to the conventional moral beliefs about policing in thick rule of law, then emergency policing, then counterterrorism warfare, and, finally, doing and allowing in conventional war. It is believed to be increasingly permissible to harm innocents and increasingly obligatory to accept harm carrying out acts of defense as one moves along the spectrum. Honor cultures' conventional morality of self-defense in thin rule of law is not at the same point on the spectrum as any of these phenomenon, because it is adapted to contexts analogous to but not the same as policing, unconventional war, and conventional war. Much of this has to do with the increased effectiveness of policing in thick rule of law and the need to not only sustain, but actually restore, rule of law in the more extreme contexts (e.g. unconventional war). Restoring rule of law and transitioning from thin to thick rule of law are complicated processes that require separate treatment. Still, the presence of a doing/allowing spectrum that predictably tracks non-moral facts about rule of law institutions creates a presumption, or at least the plausible prospect, that the doing/allowing inversion tracks deep moral truth.

## Chapter Four

### **The Internal Consistency of the Conventional Morality of War: Military Necessity, Command Responsibility, and the Duty to Obedience**

Recent debates regarding the ethics of war seem to turn on the relationship between law and morality. One commonsense view, which is arguably the most influential in contemporary practice and judgment, is that moral prescriptions in war coincide or mostly coincide with legal prescriptions in war generated by the Law of War (LW). This ‘orthodox’ view can be contrasted with the ‘revisionist’ view that moral prescriptions in war are often radically different than corresponding legal prescriptions. According to revisionists, it is a ubiquitous conventionalist mistake to believe that the law of war reflects objective morality.

Perhaps the clearest and most fundamental instance of the divergence between orthodoxy and revisionism concerns the demarcation of LW into two supposedly distinct categories: *jus ad bellum* and *jus in bello*. *Jus ad bellum* regulates the resort to war and consists of criteria that determine whether an overall war is legal or criminal. Legal responsibility for *jus ad bellum* lies solely with the highest levels of strategic leadership; soldiers, sailors, and airmen (hereafter, referred to by the umbrella term ‘combatants’) are not criminally liable for illegal wars that they fight in. Furthermore, the category of law for which combatants bear legal responsibility – the *jus in bello* that regulates conduct in war – imposes the same legal requirements on all combatants, regardless of the *jus ad bellum* legality of the wars they fight in. In the law of war, combatants are never legally responsible for *jus ad bellum* and *jus ad bellum* has no effect on the *jus in bello* responsibilities that they do have. Strategic leadership, especially politicians, bear legal responsibility for *jus ad bellum*; combatants have an absolute exemption from legal responsibility for the same. Following legal experts, orthodox and revisionist just war theorists agree that LW

is divided between *jus ad bellum* and *jus in bello*. Where orthodox and revisionist just war theorists disagree is whether or not the demarcation reflects a deep moral distinction. Orthodox just war theorists tend to be collectivists who think that the demarcation does reflect a deep moral distinction because there are collectivist moral reasons that apply to *jus ad bellum* that do not apply to *jus in bello*. Revisionist just war theorists tend to think that the same moral reasons apply to *jus ad bellum* and *jus in bello*. Reductivists tend to think that this is because there are no collectivist moral reasons. Therefore, most revisionists are individualists.

I will not focus on the collectivist/individualist divide in this chapter. Rather, my aim is to show that lawyers, revisionists, and orthodox just war theorists commit a mistake when they treat *jus ad bellum* and *jus in bello* as conceptually distinct in law. That is, they commit a mistake of law. Furthermore, orthodox just war theorists probably commit a mistake of morality when they treat *jus ad bellum* and *jus in bello* as conceptually distinct in morality. Even if orthodox just war theorists do not commit a mistake when they treat *jus ad bellum* and *jus in bello* as conceptually distinct in morality, they do so for the wrong reasons. Therefore, they commit some species of mistake of morality. For their part, revisionist just war theorists probably correctly assert that there is no deep moral difference between *jus ad bellum* and *jus in bello*. However, they overlook the epistemic excusing conditions that underlie the appearance of a distinction between *jus ad bellum* and *jus in bello*. Therefore, they also commit a moral mistake when they describe the deep morality of war that undergirds *jus ad bellum* and *jus in bello*. To begin correcting these mistakes, I will correct for the mistake of law and then explore the possibilities for correcting the mistakes of morality.

## 1. The Internal Inconsistency Argument

Both orthodox and revisionist just war theorists employ reflective equilibrium as moral method. One employs reflective equilibrium by comparing one's considered judgments about cases and one's considered judgments about moral principles. Each of one's considered judgments are members of a set of one's moral beliefs. If all of the members of one's set of moral beliefs can be reconciled with each other in a consistent manner, then the set is considered to be coherent. Achieving coherence within an appropriately inclusive set of moral and non-moral beliefs is considered to provide a strong reason to believe that each member of the set is a justified belief. However, if one cannot achieve such coherence, this counts as a strong reason to believe that one or more of the judgments within the set are unjustified and ought to be modified until coherence is achieved.<sup>71</sup>

Among the apparent inconsistencies in the conventional morality of war, just war theorists are especially concerned with the apparently inconsistent judgments that (a) combatants are not morally or legally responsible for *jus ad bellum* and (b) combatants are morally and legally responsible for *jus in bello*.<sup>72</sup> Whereas orthodox just war theorists attempt to justify this apparent incoherence of the conventional morality of war by appealing to a special collectivist morality of war, revisionists see it as fundamentally problematic. Revisionists argue for what I will call the 'internal inconsistency phenomenon': if the relevant factors and principles are applied consistently to combatants, then one cannot generate prescriptions consistent with (a) and (b) simultaneously.

---

<sup>71</sup> There is room to explore the relationship between coherence and the importance of correcting for hypocrisy here. One widely held criticism of reflective equilibrium is that it is too conservative. However, it is progressive in the sense that it facilitates the correction of hypocrisy. I will not fully describe or respond to those issues here.

<sup>72</sup> Michael Walzer, for example, writes, "I am not sure whether the moral reality of war is wholly coherent," while discussing the *jus ad bellum/jus in bello* distinction. Walzer, *JUW*, p. 22.

Therefore, revisionists believe that the *jus ad bellum/jus in bello* distinction in the conventionalist morality of war is irresolvably incoherent.

Revisionists apply reflective equilibrium to the internal inconsistency phenomenon to advance the 'internal inconsistency argument': (a) and (b) are incoherent and, therefore, one or both judgments are unjustified beliefs. In order to achieve coherence, revisionists almost uniformly prescribe jettisoning (a) in favor of the judgment that combatants are at least sometimes morally responsible for *jus ad bellum* in the wars in which they fight. This is supposedly the best way to restore coherence between one's considered moral judgments about cases of *jus ad bellum* and *jus in bello* and principles in the morality of war. It is worth quoting revisionist Jeff McMahan at length on this point, for he, as he so often does, most clearly articulates a more widely held revisionist argument.

A second doubt about the consistency of our beliefs is whether the view that unjust combatants are excused for participation in an unjust war is compatible with the view that neither they nor just combatants are in general excused for violations of the rules governing the conduct of war. The common view is, in Walzer's words, that when a combatant "violates the rules of war, superior orders are no defence. The atrocities he commits are his own; the war is not." Although we do not regard unjust combatants as culpable and do not hold them legally liable for participation in an unjust and illegal war, we do hold them morally accountable, as well as individually liable under international criminal law, for the commission of war crimes. Yet the conditions that most people think excuse or even justify participation in an unjust or criminal war are often present to an equal or even greater degree when combatants commit war crimes by violating the rules of war. How can these conditions fail to excuse violations of *jus in bello* when they do excuse the violation of *jus ad bellum* that is involved in participation in an unjust and criminal war?<sup>73</sup>

---

<sup>73</sup> McMahan, *Killing in War*, 126.

The argument is straightforward. If the same moral principles are applied to combatants' decisions to participate in war and their decisions about how to conduct themselves in war, then those principles ought to either exculpate combatants of both kinds of violations or exculpate them of neither. If we treat 'like cases alike,' then combatants are morally responsible for *jus ad bellum* and *jus in bello* or they are morally responsible for neither. It is the ubiquitous revisionist position that combatants are morally responsible for both.

The aforementioned point is especially salient in conditions of uncertainty and risk. Orthodox just war theorists sometimes argue that combatants are usually unsure whether or not the particular war they are ordered to fight in is just. In the context of uncertainty and risk, they are at least permitted and may even have the duty to follow orders and participate in the war. Revisionists treat this objection explicitly and reject it on the grounds that it is inconsistent with the way the conventional morality treats obedience to orders in the context of *jus in bello*. They, along with many of their orthodox opponents, claim that the law of war and the conventional morality of war reject the 'obedience to orders' defense in the case of *jus in bello* war crimes. Again McMahan provides the clearest articulation of the more widely held revisionist position:

War crimes are often committed, not on the initiative of the perpetrator, but in response to orders... Just as there is often considerable uncertainty about whether a war is just, so there can also be uncertainty about whether an individual act of war is permissible... Even if we assume that *in bello* morality coincides with *in bello* law, and even if the legal rules are clear and explicit, there can also be uncertainty about their application in particular circumstances. A combatant might receive an order to fire on children whom his commander has identified as child soldiers; or he may be ordered to destroy a house in a civilian area in which his commander claims that enemy combatants are sheltering; or may be ordered to fire on enemy combatants who appear to be trying to surrender, though his commander insists that their signals are only a ruse intended to lure his forces into a trap. Are such orders unlawful? The answer may depend on whether the commander's factual claims are true, which is a matter about which the combatant may have good reason to



disagree with the commander... So it seems that the same conditions that are commonly thought to excuse participation in an unjust war are also present in at least some instances in which combatants commit war crimes. This leaves us with several options. We can argue that there are differences between the *ad bellum* and *in bello* contexts that in general give duress and uncertainty a greater excusing effect in the former than in the latter. Or we can deny that these excuses have much force in either context and thus accept that unjust combatants are generally blamable, even when they scrupulously adhere to the laws of warfare. Or we can accept that duress and uncertainty have considerable mitigating force in both cases, thereby abandoning the idea that combatants are generally culpable for the commission of war crimes... If this is right, the simple account according to which unjust combatants who fight within the rules are excused while war criminals are not is too simple to be sustainable.<sup>74</sup>

It is worth highlighting some of the key claims and structure of this more specific formulation of the 'internal inconsistency argument'. The structure of the argument is thus:

P1: One's judgments about cases should reflect a consistent application of uniform moral principles (i.e. like cases ought to be treated alike)

P2: The commonsense morality of war, which is mostly coincident with the law of war, claims that combatants have a *respondeat superior* defense in matters of *jus ad bellum* and absolute liability in matters of *jus in bello*. That is, one always has a justification or excuse for obeying orders to participate in a war, regardless of the overall justification for the war. One never has a justification or an excuse for obeying orders to commit a war crime during the conduct of war (e.g. torturing prisoners, committing perfidy, intentionally targeting non-combatants, violating necessity, violating proportionality, etc.)

---

<sup>74</sup> Ibid, 127-8.

P3: Lesser evil justifications, rights forfeitures, epistemic challenges and duress are the reasons for granting justifications and excuses for inflicting harm during war.

P4: Combatants face similar duress and epistemic challenges when (1) they comply with orders to go to war as they do when (2) they comply with orders to carry out acts within war.

Therefore, a consistent application of these considerations should lead to a different legal and moral prescription than the existing view expressed in P2 reflecting an inconsistency.

---

C: In order to resolve this inconsistency, we should acknowledge that combatants are responsible for disobeying some *jus ad bellum* orders and are not responsible for disobeying some *jus in bello* orders.

The problem with this argument, which is generally accepted by both revisionists and their critics, is that P2 and P4 are false and reflect a fundamental misunderstanding of the law of war that corresponds to the conventional morality of war. In other words, critics and apologists for the conventional morality of war fundamentally misunderstand how the obedience to orders defense functions in conventional *jus in bello* judgments. It is to this point that I now turn.

## **2. The Structure of the Law of War**

LW is often believed to be unique in international law because it sometimes ascribes legal responsibilities to individuals, whereas the rest of international law – human rights law (HRL), for example – ascribes legal responsibilities almost exclusively to states. To conceptualize LW in this way is often misleading, however. LW should be understood, at least partly and probably mostly, as a set of legal responsibilities that are primarily state responsibilities, even though it also uniquely

(for international law) ascribes legal responsibility to individuals. There are several reasons to think so.

First, states are responsible for criminal wars. It is true that the strategic political leadership of states solely bear criminal responsibility for *jus ad bellum* decisions, but states can also be sued for reparations for costs incurred during illegal wars.

Second, states are responsible for communicating, training, and enforcing *jus in bello* obligations within their own militaries. Thus, it is the United States' responsibility to train its own combatants, to supervise them, and to discipline them for infractions. It is only when a state is incapable of or unwilling to carrying out these functions – perhaps because the state institutions are destroyed or dissolved – that the international community steps in to try individuals for war crimes. For example, the Nuremburg Tribunals and Tokyo Tribunals occurred after the German and Japanese governments were dissolved and replaced by international occupation forces. When the international community does try individuals for war crimes, it does so with a full understanding that a state structure was in place during the war. The nature of the state structure informs who is brought to trial and why. This raises the question: how do international tribunals ascribe individual responsibility for *jus in bello* violations? Leaders are brought to trial for command responsibility, which can take the form of direct orders or negligence for failing to implement good order and discipline regarding compliance with *jus in bello*. Subordinates are brought to trial for following manifestly illegal orders, which only comprise a relatively small subset of all illegal orders. Subordinates are not brought to trial for following orders that may be illegal but are not manifestly so, even when their superior officers are prosecuted and placed under legal scrutiny for issuing the orders.

Thirdly, LW delimits the state's right to issue orders. By placing limits on what is permissible in the conduct of war, LW communicates to soldiers the limits of their state's right to demand obedience in time of war. In war, the international community assumes that combatants have a *prima facie duty* to obedience, and *jus in bello* prescribes the conditions under which the state has no such right and combatants have a duty to disobey. The stringency of the state's legal right to demand obedience can be quite exacting. It often permits serious punishment for illegal disobedience, up to and including capital punishment. The combatant's legal duty to disobey illegal orders is also stringent; threat of capital punishment only partially mitigates the defendant's culpability for knowingly violating *jus in bello*.

It is the conjunction of the second and third points that I wish to emphasize. LW delimits the state's right to demand obedience, partly by requiring individual combatants to disobey orders that manifestly violate *jus in bello*. It is a common mistake to view this fact as an absolute duty of combatants to disobey all illegal orders. However, prosecutors frequently discriminate between orders that are legally suspect from the subordinate's vantage and orders that are manifestly illegal from the subordinate's vantage. In the former case, prosecutors subject the officers who issue the suspect orders to criminal prosecution, but they do not subject the subordinates who follow the orders to criminal prosecution. In the latter type of case, both officers and subordinates are subject to criminal prosecution. Since the vast majority of cases involving subordinate violations of *jus in bello* that are prosecuted involve manifestly illegal acts, case law tends to include rejections of the 'I was following orders' defense in an overwhelming majority of cases. However, the acceptance of the 'I was following orders' defense is clearest in cases where superior officers are called to account for issuing suspect orders, but subordinates are not called to account at all for following those same orders. Let us now turn our attention to such an illustrative case, the trial of

Nazi general Lothar Rendulic at Nuremburg, and the absence of any such trial for Rendulic's subordinates.

Following World War II, the Allies conducted tribunals at Nuremburg to try Nazi leaders for war crimes. German General Lothar Rendulic was indicted on several counts, one of which was “plundering and pillaging public and private property, and wantonly destroying cities, towns, and villages *for which there was no military necessity.*”<sup>75</sup> The facts germane to the charge were generally agreed upon. During October 1944, General Rendulic faced a trying situation as commander of Germany's 20<sup>th</sup> Mountain Army in Finland. To the east, vastly superior Soviet troops advanced on his position. A deliberate defense against such odds was untenable. However, the only avenue for retreat was to the west across treacherous arctic terrain. As a result, it looked as though his forces could not move fast enough to escape the Russian advance, even if they fled. They seemed to face a nearly certain rout at the hands of the Red Army. In order to avoid such a fate, Rendulic believed that the 20th had one option with any hope of success – razing the countryside as they withdrew towards Norway. Aiming to put an increased strain on enemy logistics and deny them navigational assistance from native Finns, Rendulic ordered his troops to “ruthlessly” evacuate the entire civilian population and burn their homes, leaving nothing but tundra and ashes in their wake. If the Russians had to supply themselves with food and find their own way through the snow, they might move slower, giving German forces an opportunity to escape. The Nazi soldiers carried out Rendulic's order with typical effectiveness, destroying all civilian infrastructure they encountered, including villages, isolated homes, roads, and port facilities. After three months of laying waste to Finland and moving westward, the 20<sup>th</sup> finally reached Norway. However, after the war, it became clear that Russian forces did not seriously

---

<sup>75</sup> *United States v. Wilhelm List, et al.* (“The Hostage Case”)(1948), XI TWC 1230.

pursue Rendulic and, therefore, the terrible destruction inflicted on Finnish civilians was not instrumental to a successful retreat. With the benefit of hindsight, it was clear that Rendulic's scorched earth tactics were not necessary to accomplish his mission. Hence, the Nuremberg prosecution's argument that Rendulic violated military necessity with this action.

The Nuremberg Tribunal did not side with the prosecution, though. It ruled that Rendulic's razing of northern Finland was in accord with military necessity. The case and the ruling tell us several important facts about military necessity. The most obvious point, the one contemporary just war theorists are keen to highlight, is that military necessity permits combatants to act in ways that are almost certain to inflict foreseeable grievous harm on large numbers of innocent non-combatants. Furthermore, the law of war, including military necessity, employs an evidence-relative reasonable person standard of wrongdoing. In this way, it is similar to domestic laws germane to self-defense. The evidence-relative reasonable person standard can be contrasted with a fact-relative standard, according to which an act is right only if it is permissible in light of all the facts from an omniscient point of view. Citing an *ex ante* reasonable person standard and eschewing the use of evidence that only becomes available *ex post*, the Nuremberg Tribunal proclaimed that:

There is evidence in the record that there was no necessity for this destruction and devastation. An examination of the facts in retrospect can well sustain this conclusion. But ... we are not called upon to determine whether urgent military necessity for the destruction and devastation in the province of Finmark actually existed ... conditions, as they appeared to the defendant at the time, were sufficient upon which he could honestly conclude that urgent military necessity warranted the decision made."<sup>76</sup>

---

<sup>76</sup> Ibid., 1297.

Some debates in the ethics of war and self-defense turn on which moral perspective one ought to adopt. It is not my aim to treat these arguments at great length. However, it is important to point out that it makes sense to morally evaluate the laws of war and the laws germane to domestic self-defense from the same evidence-relative reasonable person perspective that both employ in law.

While LW and HRL (Human Rights Law) both adopt reasonable person standards for judgment, they employ very different standards. Military necessity illustrates this point more than any other single aspect of the law of war, because it is the foundational meta-principle that distinguishes the law of war from human rights law and domestic law that complies with HRL. Outside of war, there is a *prima facie* prohibition against inflicting serious harm on the innocent and any act that inflicts severe harm on the innocent is subject to intense scrutiny and investigation. In other words, HRL contains a background presumption that homicide is illegal and, therefore, all homicide demands justification for its deviation from the *prima facie* prohibition. This is not true in war, where the *lex specialis* of military necessity displaces the HRL *lex generalis* presumption that homicide is *prima facie* prohibited. Military necessity lays a foundational starting point for the law of war because it stipulates that much homicide is permitted (in the sense that LW presumes that most homicide in war is *prima facie* justified). Combatants are presumed to have a right to kill and harm, unless the law of war specifies that such killing and harming is prohibited. Specifically, combatants are permitted to kill enemy combatants and target enemy military infrastructure. All such harming is presumed to be legal and moral in war. Therefore, the language of justification is not apt. Outside war, the law requires justification for all acts of homicide. However, in order for an act of war to require legal justification, there must be a law prohibiting the act. Prohibitions in the *jus in bello* fall into two general categories: those that admit of a necessity justification and those that do not. The distinction is relatively easy to identify. If

a prohibition explicitly contains a clause that admits a necessity justification, it falls into the first category. If it does not, then it can never be justified.<sup>77</sup> Acts covered by the prohibition are *prima facie* presumed to be prohibited, but the prohibition can be overridden by a military necessity justification. Rendulic's scorched earth campaign fell into this category because the relevant law prohibits destroying civilian property unless military necessity requires doing so. The prohibition entailed that Rendulic could be tried for a war crime. The clause admitting of military necessity entailed that Rendulic's action could be justified.

Thus, we can see military necessity's relation to three categories of *jus in bello* law. The first category is the meta-principle of military necessity that underpins all of LW.<sup>78</sup> It grants combatants an absolute right to harm enemy military personnel, equipment, and infrastructure unless there is a specific prohibition against doing so. Such acts are not grounds for a legal complaint and do not require justification. In evidence-relative terms, a combatant is permitted to inflict such harm so long as there is evidence that the target is a military target. The second category consists of prohibited actions that admit of a military necessity justification. In evidence-relative terms, a combatant is permitted to inflict such harm so long as there is evidence that violating the prohibition will increase the combatant's ability to achieve military advantage by some degree. The third category consists of absolutely prohibited actions that never admit of any justification, no matter the evidence.

Let us consider Rendulic's case in light of these insights, distinguishing between commanders' liberty rights to order subordinates to do harm and subordinates' obligations to follow

---

<sup>77</sup> Laws against torturing prisoners of war fall into this second category. They admit of no military necessity justification.

<sup>78</sup> Brian J. Bill, "The Rendulic 'Rule': Military Necessity, Commander's Knowledge, and Methods of Warfare." *Yearbook of International Humanitarian Law* 12 (2009): 119-155.



orders to do harm. Rendulic had a liberty right to issue a scorched earth campaign, but his subordinates in the 20<sup>th</sup> Mountain Army had a legal obligation to follow the order. Had they violated Rendulic's order, they almost certainly would have faced harsh legal penalties, up to and including execution. International law, such as military necessity, imposes constraints on permissibility that outline the scope of the orders combatant commanders, such as Rendulic, have the liberty right to issue.<sup>79</sup> Put another way, the international law of war permits combatant commanders to order their subordinates to 'do' a great deal of harm, but it does not require combatant commanders to issue such orders. This, however, does not entail that subordinate combatants usually have a liberty right to choose to inflict less harm than military necessity permits. They are usually legally required to inflict such harm, for almost every state has domestic law requiring combatants to obey orders that comply with international law. As a result, for subordinate combatants receiving orders, international laws of war merely delimit the state's legal right to demand obedience. The subordinate is required to follow all orders that are not manifest violations of *jus in bello* and is required to disobey all orders that are manifest violations of *jus in bello*. This is the central point about the *lex lata* that is important to reconceptualizing the demarcation between *jus ad bellum* and *jus in bello* in law and morality. It is to that point that I now turn.

### **3. Reconceptualizing the Categories of *Jus Ad Bellum* and *Jus In Bello***

Recall that the subject of inquiry is the inconsistency argument for revising LW and our preliminary inquiry is the truth value of premise P2, which states:

---

<sup>79</sup> Here I am using Hohfeld's useful conception of a liberty right. Wesley Hohfeld, "Some Fundamental Legal Conceptions as Applied in Judicial Reasoning," *Yale Law Journal* 23 (1913–1914): 30.

P2: The commonsense morality of war, which is mostly coincident with the law of war, claims that combatants have a *respondeat superior* defense in matters of *jus ad bellum* and absolute liability in matters of *jus in bello*. That is, one always has a justification or excuse for obeying orders to participate in a war, regardless of the overall justification for the war. One never has a justification or an excuse for obeying orders to commit a war crime during the conduct of war (e.g. torturing prisoners, committing perfidy, intentionally targeting non-combatants, violating necessity, violating proportionality, etc.)

In section 2, I demonstrated that P2 is false because subordinate combatants often have justifications or excuses for obeying orders to commit a war crime during the conduct of war. This normally occurs when military units violate necessity or proportionality in ways that are not manifestly illegal to the subordinate combatants who follow orders. Therefore, P2 should be rewritten as P2\*:

P2\*: The commonsense morality of war is contrary to law. According to the law, combatants have a *respondeat superior* defense when they obey orders that do not manifestly violate *jus ad bellum* and *jus in bello*. It just so happens that the only orders that manifestly violate the law of war are some (but not all) orders to violate *jus in bello*. Orders that violate *jus ad bellum* are almost never manifestly illegal. Orders that violate some aspects of *jus in bello* are almost never manifestly illegal (e.g. laws prohibiting violating the principles of proportionality and necessity). The only orders that manifestly violate *jus in bello* are outlawed categorically as act types (e.g. never torture).

This point is sufficient to undermine the soundness of the inconsistency argument. However, it is useful to go further still and turn to P4.

Recall premise P4, which can be rewritten as premise P4\*:

P4: Combatants face similar duress and epistemic challenges when (1) they comply with orders to go to war as they do when (2) they comply with orders to carry out acts within war. Therefore, a consistent application of these considerations should lead to a different legal and moral prescription than the existing view expressed in P2 reflecting an inconsistency.

P4\*: Combatants usually face similar duress and epistemic challenges when (1) they comply with orders to go to war as they do when (2) they comply with orders to carry out acts within war. The lone exception is when a *jus in bello* act type is categorically prohibited. Therefore, a consistent application of these considerations should lead to the legal and moral prescription expressed in P2.

After one makes this change, it is possible to restructure the argument as follows:

P1: One's judgments about cases should reflect a consistent application of uniform moral principles (i.e. like cases ought to be treated alike)

P2\*: The commonsense morality of war is contrary to law. According to the law, combatants have a *respondeat superior* defense when they obey orders that do not manifestly violate *jus ad bellum* and *jus in bello*. It just so happens that the only orders that manifestly violate the law of war are some (but not all) orders to violate *jus in bello*. Orders that violate *jus ad bellum* are almost never manifestly illegal. Orders that violate some aspects of *jus in bello* are almost never manifestly illegal (e.g. laws prohibiting violating the principles of proportionality and necessity). The only orders that manifestly violate *jus in bello* are outlawed categorically as act types (e.g. never torture).

P3: Lesser evil justifications, rights forfeitures, epistemic challenges and duress are the reasons for granting justifications and excuses for inflicting harm during war.

P4\*: Combatants usually face similar duress and epistemic challenges when (1) they comply with orders to go to war as they do when (2) they comply with orders to carry out acts within war. The lone exception is when a *jus in bello* act type is categorically prohibited. Therefore, a consistent application of these considerations should lead to the legal and moral prescription expressed in P2.

---

C\*: There is no inconsistency. It is consistent to argue that combatants are almost never responsible for obeying *jus ad bellum* orders and are sometimes responsible for disobeying some *jus in bello* orders.

The *jus ad bellum/jus in bello* distinction is not vulnerable to the inconsistency argument because it reflects the same excusing conditions applied consistently to leaders with the authority to issue orders and subordinates obligated to follow those same orders. Unless an order is manifestly illegal, leaders have the authority and responsibility to issue the order, but subordinates have a mere duty to obey and bear no responsibility. The mistake of many just war theorists is to assume that all combatants are legally responsible for *jus in bello* violations, though. This is false. In fact, unless a *jus in bello* violation is manifestly illegal, the commander who orders the act is responsible and the subordinate who carries out the order bears no responsibility. With respect to *jus ad bellum*, the distinction between leader and subordinate mostly maps onto the distinction between political leadership and combatants, for the latter is obligated to fight on command of the former. Since the legality of a particular war is almost never manifestly illegal, the overwhelming majority of combatants have a legal duty to obey orders to participate in war. What sets *jus in bello* apart from *jus ad bellum* is not an inconsistent application of the excusing or justifying force

of obedience to orders. Rather, it is that *jus in bello* violations include some acts that are categorically forbidden – and therefore manifestly illegal, while *jus ad bellum* violations include no such acts. Therefore, there are some instances of *jus in bello* violations for which obedience to orders is no defense, while there are no such instances in *jus ad bellum*. Combatants always have an obedience to orders defense in *jus ad bellum*, but they merely often have an obedience to orders defense in *jus in bello*. This point does not conclusively indicate that the *jus ad bellum/jus in bello* distinction in law reflects deep moral truth. It does, however, show that the internal inconsistency argument is unsound.

### Selected Bibliography

- Carnahan, Burrus M. "Lincoln, Lieber and the laws of war: the origins and limits of the principle of military necessity." *American Journal of International Law* (1998): 213-231.
- Dinstein, Yoram. *The conduct of hostilities under the law of international armed conflict*. Cambridge University Press, 2015.
- Dinstein, Yoram. *War, aggression and self-defence*. Cambridge University Press, 2011.
- Downey, William Gerald. "The law of war and military necessity." *The American Journal of International Law* 47.2 (1953): 251-262.
- Fabre, Cécile. *Cosmopolitan war*. Oxford University Press, 2012.
- Fabre, Cecile. "Cosmopolitanism, just war theory and legitimate authority." *International Affairs* 84.5 (2008): 963-976.
- Fabre, Cécile. "Guns, food, and liability to attack in war." *Ethics* 120.1 (2009): 36-63.
- Fabre, Cécile. "In defence of mercenarism." *British Journal of Political Science* 40.03 (2010): 539-559.
- Fabre, Cecile. "Internecine war killings." *Utilitas* 24.02 (2012): 214-236.
- Fabre, Cécile. "Mandatory rescue killings." *Journal of Political Philosophy* 15.4 (2007): 363-384.
- Fabre, Cécile, and Seth Lazar, eds. *The Morality of Defensive War*. OUP Oxford, 2014.
- Fabre, Cécile. "Rights, Justice and War: A Reply\*." *Law & Philosophy* 33.3 (2014).
- Frowe, Helen. *Defensive killing*. OUP Oxford, 2014.
- Frowe, Helen. "Equating innocent threats and bystanders." *Journal of Applied Philosophy* 25.4 (2008): 277-290.
- Frowe, Helen, and Gerald Lang, eds. *How we fight: ethics in war*. Oxford University Press, 2014.
- Frowe, Helen. "The justified infliction of unjust harm." *Proceedings of the Aristotelian Society*. Vol. 109. No. 1 pt 3. The Oxford University Press, 2009.
- Frowe, Helen. "A practical account of self-defence." *Law and Philosophy* 29.3 (2010): 245-272.

- Frowe, Helen. *Killing John to Save Mary: A Defense of the Moral Distinction between Killing and Letting Die*. The MIT Press, 2006.
- Frowe, Helen. "Self-Defence and the principle of non-combatant immunity." *Journal of Moral Philosophy* 8.4 (2011): 530-546.
- Haque, Adil Ahmad. "Law and Morality at War." *Criminal Law and Philosophy* 8.1 (2014): 79-97.
- Haque, Adil Ahmad. "Laws for War." *Forthcoming in Theoretical Boundaries of Armed Conflict & Human Rights* (Jehns David Ohlin ed., 2015) (2015).
- Haque, Adil Ahmad. "Proportionality (in War)." *The International Encyclopedia of Ethics* (2013).
- Hayashi, Nobuo. "Requirements of military necessity in international humanitarian law and international criminal law." *Boston University International Law Journal* 28.1 (2010).
- Horton, Scott. "Kriegsraison or Military Necessity-The Bush Administration's Wilhelmine Attitude towards the Conduct of War." *Fordham Int'l LJ* 30 (2006): 576.
- Hurka, Thomas. "Proportionality in the Morality of War." *Philosophy & Public Affairs* 33.1 (2005): 34-66.
- Hurka, Thomas. "Liability and just cause." *Ethics & International Affairs* 21.2 (2007): 199-218.
- Lazar, Seth. "Necessity and non-combatant immunity." *Review of International Studies* 40.01 (2014): 53-76.
- Lazar, Seth. "Necessity in Self-Defense and War." *Philosophy & Public Affairs* 40.1 (2012): 3-44.
- Lazar, Seth. *Sparing Civilians*. OUP Oxford, 2015.
- Luban, David J. "Carl Schmitt and the critique of lawfare." *Case Western Reserve Journal of International Law, Forthcoming* (2011): 11-33.
- Luban, David. "Just war and human rights." *Philosophy & Public Affairs*(1980): 160-181.
- Luban, David. "The legacies of Nuremberg." *Social Research* (1987): 779-829.
- Luban, David. "Preventive war." *Philosophy & Public Affairs* 32.3 (2004): 207-248.
- Luban, David. "War as punishment." *Philosophy & Public Affairs* 39.4 (2011): 299-330.
- May, Larry. "Jus Post Bellum Proportionality and the Fog of War." *European Journal of International Law* 24.1 (2013): 315-333.

- May, Larry. "Targeted Killings and Proportionality in Law Two Models." *Journal of International Criminal Justice* 11.1 (2013): 47-63.
- May, Larry. *War crimes and just war*. Cambridge University Press, 2007.
- May, Larry, and Emily Crookston. "War: essays in political philosophy." (2008).
- McMahan, Jeff. "Duty, obedience, desert, and proportionality in war: a response." *Ethics* 122.1 (2011): 135-167.
- McMahan, Jeff. "The ethics of killing in war." *Ethics* 114.4 (2004): 693-733.
- McMahan, Jeff. "Humanitarian intervention, consent, and proportionality." *Humanitarian Intervention* 3 (2010): 251-279.
- McMahan, Jeff. "Innocence, Self-Defense and Killing in War." *Journal of Political Philosophy* 2.3 (1994): 193-221.
- McMahan, Jeff. *Killing in war*. Oxford University Press, 2009.
- McMahan, Jeff. "Killing, letting die, and withdrawing aid." *Ethics* 103.2 (1993): 250-279.
- McMahan, Jeff. "The just distribution of harm between combatants and noncombatants." *Philosophy & Public Affairs* 38.4 (2010): 342-379.
- McMahan, Jeff. "Proportionality in the Afghanistan war." *Ethics & International Affairs* 25.02 (2011): 143-154.
- McMahan, Jeff. "Proportionality and Just Cause." *journal of moral philosophy* 11.4 (2014): 428-453.
- McMahan, Jeff. "Proportionality and Time." *Ethics* 125.3 (2015): 696-719.
- McMahan, Jeff. "Self-defense and the problem of the innocent attacker." *Ethics* 104.2 (1994): 252-290.
- McMahan, Jeff. "War as self-defense." *Ethics & International Affairs* 18.01 (2004): 75-80.
- McMahan, Jeff. "Who is morally liable to be killed in war." *Analysis* 71.3 (2011): 544-559.
- Melzer, Nils. "Keeping the balance between military necessity and humanity: a response to four critiques of the ICRC's interpretive guidance on the notion of direct participation in hostilities." *NYUJ Int'l L. & Pol.* 42 (2009): 831.
- Moorehead, Caroline. *Dunant's dream: war, Switzerland and the history of the Red Cross*. London: HarperCollins, 1998.
- Newton, Michael A. "Modern Military Necessity: The Role & (and) Relevance of Military Lawyers." *Roger Williams UL Rev.* 12 (2006): 877.



- Newton, Michael, and Larry May. *Proportionality in International Law*. Oxford University Press, 2014.
- Parry, Jonathan. "Just War Theory, Legitimate Authority, and Irregular Belligerency." *Philosophia* 43.1 (2015): 175-196.
- Rodin, David. "Terrorism without intention." *Ethics* 114.4 (2004): 752-771.
- Rodin, David. *War and Self-Defense*. Oxford: Oxford University Press, 2002.
- Rodin, David. "War and self-defense." *Ethics & International Affairs* 18.01 (2004): 63-68.
- Schmitt, Michael N. "Military necessity and humanity in international humanitarian law: preserving the delicate balance." *Essays on Law and War at the Fault Lines*. TMC Asser Press, 2011. 89-129.
- Shue, Henry. *Basic rights: Subsistence, affluence, and US foreign policy*. Princeton University Press, 1996.
- Shue, Henry. *Fighting Hurt: Rule and Exception in Torture and War*. Oxford University Press, 2016.
- Shue, Henry. "Mediating duties." *Ethics* 98.4 (1988): 687-704.
- Solis, Gary D. *The law of armed conflict: international humanitarian law in war*. Cambridge University Press, 2016.
- Tadros, Victor. "Duty and liability." *Utilitas* 24.02 (2012): 259-277.
- Tadros, Victor. *The ends of harm: The moral foundations of criminal law*. Oxford University Press on Demand, 2011.
- Tadros, Victor. "Orwell's battle with Brittain: vicarious liability for unjust aggression." *Philosophy & Public Affairs* 42.1 (2014): 42-77.
- Walzer, Michael. *Arguing about war*. Yale University Press, 2008.
- Walzer, Michael. *Just and unjust wars: A moral argument with historical illustrations*. Basic Books, 2015.
- Walzer, Michael. "The moral standing of states: a response to four critics." *Philosophy & Public Affairs* (1980): 209-229.
- Walzer, Michael. *Obligations: Essays on disobedience, war, and citizenship*. Harvard University Press, 1970.
- Walzer, Michael. "The triumph of just war theory (and the dangers of success)." *Social Research* (2002): 925-944.

Walzer, Michael. "World War II: why was this war different?." *Philosophy & Public Affairs* (1971): 3-21.