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Doctor of Philosophy

**SECURITY INSTITUTIONS, USE OF FORCE AND THE
STATE: A MORAL FRAMEWORK**

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*A thesis submitted for the degree of Doctor of Philosophy of The Australian National
University*

December 2016

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Signed Declaration

I hereby declare that this research dissertation is my original work, that all sources have been fully cited, and that it has not been submitted for any other qualification.

A handwritten signature in black ink, appearing to read 'Shannon Brandt Ford', with a stylized, cursive script.

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15 December 2016

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Abstract

This thesis examines the key moral principles that should govern decision-making by police and military when using lethal force. To this end, it provides an ethical analysis of the following question: Under what circumstances, if any, is it morally justified for the agents of state-sanctioned security institutions to use lethal force, in particular the police and the military? Recent literature in this area suggests that modern conflicts involve new and unique features that render conventional ways of thinking about the ethics of armed conflict, and the use of lethal force, as inadequate or redundant. In particular, there is an increased concern with the moral difficulties created by “non-standard” cases. This is where the police or military are obliged to operate outside their conventional contexts. In such non-standard cases, on what moral basis can (or should) state actors – especially the police and military – use lethal force?

One approach argues that there is nothing morally exceptional about the use of lethal force by police or military. This says the only available moral justification for using lethal force is killing in self-defence or defence of others. In contrast, I use an institutional approach to develop a moral framework for the state’s morally exceptional use of lethal force. The institutional approach is concerned with the ends (*telos*) or purpose of a social institution. It says that the moral purpose of a social institution alters the moral responsibilities of its agents; what is referred to as role morality. My analysis demonstrates that there is an important moral distinction between justified killing in self-defence and state-sanctioned uses of lethal force. My claim is that police and military uses of lethal force are *not* morally justified in the same way as the average person’s use of lethal force (i.e. self-defence or defence of others). Instead, I argue that the state-sanctioned institutional role of police and military give these state actors special moral duties, and therefore exceptional moral justification, for using lethal force.

I argue that the institutional end of the police is the preservation of public safety. This includes using lethal force where it is necessary to protect life and prevent serious injury to jurisdictional inhabitants. In contrast, a morally responsible state uses military force to defend the “common good.” That is, when it is necessary to defend the peaceful functioning of a state from armed threats or other forms of political violence. I then conclude that non-standard cases require the addition of *jus ad vim* (or the just use of military force short-of-war) as a hybrid element to the moral framework for the state-sanctioned use of lethal force. This provides a better way of applying ethics to the use of military force when defending the common good against serious threats in non-standard cases. This is because *jus ad vim* complements the conventional military paradigm by permitting the use of military capabilities to defend the common good. But, at the same time, it inhibits the move towards the more destructive levels of violence characteristic of conventional warfighting.

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Glossary

ADF	Australian Defence Force
CENTCOM	U.S. Central Command
CIA	Central Intelligence Agency
CJW	Conventional Just War
CMP	Conventional Military Paradigm
CPP	Conventional Policing Paradigm
CO	Commanding Officer
DDE	Doctrine of Double Effect
FBI	Federal Bureau of Investigation
FCO	Fire Control Officer
GPS	Global Positioning System
IHL	International Humanitarian Law
INTERFET	International Force East Timor
INTERPOL	International Criminal Police Organisation
IPCC	Independent Police Complaints Commission
IRA	Irish Republican Army
ISIS	Islamic State of Iraq and Syria
JAB	Jus ad Bellum
JAV	Jus ad Vim
JIB	Jus in Bello
JWT	Just war Tradition (or Just war Theory)
LOAC	Law of Armed Conflict
NATO	North Atlantic Treaty Organisation
NCO	Non-Commissioned Officer
NSA	National Security Agency
PWO	Principal Warfare Officer
RAMSI	Regional Assistance Mission to the Solomon Islands
R2P	Responsibility to Protect
ROE	Rules of Engagement
SAS	Special Air Service

INTRODUCTION

0.1 Research Goals

It has generally been understood in the post-World War II era, and in light of the rise of the United Nations, that political conflict is best solved using peaceful means and that resorting to violence should be avoided unless absolutely necessary. Specifically, this means that the capability to use military force, which is generally monopolised by states, should not be used except in cases of national self-defence. More recent times, however, have seen the development of a moral problem with the way that some nation-states approach the use of military force. Many states are concluding that they are morally permitted, and in some cases duty-bound, to use the uniquely destructive capabilities of the military in a broader range of situations. Recent literature in philosophy, international relations and politics suggest that modern conflicts involve new and unique features that render conventional ways of thinking about the ethics of armed conflict, and the use of lethal force, as inadequate or redundant. For example, Joseph Margolis argues that these conflicts involve non-state actors, high civilian-combatant casualties, the participation of mercenaries, and the use of unconventional tactics such as terrorism and human shields.¹ Jessica Wolfendale suggests that modern conflicts no longer conform to the conventional model of interstate conflict motivated by concrete political aims.² Authors such as Mary Kaldor and Herfried Munkler use the term “new war” to describe current forms of armed conflict.³ Paul Gilbert suggests that these modern wars are characterized by low-intensity intrastate conflicts motivated by “identity politics.”⁴ Michael Gross attempts to articulate the modes of warfare that deal

¹ Joseph Margolis, "Terrorism and the New Forms of War," *Metaphilosophy* 35, no. 3 (2004).

² Jessica Wolfendale, "'New Wars,' Terrorism, and Just War Theory," in *New Wars and New Soldiers: Military Ethics in the Contemporary World*, ed. P. Tripodi and J. Wolfendale (Ashgate, 2011), 13.

³ Mary Kaldor, *New & Old Wars* (Stanford University Press, 2007); Herfried Munkler, *The New Wars* (Polity Press, 2005).

⁴ Paul Gilbert, *New Terror, New Wars* (Edinburgh University Press, 2003).

with modern dilemmas but in a way that still meets the Just war conditions of necessity and humanitarianism. Faced with asymmetric war, Gross suggests that statesmen, jurists and philosophers are now ready to reconsider deeply held ideas about combatant rights, unnecessary suffering and non-combatant immunity to lay a foundation for practices that are both militarily necessary and humane.⁵ And Simon Bronitt et al suggest that the “War on Terror” provides a new context in which legal systems have struggled to determine the legitimate boundaries on the use of force to prevent acts of terrorism, including the development of lethal force. They suggest that much of the academic debate has focused on questions of necessity, reasonableness and proportionality, including the way in which the law authorises the pre-emptive uses of lethal force in both policing and military operations.⁶

There is an urgent need to address these new and unique features of modern conflict. In particular, the prevailing moral approaches for distinguishing between law enforcement and warfighting is insufficient. Claire Finkelstein and Kevin Govern, for example, suggest that a significant shift in the demographics of war is the influx of civilians into battle. With this shift in the landscape of war, they argue that the “formerly bright-line distinction between state and non-state actors has been eclipsed, and with it the boundary distinction between combatants and civilians.”⁷ Rosa Brooks describes the way in which most of the soldiers she interviewed had not spent much time doing what they thought of as the essence of soldiering. When asked what made

⁵ Michael L. Gross, *Moral Dilemmas of Modern War: Torture, Assassination, and Blackmail in an Age of Asymmetric Conflict* (New York: Cambridge University Press, 2010), 4.

⁶ S. Bronitt, M. Gani, and S. Hufnagel, *Shooting to Kill: Socio-Legal Perspectives on the Use of Lethal Force* (Oxford and Portland, Oregon: Hart Publishing, 2012), xiii-xiv.

⁷ Claire Finkelstein and Kevin Govern, "Cyber and the Changing Face of War," in *Cyber War: Law and Ethics for Virtual Conflicts*, ed. J.D. Ohlin, C.O. Finkelstein, and K. Govern (Oxford, UK: Oxford University Press, 2015).

them different from police officers, she suggests that “this generated an uncomfortable silence.”⁸ Brooks then concludes,

As the tasks we assign to the military expand, and as private contractors and intelligence community paramilitary operatives take on many of the tasks we assign to the military, it’s gotten harder and harder to distinguish between the various players. What’s more, if the military sees its job as protecting the nation from security threats, but the gravest security threats are things like climate change and financial collapse rather than war or even terrorism, it becomes increasingly difficult to define a uniquely “military” role and mission⁹

Furthermore, J. Martin Rochester notes that the distinction between war and peace becomes blurred in cases of force without war. He suggests that the use of armed force today increasingly takes the form of “sporadic, intermittent violence in scattered locales, often involving nonstate actors (including terrorists, militias, guerillas, and gangs).¹⁰ Rochester’s concern is with how the changing nature of modern warfare is playing havoc with the conventional rules of engagement and the laws of war. It might be the case, he suggests, that the rules have not kept pace with the changing realities, which raises question about their continued relevance.¹¹

I refer to this as the “moral problem of non-standard cases.” This problem includes the moral controversies around the use of drones in places such as Waziristan, Pakistan and Yemen. It includes the interventions and non-standard roles of the military in places such as Iraq, Afghanistan, Mogadishu, Bosnia, Libya and Syria. And it includes the use of special forces in counter-terrorism operations in the United Kingdom, France, Australia, the United States, and so on and so forth. The problem is that the context of policing and warfare continues to evolve and yet the morally justified use of lethal force by the state is contextually-dependent and fixed. The use of military forces in policing (and vice versa) and the rise in non-state violent actors means that these “non-standard cases” will continue to increase in frequency, thus meriting

⁸ Rosa Brooks, *How Everything Became War and the Military Became Everything: Tales from the Pentagon* (New York, U.S.: Simon & Schuster, 2016), 260.

⁹ *Ibid.*

¹⁰ J.M. Rochester, *The New Warfare: Rethinking Rules for an Unruly World* (Taylor & Francis, 2016), 5.

sustained critical reflection. The literature seeking to address this problem is deficient, however, because it largely does not seek to integrate the moral principles for using lethal force with the ongoing practices of state-sanctioned institutions. A central contribution of this thesis is that it interrogates such non-standard cases.

Therefore, in order to better integrate the moral principles for using lethal force with the practice of state-sanctioned institutions, this thesis is an ethical analysis of the following question: *Under what circumstances, if any, is it morally justified for the agents of state-sanctioned security institutions to use lethal force, in particular the police and the military?* I examine the moral justifications for the use of lethal force by the agents of state-sanctioned security institutions (i.e. police officers and soldiers). A particular concern of this thesis is whether the use of lethal force by police and military is morally justified on the same basis as the average person. Or does their state-sanctioned institutional role give them special permissions and obligations when it comes to killing? Furthermore, if state-sanctioned moral justifications differ from the average person, is the moral justification for police use of lethal force also morally distinct from the military use of force?

The overall purpose of this research project is to undertake an ethical analysis of the key moral principles that should govern decision-making by members of state-sanctioned institutions when using lethal force. This means I will seek to achieve a number of research goals. *First*, I identify the moral principles on which we rely to judge the actions of an agent who uses lethal force, with a particular emphasis on the police and the military. These moral principles are, in part, derived from the analysis of case studies where lethal force has been used by ordinary individuals, police officers and soldiers. *Second*, I compare and contrast the moral principles adhered to by police and the military respectively. Police officers working within well-ordered liberal

¹¹ Ibid.

democracies during peacetime, for example, use lethal force in a highly restrictive way. In contrast, the rules of engagement for soldiers in theatres of war are quite different. I describe the important moral differences between police uses of lethal force and military uses of lethal force. *Third*, I identify and analyse the moral principles that should govern the use of lethal force by police and the military respectively. I examine the moral basis for the use of lethal force by reviewing the relevant academic literature. Then I develop a rigorous normative account to ground uses of lethal force by the police and military respectively. *Fourth*, I develop a better integration of practice and moral principle in the use of lethal force by each of these agencies taken separately. My normative account for the use of lethal force offers a more robust foundation for understanding the moral basis on which the police and military use lethal force. Consequently, this thesis provides an opportunity to both improve the ethical decision-making of police officers and soldiers facing situations requiring lethal force and to develop lethal force guidelines for the police and the military.

0.2 Methodology

This thesis uses a methodology based on an *ethical analysis* of the use of lethal force by police and the military. Ethical analysis is primarily concerned with reason-based arguments for judging the moral rightness or wrongness of an action. It applies moral reasoning: that is, the morally right thing to do is determined by what are good moral reasons for doing a particular action. Derek Parfit says that we call something *good* in the reason-implicating sense when,

there are certain kinds of fact about this thing's nature, or properties, that would in certain situations give us or others strong reasons to respond to this thing in some positive way, such as wanting, choosing, using, producing, or preserving this thing¹²

¹² Derek Parfit, *On What Matters*, vol. One (Oxford: Oxford University Press, 2011), 38.

James Rachels suggests that if we are concerned with doing what is good then we should allow ourselves to be guided by moral reasons or arguments. He describes the minimum conception of morality as “the effort to guide one’s conduct by reason while giving equal weight to the interests of each individual who will be affected by one’s conduct.”¹³

One form of moral reasoning seeks to resolve practical ethical problems by relying on uncovering the substantive moral intuitions we hold. According to Frances Kamm, many ethicists (particularly non-consequentialists) now employ a form of moral intuitionism where “they test and develop theories or principles by means of intuitive judgments about cases.”¹⁴ Kamm suggests that this type of ethical analysis compares the implications that proposed principles of permissible conduct have for a particular hypothetical case with the ethicist’s considered moral judgments about what can permissibly be done in such cases.¹⁵ Jeff McMahan also suggests that we should reason on the basis of our existing substantive moral beliefs.¹⁶ For McMahan, a moral intuition is a spontaneous moral judgment concerning a particular act where one finds it immediately compelling that the particular type of act is wrong.¹⁷ For example, McMahan suggests that in examining the controversial issue of abortion we might choose, as a less controversial starting point, the moral belief that killing an innocent person is seriously morally objectionable, whereas killing a lower nonhuman animal (e.g. a frog) is only mildly morally objectionable.¹⁸

This approach to ethical analysis, which is based on our moral intuitions about particular cases, is different to an approach that relies on moral theory. According to

¹³ James Rachels, *The Elements of Moral Philosophy*, 2nd ed. (New York: McGraw-Hill, Inc., 1986), 13.

¹⁴ Frances Kamm, *Intricate Ethics : Rights, Responsibilities, and Permissible Harm* (New York: Oxford University Press, 2007), 14.

¹⁵ *Ibid.*

¹⁶ Jeff McMahan, "Moral Intuition," in *The Blackwell Guide to Ethical Theory*, ed. Hugh LaFollette (Chichester, West Sussex: Blackwell Publishing, 2013), 92.

¹⁷ *Ibid.*, 94.

McMahan, the theoretical approach to moral reasoning says that we should seek to understand what a particular moral theory tells us about a practical moral problem.¹⁹ This usually means either a consequentialist theory or a deontological theory. According to Shelly Kagan, consequentialism claims that the goodness of outcomes is the only morally relevant factor in determining the status of a given act. It holds that, morally speaking, consequences are the only things that matter. So you should always perform the act with the best consequences.²⁰ Therefore, Kagan says, the moral requirement of consequentialism is for the agent to perform the act with the best consequences. The optimal act is the only act that is morally permissible: no other act is morally right.²¹ In contrast, deontology promotes the existence of constraints, which erect moral barriers to the optimal act.²² Kamm suggests that non-consequentialism of this sort typically includes prerogatives not to maximise the good and constraints on producing the good. She suggests that such prerogatives deny that moral agents must always seek to maximise good consequences.²³ Kagan further suggests that if an act involves *doing harm*, then this is a highly relevant fact about it, and it weighs heavily against the moral permissibility of the act. In order to move beyond consequentialism, he suggests that, at the very least, we will want to add a constraint against doing harm.²⁴ What exactly is doing harm?²⁵ According to Kagan, the natural proposal suggests we

¹⁸ Ibid., 92.

¹⁹ Ibid., 95.

²⁰ Shelly Kagan, *Normative Ethics*, Dimensions of Philosophy (Boulder, Colorado: Westview Press, 1998), 60.

²¹ Ibid., 61.

²² Ibid., 73.

²³ Kamm, 14.

²⁴ Kagan, 78.

²⁵ Kagan goes on to discuss the moderate deontologist attitude to the constraint against harming. The moderate deontologist believes the constraint can be judged according to a threshold. Up to a point, it is forbidden to harm an innocent person. But beyond the threshold point it is permissible to harm the person. The problem for moderate deontologists, however, is explaining where to draw the line and why they draw it at that particular point, he suggests. Ibid., 79-81.

harm someone when we act in such a way as to affect their interests adversely. If someone is worse off because of our actions, then we have harmed that person.²⁶

My overall concern is with providing a better understanding of moral principles in order to improve ethical practices. The methodological approach I take here is pluralistic in relation to moral theory. A moral theory is pluralistic when it recognises more than one normative factor, suggests Kagan.²⁷ But this is not the main focus of my ethical analysis. Instead, my main concern is with testing moral principles against cases. Victor Tadros says that we should consider whether to endorse a moral principle by testing its implications in real and imaginary cases. We can then evaluate these implications by drawing upon the moral significance of the beings affected by them.²⁸ He describes his methodological approach as one where he defends a set of proposed moral principles by,

considering the implications that those principles would have for the range of morally significant agents who are intended to be governed by those principles, and the other things and beings of moral value in our world. Were we all to endorse some principle . . . those people who are governed by the principle would have to act in certain ways, and that would have implications for their life, the lives of others, and other things of value in the world.²⁹

The most important way to demonstrate that we should endorse a particular moral principle or value, Tadros suggests, is to provide a compelling argument for them in the light of more basic ideas that we agree are true. Giving moral reasons for our actions is, he suggests, where an appeal to moral intuitions can play an effective role in developing agreement and understanding.³⁰

²⁶ Ibid., 84.

²⁷ Ibid., 72.

²⁸ Victor Tadros, *The Ends of Harm: The Moral Foundations of Criminal Law* (Oxford: Oxford University Press, 2011), 5-6.

²⁹ Ibid., 4.

³⁰ Ibid., 6.

The specific focus of my research project is an ethical analysis of the moral justifications for using lethal force.³¹ What do I mean by moral justification? In situations where our actions harm others it is necessary that we morally justify our behaviour. Justification is the moral reason (or set of moral reasons) that makes such an action morally neutral or possibly even the right thing to do. In contrast, an unjustified harm is one where the moral reason for causing harm does not stand up to scrutiny. The moral reason is inadequate for changing the moral status of an act from one that is unjust to one that is just (i.e. either a right or neutral action). A fundamental part of knowing what is right and wrong is being able to establish reasons for the actions we take. Throughout this thesis, I have a particular concern with the reasons given for deliberately doing harm to others. Specifically, I explore the reasons for using lethal force, which is a deliberate act of violence done to a person (or persons) that kills them or is likely to kill them.

Furthermore, I am not interested in just any type of reason for using lethal force. This thesis is specifically concerned with the sufficient *moral* reasons for killing. For example, consider the following imaginary case. Country A and Country B are competing in the Olympics and they both have athletes in the 100m final. A sprinter from Country A (Ted) is the firm favourite to win the gold medal and a sprinter from Country B (Marshall) is likely to come second. But let us also assume that an official from Country B (Barney), who is the head of its sprinting program, has much to gain if Marshall wins the gold medal. If Marshall wins the gold medal, then Barney is guaranteed a large sum of money in his home country, enough to set him up for life. As it happens, Barney is aware that Ted has a life-threatening allergy to a particular food product. Barney also knows that he can easily lace Ted's normal food with the allergen

³¹ Although I have not undertaken original empirical work myself, I do make use of real case studies to support my arguments as much as possible. These case studies focus predominantly on Western security institutions, especially the United States, United Kingdom and Australia.

without being detected. Barney adds the allergen to the food and, after eating it, Ted falls into a coma and consequently dies several weeks later. Marshall goes on to win the gold medal and nobody is any the wiser. In this case, Barney has an important motivating reason for poisoning Ted's food: he will receive a large amount of money. But this is not good *moral* reason to justify killing Ted.

The factors that morally "*justify*" an act do so by changing its moral status, so that the act in question becomes permissible or, in some cases, obligatory. That is, according to David Rodin, a justified action is one that would normally be wrong, but which, given the circumstances, is either fully permissible or even a positive good.³² Thus it concerns the rightness of the action itself. There are two senses in which I use moral justification. The weaker sense of justification makes an otherwise wrongful act *morally permissible*. Suzanne Uniacke suggests that where she uses justification in this weaker sense, "there is no implication that a justified act is positively the right thing to do; nor does this sense in which an act can be justified imply that one has a duty so to act."³³ In contrast, the stronger sense of justification makes a normally wrongful act a *duty* that should be performed. Uniacke describes the stronger sense of justification as performing "the right act."³⁴ Importantly, the existence of a duty implies that the action is also morally permissible. Uniacke says "a right act is of course permissible," and concludes that "whereas permissible conduct can be morally optional, conduct that is right is not."³⁵ Or, as Jonathan Quong suggests, an appropriate moral justification gives us a positive moral reason to perform the act.³⁶

³² David Rodin, *War and Self-Defense* (New York: Oxford University Press, 2003), 28.

³³ Suzanne Uniacke, "Self-Defence and Just War," in *Gerechter Krieg: Ideengeschichtliche, Rechtsphilosophische Und Ethische Beiträge*, ed. Dieter Janssen and Michael Quante (Mentis Verlag: Paderborn, 2002), 64-65.

³⁴ *Ibid.*, 65.

³⁵ *Ibid.*

³⁶ Jonathan Quong, "Liability to Defensive Harm," *Philosophy & Public Affairs* 40, no. 1 (2012): 69.

Rodin points out that justification is a much stronger form of exculpation than an *excuse*.³⁷ According to Rodin, a full excuse means we conclude that someone has done the wrong thing but we do not punish the wrongdoer or blame them for their actions. Excuses vary in strength from partial mitigation to a full pardon. But no excuse gives an actor permission to perform an otherwise morally prohibited act.³⁸ Unjustified moral reasons for harm include excuses. Justification and excuse are both types of moral reasons for acting, but there is a central distinction to be made between justification and excuse. Kagan suggests that reasons which merely “excuse” do not affect the moral permissibility of the act. Instead they alter the extent to which we are willing to blame the agent should the forbidden act be performed anyway.³⁹ So an excuse is a moral reason that we have for causing a person harm that does not change the judgment on the act as one that is wrong. It does, however, change our willingness to blame the person who has caused the harm.⁴⁰ This leaves us with three basic categories of moral judgment on actions that harm: 1) Justified; 2) Unjustified (Excused); and 3) Unjustified (Unexcused). This thesis is concerned with the first category of moral judgment. That is, the actual reasons that morally justify the use of lethal force. It addresses substantive issues of moral hazard in the context of using lethal force. The ambiguity surrounding use of lethal force for police and military means that it is important to address, understand and clarify the justifications for the use of force because the other categories fall into negligent, immoral or criminal behaviour.

³⁷ Rodin describes an exculpation as “some feature or set of circumstances that serves to remove or mitigate the blame attributable to an agent for the performance of a proscribed action.” Rodin, 26.

³⁸ *Ibid.*, 27.

³⁹ Kagan, 91.

⁴⁰ Both justifications and excuses should be distinguished from *post hoc rationalization*. This is a reason given after the event in an attempt to make a harmful action appear justified. But it is not the true reason for acting. Thomas Merton notes the difficulty of discriminating between rationalization and truth in cases where unintended consequences are *post facto* declared to have been intended. He compares such reason-giving to the instance of “the horseman who, on being thrown from his steed, declared that he was ‘simply dismounting.’” Robert K Merton, “The Unanticipated Consequences of Purposive Social Action,” *American Sociological Review* 1, no. 6 (1936): 897.

0.3 Outline

This thesis sets out to determine what moral justifications should be applied when the police or military are faced with making the decision to use (or refrain from using) lethal force. In doing so, it demonstrates that there is an important moral distinction between justified killing in self-defence and state-sanctioned uses of lethal force. My conclusion is that police and military uses of lethal force are *not* morally justified in exactly the same way as the average person's is (i.e. self-defence or defence of others). Instead, I argue that the state-sanctioned institutional role of police and military give these state actors special moral duties, and therefore exceptional moral justification, for using lethal force. That is, the state gives actors, sanctioned to act on its behalf, additional moral permissions to use lethal force. This is what I will refer to as the state-sanctioned use of lethal force. The military use of lethal force, however, requires a warfighting context to activate its exceptional moral justification. Likewise, the police use of lethal force requires a law enforcement context to activate its exceptional justification. If the police or military are operating within the appropriate context, then I call this a standard case of using lethal force. But if the police or military are operating outside the appropriate context, then it is a non-standard case and state-sanctioned justifications become morally problematic.

The existence of non-standard cases presents a *practical* moral problem because police or military actors get confused about what they can and cannot do when deciding to use lethal force in such situations. If we believe that the state has a responsibility to "defend and protect" and it relies on its police and/or military institutions to use lethal force in some cases to fulfil this obligation, then this should include both *standard and non-standard cases*. But then if police or military are *not* granted exceptional justification in non-standard cases, then on what basis should (or can) they use lethal force? If police or military *are* granted exceptional justification to use lethal force in

non-standard cases, then which paradigm of justification should be applied? That is, should the police act like soldiers in a warlike context and/or should the military act like police in a law enforcement context? Furthermore, at the *theoretical* level, it is not clear how state institutions, such as the police and military, have access to additional moral justifications. We might believe that soldiers derive a unique type of moral authority to use lethal force from the military institution of which they are a part. Likewise, we might believe that police officers receive a moral authority to use force by being part of a policing institution. But if this is true, then on what moral basis should (or can) state-sanctioned actors – especially the police and military – use lethal force? Is it ultimately a form of self-defence or is it based upon something else?

I outline a moral framework for justifying the state's morally exceptional use of lethal force in standard *and* non-standard cases. The thesis is broken into two parts. Part One (Chapters 1-3) concerns itself with describing the problem of non-standard cases and then the way in which killing in self-defence and defence of others is morally justified. Chapter 1 describes the moral dilemma with which I am concerned and sets the scene for the rest of my analysis. I use a series of case studies to demonstrate that morally justifying a state's use of lethal force becomes problematic when applied outside of the two conventional contexts of law enforcement and warfare. The moral reasoning conventionally used to justify the state-sanctioned use of lethal force is not as clear in situations that do not neatly fit either the police or military paradigms. These situations I describe as "non-standard cases." The state's use of lethal force outside the two main paradigms is problematic because each assumes specific contextual conditions that differ significantly from one another. If conditions unique to either context are necessary to justify a state's morally exceptional use of lethal force then it seems likely that cases lacking the necessary conditions of either context, or having a mix of both, are ethically problematic. Furthermore, I briefly outline the state's responsibility to

defend the political community and protect its jurisdictional inhabitants from serious threats. This is the moral basis for the state's monopoly of force, which it delegates, as a duty, to the police and military.

But how is it that the average person can be morally justified in killing another human being in self-defence in the first place? In answering this question, Chapter 2 examines the argument for morally justifying the use of killing in self-defence. I conclude that the moral purpose of permitting killing in self-defence is to ward-off an immediate unjust deadly threat. And the best explanation for morally justifying killing in self-defence is a rights-based unjust threat account for morally justified killing in self-defence. This says that a person has a moral obligation to *not* pose a deadly threat to the defender. The failure to keep this moral obligation is the source of the moral asymmetry necessary to justify the defender killing the unjust threat in self-defence in cases where there is a forced choice between lives. I also argue, however, that the unjust threat account should be modified to include calculations of risk and cost. That is, if the threat is non-culpable or only partially culpable, then the defender should seek to share the cost and risk with the threat in order for both parties to survive.

Then, in Chapter 3, I explore the implications of this modified unjust threat account for the moral justification of killing in defence of others. When is it morally justified to kill a human being in defence of others? All other things being equal, a third-party intervener is permitted to use lethal force against the unjust threat with reasons that satisfy the same impartial moral requirements that hold for killing in self-defence. This means that when a third-party intervenes to defend the victim of a deadly attack, the rescuer's action is still morally justified by the victim's possession of the right not to be killed. But I also argue that we all have a humanitarian duty to protect innocent humans from being unjustly killed. This means that a third-party should use forceful intervention (including lethal force) to protect an innocent human life in cases

where the use of force against an unjust threat is morally permissible and a potential intervener has a duty to rescue a defender. Furthermore, I argue that a potential intervener's obligation to rescue the defender is strengthened when he has an agent-relative responsibility for the wellbeing of the defender.

Part Two of this thesis (Chapters 4-6) examines the moral responsibilities of the state and its actors. It outlines the moral basis for the state-sanctioned use of lethal force and addresses the problem of non-standard cases. I demonstrate why and how the state-sanctioned use of lethal force is morally distinct from justifications based on killing in self-defence or defence of others, which are concerned with the moral responsibilities of individuals *qua* individuals. This distinction is clearest when comparing the moral permissibility of killing in self-defence with that of military combatants killing in war. So, in Chapter 4, I ask the question, is it *more* permissible, morally-speaking, to kill human beings in war? I argue that the just war tradition gives military combatants exceptional moral permissions to kill in war *not* granted to the average person. For example, military combatants in active theatres of war are morally permitted to kill unarmed enemy combatants without warning, use highly destructive weaponry and do serious collateral harm. But then I demonstrate how this conventional understanding of military killing in war has been challenged, both theoretically and practically. In particular, military force is sometimes required to defend the political community and protect its jurisdictional inhabitants in non-standard cases. This puts military actors in a moral bind. A military actor might obey an order to use lethal force, rightly and reasonably within the military paradigm of justification, against an actual serious threat. But then the same military actor is subsequently judged as having acted wrongly, and punished, because it is a non-standard case.

After considering some of the more common methods for solving the problem of non-standard cases, Chapter 5 then examines the policing paradigm for justifying lethal

force. It asks, when should the police use lethal force? I demonstrate that there is a significant ethical distinction between an individual killing in self-defence (or defence of others) and the police use of lethal force. Importantly, police officers are not constrained by the “immediacy condition” in the same way as the average person. This, I argue, is because police have a state-imposed institutional responsibility to preserve public safety. But the police use of lethal force is much more restrictive (less morally permissive) than the military’s use of lethal force in wartime. And, in some cases, the police use of force is even less morally permissive than self-defence or defence of others. Police are obliged to go to great lengths to avoid shooting anybody in threatening situations. This includes taking on significant risks to their own safety. I then argue that this policing paradigm should only be stretched so far before it then becomes military force. In particular, I examine the limitations imposed by police jurisdiction and some of the key issues with extra-jurisdictional policing. Then I explore the limitations for the policing paradigm in using lethal force during a state of emergency. Finally, I outline a moral argument for maintaining the distinction between the police and military.

Finally, Chapter 6 examines the morally justified use of military force. When can (or should) the military use lethal force? I argue that the military’s state-sanctioned exceptional moral permissions for using lethal force are derived from its institutional teleology, which is to defend the “common good.” I then argue that this is the basis for morally justifying the use of lethal force within the conventional military paradigm. Next I argue that conflicts short-of-war demand more restraint than the more morally permissive conventional military paradigm. I subsequently argue for the addition of *jus ad vim* (or the just use of military force short-of-war) as a hybrid element to the moral framework for the state-sanctioned use of lethal force. This provides a better way of applying ethics to the use of military force when defending the common good in non-

standard cases. This is because *jus ad vim* complements the conventional military paradigm by permitting the use of military capabilities to defend the political community and protect jurisdictional inhabitants against serious threats in non-standard cases. But, at the same time, it inhibits the move towards the more destructive levels of violence characteristic of conventional warfighting.

Ultimately, the circumstances where it is morally justified for the agents of state-sanctioned security institutions to use lethal force is where this is necessary to meet the state-imposed obligations derived from their institutional teleology. For the police, this means preserving public safety from criminal threats within their jurisdiction. For the military, it means defending the common good. Specifically, military force is necessary to defend the peaceful functioning of a state from armed threats or other forms of political violence. This includes the standard cases of fighting wars against external state aggression where military combatants have access to extraordinary moral permissions to use lethal force. It also includes the non-standard cases where the military are required to respond to a wide-range of threats and in a variety of situations short of war, or where a state has moral responsibilities to the common good outside defending its own political community. In these non-standard cases, however, the military are required to be much more restrained.

CHAPTER ONE: THE PROBLEM: MORALLY JUSTIFYING THE STATE'S USE OF LETHAL FORCE

1.1 Introduction

This chapter describes an ethical puzzle: justifying a state's use of lethal force becomes morally problematic when applied outside of the two conventional contexts of law enforcement and warfare. The first section of this chapter introduces the reader to a set of paradigmatic case studies. These cases act as a primer for an initial outline of four basic paradigms of moral justification. These are: 1) killing in self-defence; 2) killing in defence of others; 3) police lethal force; and 4) military lethal force. I seek to demonstrate that it is plausible to conclude that these four paradigms for justifying the use of lethal force are different in morally relevant ways.

Then, in the second section, I use case studies to highlight examples of unjustified killing. An unjustified killing is where one person kills another without a sufficiently just reason for doing so. I conclude that a concern for police officers and soldiers is the risk they take that some uses of lethal force might fail to be sufficiently justified, perhaps because of the ambiguity of the situation, which then puts them in the unjust category and potentially liable to either punishment or defensive harm themselves.

Next, the third section describes a number of cases where the police or military have used lethal force in situations that are not obviously cases of justified or unjustified killing. I refer to these types of cases as "non-standard cases." I conclude that the moral justifications for use of lethal force by either the police or the military become unclear, and potentially unjustified, when the incident occurs outside of the police or military justificatory paradigms respectively. That is, morally justifying a state's use of lethal force is problematic when applied outside of the paradigmatic accounts for justified killing.

In the final section, I describe the moral dilemma created by such non-standard cases. I start with the commonly presumed notion that states have an obligation to defend the political community and protect jurisdictional inhabitants from threats, which then obliges the police and military to use lethal force in some situations of conflict. In order to meet this obligation, the police and military are sanctioned by the state to use lethal force. This means that the police and military have access to exceptional moral justifications in doing harm, which are not granted to the average person. In non-standard cases, however, police and military access to the normal state-sanctioned exceptional justifications is less clear. This is a source of significant moral confusion.

1.2 Morally Justified Killing

a. Self-defence and defence of others

Two key paradigms for morally justified killing are self-defence and defence of others. These two paradigms are concerned with the individual's moral responsibilities *qua* individuals. My first case study illustrates a paradigm example of morally justified killing in self-defence. Consider a situation where two attackers attempt to seriously harm a defender who is consequently faced with an inescapable choice: either the defender allows the attack (hoping perhaps that he survives) or he attempts to fight back with force of his own. The attackers are armed with deadly weapons and the choice is forced upon the defender. On 12 February 2007, Byron Samuels, a Homewood auto shop worker was attacked by two men in his place of work.⁴¹ The Allegheny County District Attorney's office investigation into the incident concluded that Samuels shot the two assailants (brothers Russell and Maurice Thomas) with a pistol in self-defence, killing one and wounding the other. Samuel's lawyer argued that it was a "classic

example of self-defence; it has all the elements. They came into his place of work and attacked him. He wrestled the gun from them and defended himself.”⁴² Samuels told police that two armed men beat and pistol-whipped him, and falsely accused him of robbing their Wilkinsburg home. He was cornered when he disarmed one of them and used a pistol to defend himself. He said one man was armed with an AK-47 assault rifle. Investigators found a shell casing that matched the rifle he described. “Once we got the ballistics analysis, it supported Byron Samuels’ self-defence claim,” said the Chief Homicide Attorney.⁴³ Consequently, the District Attorney’s office dropped all charges against Samuels.

How do we know whether or not Samuels’ actions were morally justified in this case? A traditional place where theorists have sought to morally justify the use of lethal force is the notion of self-defence.⁴⁴ This says that a person who is *unjustly* attacked has a right to defend her life and, in some cases, this might mean killing the attacker.⁴⁵ I refer to this as the “Killing in Self-Defence” paradigm for justifying the use of lethal force. In situations where an attack is likely to be lethal or seriously harmful, the victim is morally permitted to kill an unjust attacker. In the Byron Samuels case, the Thomas brothers attacked Samuels with guns and Samuels’ actions were judged necessary to ward-off that attack.

In Chapter 2 I explain how the average person is morally justified in killing another human being in self-defence. One of the key concepts I use consistently

⁴¹ Gabrielle Banks, "Homewood Garage Shootings Ruled Self-Defense," Pittsburgh Post-Gazette, <http://www.post-gazette.com/pg/07054/764481-100.stm>.

⁴² Ibid.

⁴³ Ibid.

⁴⁴ Good introductions to the ethics of killing in self-defence include: Suzanne Uniacke, *Permissible Killing: The Self-Defence Justification of Homicide*, Cambridge Studies in Philosophy and Law (Cambridge, UK: Cambridge University Press, 1994); Seumas Miller, "Killing in Self-Defense," *Public Affairs Quarterly* 7, no. 4 (1993); Rodin; Jonathan Quong, "Killing in Self-Defense," *Ethics* 119, no. 3 (2009); Jeff McMahan, *Killing in War* (Oxford: Oxford University Press, 2009); Fiona Leverick, *Killing in Self-Defence* (Oxford: Oxford University press, 2006); Helen Frowe, *Defensive Killing* (Oxford: Oxford University Press, 2014).

⁴⁵ I cover the notion of “unjust” later in this chapter.

throughout my discussion is the term “threat.” Here I am referring to a human being who poses an immediate danger to another human being’s life. The danger is both likely to occur and is of a seriously harmful nature. That is, the subject of the danger is likely to either be killed or seriously injured by the threat. For example, in a hypothetical case – *Deadly Threat* – imagine a situation where one person (Meg) is driving her car along the road when another person (Sam) steps out in front of the car. Meg does not see Sam until it is too late and, despite her best attempts to brake, she hits Sam and kills him. In this case, Meg is the threat to Sam’s life. In contrast, “attacker” is a threat who intentionally attacks another person (or group of persons) and is therefore, to some degree, culpable (i.e. morally blameworthy) for any harm done. For example, in another hypothetical case – *Deadly Attacker* – we could change the facts of the *Deadly Threat* case above so that Meg attempts to kill Sam because she wants to take his money. So Meg points a gun she is carrying at Sam and pulls the trigger with the intention that shooting Sam will kill him. In this second hypothetical, Meg is still a serious threat to Sam’s life. But there is an important moral difference to the *Deadly Threat* hypothetical: Meg is an attacker because she is culpable for threatening Sam’s life. If she inadvertently threatened Sam’s life (which is what we see in the case of *Deadly Threat*) then we would still describe Meg as the threat but we would not describe her as an attacker.

In addition, a third key term is the “defender.” This is the subject or target of a harmful threat. As we will see, the threat must be likely to do serious harm or be a serious violation of human rights to justify killing in self-defence. In *Deadly Threat* and *Deadly Attacker*, Sam is the defender because he is the subject of Meg’s threat in both cases. Sam is the one who will be killed or seriously harmed without intervention.

A variation to the self-defence moral justification is defence of others. This is where the threat or attacker is killed by a third-party in order to save the life of the

defender. I refer to this as the “Defence of Others” paradigm for justifying the use of lethal force. In these cases, I use the term “Intervener” to refer to a third-party person who acts against the threat or attacker to protect the defender. In a situation where the defender is facing a lethal threat, the intervener is a person who, by acting, might prevent a defender being harmed or having his rights violated. In the hypothetical case – *Deadly Intervener* – Meg points her gun at Sam (who is unarmed) and is about to shoot him. A third person (Dean) is standing nearby, however, and he can see that Meg is about to shoot Sam. Dean is quicker on the draw than Meg and intervenes by shooting her first and thus saves Sam’s life. In this case, the intervener (Dean) acts on behalf of the defender (Sam) to prevent him from being killed by the attacker (Meg). In Chapter 3, I explore the moral justification of killing in defence of others.

b. Military force

In contrast with killing in self-defence and defence of others, the use of lethal force by a) police officers and b) military combatants reflect concern with the moral responsibilities of collectives and the agents who act on their behalf.⁴⁶ The purpose of the next case study is to demonstrate the plausibility of suggesting that military combatants killing in war is morally distinct from either killing in self-defence or in defence of others. It illustrates a paradigmatic use of lethal force by military combatants against enemy military combatants in war. The Battle of Buna was fought in New Guinea as part of the Pacific campaign of World War II.⁴⁷ In November 1942, Australian and United States troops closed in on Japan’s main beachheads in New Guinea (Buna, Sanananda and Gona) as Japan’s forces retreated along the Kokoda

⁴⁶ I recognise that this is a contested position. But rather than attempting to resolve it here, I will address it in Part Two.

⁴⁷ "Battle of Buna," Australian War Memorial, http://www.awm.gov.au/units/event_340.asp; Peter Dennis and Jeffrey Grey, *The Foundations of Victory: The Pacific War 1943-1944* (Canberra: Australian Government, Department of Defence, Army History Unit, 2004); Lex McAulay, *To the Bitter End: The Japanese Defeat at Buna and Gona 1942-43* (Milson's Point, NSW: Arrow Books, 1992).

Trail. The American 32nd Division led the initial attack and were reinforced by the 18th Australian Brigade and a squadron of tanks from the 2/6th Australian Armoured Regiment. Japan's forces remained well-entrenched around the airfields near Buna village and the fighting was arduous, with Japan's bunkers having to be destroyed one by one. But the bulk of Japan's positions were destroyed 1 January 1943. Casualties on both sides were high. The Allied forces suffered 2,870 casualties (including 620 killed) and approximately 1,400 Japanese soldiers were killed (more probably died but were buried alive in bunkers).⁴⁸ This is widely considered to be legally and morally justified.

The Allied soldiers' use of lethal force against Japan's soldiers in Papua New Guinea is morally distinct from the killing in self-defence case outlined above. Stephen Neff identifies, in his history of war and the law of nations, a set of normative features that make war different to the rest of social life. He suggests that war is a violent conflict between collectives rather than between individuals. This is what helps distinguish it from interpersonal violence.⁴⁹ According to Neff, war is also waged against foreign people rather than domestic enemies and it is distinguishable from peacetime.⁵⁰

Despite this distinct set of normative features, war is still a rule-governed activity. The just war tradition is an important source of the academic literature seeking to explore this notion. For example, Shannon French argues that the strong moral prohibition on murder produces a dilemma for those who are asked to fight wars and are directed by their political masters to kill an enemy. Soldiers must learn to "take only certain lives in certain ways, at certain times, and for certain reasons . . . otherwise they become indistinguishable from murderers and will find themselves condemned by the

⁴⁸ "Battle of Buna".

⁴⁹ S.C. Neff, *War and the Law of Nations: A General History* (Cambridge University Press, 2005), 15.

⁵⁰ *Ibid.*

very societies they were created to serve.”⁵¹ In Chapter 4, I examine the just war tradition in more detail and explain how it seeks to justify the moral exceptionalism of military killing in war.

c. Police force

The final case study here demonstrates that there might also be some key moral distinctions between killing in self-defence and the police use of lethal force. On 21 March 2009, a convicted felon recently released from prison, Lovelle Mixon, killed four California police officers before being shot and killed himself.⁵² Mixon initially shot and killed two Oakland police officers during a routine traffic stop. As both police officers approached the driver’s side door, Mixon leaned out of his car window and shot each officer twice. Neither officer had drawn his service revolver. He then fled the scene.⁵³ The police located Mixon in a nearby apartment when a confidential informant tipped them off. An *ad hoc* entry team entered the apartment and the first two police officers were immediately shot, with one wounded in the shoulder and the other killed. As the entry team continued onwards, a female started screaming and emerged from the bathroom and ran past them. Then one police officer spotted Mixon beside a rear bedroom door holding an assault rifle and fired as Mixon retreated into the bedroom and closed the door. The entry team members pressed forward and a fourth police officer was killed as he entered the rear bedroom. The police officer who was wounded in the initial entry, tripped as he entered the rear bedroom, and had a bullet from Mixon deflect off his helmet. Then, while on the floor in front of Mixon, the wounded police officer shot Mixon. At the same time, another police officer came around the door and

⁵¹ S.E. French, *The Code of the Warrior: Exploring Warrior Values Past and Present* (Rowman & Littlefield Publishers, 2004), 3.

⁵² James K. Stewart, "Independent Board of Inquiry into the Oakland Police Department: March 21, 2009, Incident: A Public Report of Findings and Recommendations," (Oakland: CNA, Institute for Public Research, 2009).

⁵³ *Ibid.*, 2.

fired at Mixon followed by a third officer who had rushed in from the perimeter to assist the entry team. Mixon was killed in the police assault.

Mixon was shot by police officers doing their job. It might be argued that the police were merely acting defensively and were, therefore, justified in killing Mixon for the same reasons that Byron Samuels was justified in shooting the Thomas brothers. In the words of the official report of the incident, the wounded police officer “fired at the suspect in defence of his life and the lives of other team members.”⁵⁴ Certainly the actions of the police officers who entered the building were self-defensive in this respect. But this perspective overlooks the police officers’ duty to protect the public from a dangerous criminal, preferably by arresting Mixon without further endangering innocent lives. The police did not have the option to walk away from their obligation to pursue and capture Mixon. Unlike the average person who might choose to avoid the situation, such as the screaming woman who fled the scene, police officers have a job to do. They could not walk away and let Mixon escape. The independent review into the incident concluded that Mixon was solely responsible for the murder of four Oakland police officers and was a hardened career criminal with a history of predatory crimes. Before the incident, a felony warrant had been issued for his arrest and he was a danger to the public. And despite the flaws in the execution of the operation, the inquiry also commended many members of the Oakland Police Department for performing their duty with high levels of courage and bravery.⁵⁵

The point here is that the police appear to have responsibilities in using lethal force that do not apply to the average person. Byron Samuels’ action in shooting his attacker was justified on the basis of self-defence. His attackers were threatening to kill him. In contrast, the police officers who shot and killed Lovelle Mixon had an

⁵⁴ Ibid., 5.

⁵⁵ Ibid., 18.

obligation to apprehend a dangerous criminal and this mandate provided them with the authority to initiate a deadly confrontation. In Chapter 4, I examine the way in which police use of lethal force is morally distinct from killing in self-defence or in defence of others. A police officer's use of lethal force originates from the state's duty to protect, is mediated by a policing institution, and is a function of their institutional role. It also means there are specific restrictions on the police in using lethal force. In the *Mixon* case, for example, the police were restrained enough in their attack to avoid shooting an innocent woman and allow her to escape.

In sum, it is plausible to conclude that the four paradigms for justifying the use of lethal force are, morally speaking, different in important ways. That is, the different paradigms determine the application of different moral rule sets. Of course, there is more to the story than this. For the moment, however, it is enough to note that there are plausible moral distinctions between paradigms of justified killing and that this is worth examining further for the theoretical and practical implications.

1.3 Unjustified Killing

a. Murder

What does it mean to say that a killing is unjustified? It means that in the absence of a sufficiently just reason, deliberately killing another person should be judged a serious moral wrong. The following three cases illustrate the point that there is a moral presumption against killing human beings that applies to the police and the military as much as to anybody else. The first case is an example of *murder*, which Fiona Leverick describes as the intentional wrongful killing of a human being.⁵⁶ There are two necessary conditions for an act to be judged as murder. The first is that murder is a type of action (*actus rea*) where one person kills another person. That is to say, the actor is

the one who causes the death of the victim. It is not enough, however, for one person to kill another for us to judge his action as murder. A further necessary condition for a killing to be murder is establishing the attacker's *mens rea* (i.e. guilty mind). That is, the attacker maliciously intended to kill or do grievous bodily harm to the victim.

An example of murder is the case of Regina v Cunningham (1982).⁵⁷ The defendant attacked the victim in a pub believing (wrongly) that the victim had sexual relations with his fiancée. The defendant knocked the victim to the ground and repeatedly struck him on the head with a bar stool. The victim suffered a fractured skull and a subdural haemorrhage from which he died seven days later. The jury convicted the defendant of murder having found that he intended serious harm at the time of the attack. The case of Regina v Cunningham (1982) illustrates the two necessary conditions for judging a murder. First, the attacker used a barstool to assault the victim, repeatedly hitting him on the head. This attack caused the victim a serious head injury, which led to his death soon after (*actus rea*). Second, the defendant's violent attack was intended to harm the victim (*mens rea*). As a result, he was convicted of murder and received a serious punishment.

b. Mistaken Belief

The next case study illustrates a killing that is unjustified because the agent is acting on a mistaken belief about the facts of the situation. It describes an incident where soldiers deliberately shoot at a car driving toward them knowing that this action is likely to kill the occupants of the car. On 27 February 2007, Canadian soldiers shot and killed the Afghan driver of a white Toyota as it headed towards their security

⁵⁶ Leverick, 14.

⁵⁷ R v Cunningham [1982] AC 566 House of Lords

cordon around a broken-down armoured vehicle.⁵⁸ A spokesman for the Canadian Forces, said the group of Canadians signalled for the approaching vehicle to stop, but troops opened fire when the driver proceeded. He said the driver first went past a checkpoint manned by Afghan national police, ignoring orders to stay away. The driver then reportedly accelerated towards Canadian vehicles, prompting the soldiers to fire upon the vehicle and causing it to swerve into a ditch.⁵⁹ The Afghan driver was killed and his passenger was wounded. It was the third shooting death of a civilian by Canadian gunfire in just over a week.⁶⁰ The Canadian Forces command responded by sending a message to troops to use more restraint before opening fire to avoid killing civilians.⁶¹

This shooting is an example of unjustified killing because the Canadian soldiers deliberately shot at a car in the mistaken belief that the driver of the car is hostile. The Canadian soldiers here are not intending to shoot innocent civilians. But they are confronted with a dilemma. They knew that in some cases, when a car drives towards them through a roadblock, it could be an attack. But they also knew that the driver might be an innocent person. It was therefore difficult for them to confirm the identity of combatants, and act with certainty, when the enemy forces use the civilian population to conceal their attacks. The car heading towards the Canadian soldiers might have been an attacker or it might not. In this case, the Canadian soldiers concluded that the car's failure to stop was sufficient evidence of a hostile attack. Unfortunately, this decision turned out to be wrong because the occupants of the car were unarmed civilians. The soldiers' belief might be considered reasonable in the situation and

⁵⁸ CBCNews, "Canadian Troops Kill Another Afghan Civilian," <http://www.cbc.ca/news/world/story/2007/02/27/accidental-shooting-070227.html>.

⁵⁹ Ibid.

⁶⁰ On 18 February 2007, Canadian soldiers also killed an Afghan civilian during an attack on a Canadian convoy. The civilian approached Canadian Forces soldiers while they were engaged in a gun battle with insurgents and did not heed repeated warnings to move away. A day earlier (17 February) Canadian troops also shot and killed an Afghan civilian. More than 2000 Canadian soldiers were serving in Afghanistan's southern Kandahar region at the time.

therefore the shooting judged as excusable. But this does not mean that shooting non-threatening civilians is consequently justified. As explained earlier (in 0.2), an excuse is a moral reason that we have for causing a person harm that does not change the judgment on the act as one that is morally wrong. It does change our willingness to blame the person who has caused the harm. But the moral reason is inadequate for changing the moral status of an act from one that is unjust to one that is just (i.e. either a right or neutral action).

c. Extrajudicial killing

In the previous section of this chapter, I suggested that when it comes to the justified use of lethal force it is plausible that the police and the military, as representatives of the state, operate within moral paradigms distinct from the average person. It might, however, be argued that a risk in making such a distinction is to conclude that police officers and soldiers can therefore get away with murder. If the state sanctions killing, then anything goes. But we should *not* conclude that police and military make decisions without moral constraints. Police and military uses of lethal force should be subject to strict moral limits.

For example, Patricia Gossman describes a case where, on 12 July 1992, Jaswinder Singh, Arvinder Singh (his 3-year-old son) and Jasbir Singh (his brother-in-law) were shot by the Punjab police as they were returning home by car.⁶² These killings occurred in the context of a bloody struggle between the Indian Government and Sikh militant groups. Nearly 4000 people were killed in this violence. In November 1991, the Director-General of Police K.P.S. Gill launched Operation

⁶¹ CBCNews.

⁶² Patricia Gossman, "Dead Silence: The Legacy of Human Rights Abuses in Punjab," (Human Rights Watch/Asia, 1994).

Rakshak, to wrest back control from extremist Sikh militant groups.⁶³ The Punjab police pursued a two-track approach. Police executed suspected militants in custody claiming that they had been killed in armed “encounters.” At the same time, senior police officials organised clandestine units to infiltrate extremist militant organisations and target known militant leaders and prominent activists.⁶⁴

Jaswinder, Arvinder and Jasbir Singh were shot near the town of Dhulkot (in the Ambala district of Haryana, India) where a police car had begun to follow them. When they turned from the main road onto the village road they stopped and got out of the car. Seconds later the police car arrived. Five policemen emerged and shot all three as they ran across the road. The post mortem indicated that many of the shots came from behind them. At the insistence of the villagers who had gathered at the scene, the police searched the shooting victims and their car; no weapons were found. A witness also said that he saw the men raise their hands in surrender before they were shot.⁶⁵ So the police in this case shot and killed three unarmed human beings, one of whom was a three-year old boy, with no attempt to establish their identities or to arrest them. This is an unjustified killing.

Likewise, the use of lethal force by military combatants in war can also be judged as unjust. The My Lai massacre is an example of a military war crime from the Vietnam War. Michael Walzer describes this infamous case where a company of U.S. soldiers entered a Vietnam village on 16 March 1968 expecting to encounter enemy combatants but found only civilians, old men, women and children. The soldiers began killing the villagers, shooting them singly or in groups, ignoring their helplessness and pleas for mercy. In this way, the U.S. soldiers eventually killed four to five hundred

⁶³ Ibid., 11.

⁶⁴ "India's Secret Armies," in *Death Squads in Global Perspective: Murder with Deniability*, ed. B.B. Campbell and A.D. Brenner (Hampshire: Palgrave Macmillan, 2002), 262.

⁶⁵ 27.

civilians.⁶⁶ These soldiers were in the midst of fighting on a battlefield but, as George Lucas suggests, actions such as killing defenceless children cannot be justified.⁶⁷

Both of these cases demonstrate that the moral presumption against killing applies as much to soldiers and police officers as it does to the average person. Simon Bronitt, Miriam Gani and Saskia Hufnagel argue that the failure to take action against unjust uses of police or military violence undermines the rule of law and the legitimacy of the state in whose name the violence is perpetrated.⁶⁸ This is true even when the police and military are working in dangerous circumstances and dealing with a complex set of problems. It also remains true when such killings prove to be effective at solving some problems of national security. If we agree that the moral presumption should be that killing another human being is wrong unless proven to be for sufficiently just reasons, then, in the absence of a sufficiently just reason, deliberately killing another person is *unjustified* and should be judged a serious moral wrong. The cases above illustrate some of the ways in which a killing can be unjust. Clearly, murder is the most blameworthy form of unjust killing. But, as we saw above with the Canadian soldiers, not every unjust killing is murder. One might have a reasonable excuse for killing a human being but this does not then mean the killing is morally justified. Furthermore, the case studies from India and the Vietnam War demonstrate that police and military killings should have limits. Importantly, the moral presumption against killing human beings also applies to soldiers and police officers.

⁶⁶ Michael Walzer, *Just and Unjust Wars: A Moral Argument with Historical Illustrations*, 4th ed. (New York: Basic Books, 2006), 309.

⁶⁷ G. Lucas, *Military Ethics: What Everyone Needs to Know* (Oxford, UK: Oxford University Press, 2015), 51.

⁶⁸ Bronitt, Gani, and Hufnagel, xiv.

1.4 Non-Standard Cases

a. The Shooting of Pablo Escobar (1993)

This next section introduces a series of non-standard case studies involving state-sanctioned uses of lethal force. The purpose of describing these case studies is to illustrate some of the moral difficulties for police or military operating in contexts where the conditions for the conventional paradigms are not clear. In other words, these incidents are “non-standard” because they do not clearly fit either the law enforcement or warfighting contexts for the justified state-sanctioned use of lethal force. The following incident is an example of the police use of lethal force against the leader of a powerful organised crime gang. On 2 December 1993, Colombian security forces shot and killed the renowned drug kingpin, Pablo Escobar, as he attempted to flee his hideout in Medellin, Colombia.⁶⁹ Escobar, leader of the Medellin drug cartel, was killed as he and his bodyguards tried to escape police by climbing onto a rooftop of the safehouse where they were hiding. Columbian authorities said Escobar opened fire and was met by volleys of return fire from some of the dozens of police and troops who confronted Escobar at his house. We might be willing to conclude that police were justified in shooting Escobar and his bodyguards in self-defence. But should the Colombian police have done more to avoid such a violent confrontation? And why was it necessary to have heavily-armed troops at the scene? In the Escobar case, the Colombian police were dealing with the leader of a powerful organized criminal gang that was a serious threat to police authority and had significant resources at its disposal. Escobar was responsible for an organization that corrupted government officials and murdered

⁶⁹ Mark Bowden, *Killing Pablo: The Hunt for the World's Greatest Outlaw* (Grove Press, 2015); Peter Eisner, "Cocaine Trafficker Pablo Escobar Killed in Colombia," The Tech, <http://tech.mit.edu/V113/N62/escobar.62w.html>.

innocent people.⁷⁰ Given the serious threat posed by this drug cartel, the Colombian police had a responsibility to prevent Escobar's escape.

There can be a number of significant problems for the police in dealing with a powerful organized criminal gang. Such gangs might operate internationally, which means that some (or most) of their criminal activities can happen outside the jurisdiction of the state that is attempting to deal with them. Or they might have resources that rival (or exceed) the power of some states. These resources can include military-grade weaponry, sophisticated intelligence networks and small mercenary armies. Even well-resourced police agencies can find it difficult to combat powerful criminal organizations.

The moral difficulty here, for law enforcement, is that the extensive resources of such crime gangs means that police attempts at confrontation can escalate to the level of armed conflict. This requires the police to use a level of firepower that is beyond standard policing capabilities. And if it is necessary for the police to engage in such incidents on a regular basis, so as to meet its obligation to make criminal arrests, it starts to look more like warfighting than a series of police operations. This is particularly the case when such organisations use sophisticated and violent methods to fight against the state's law enforcement authorities.

b. The Detroit Riots (1967)

The next incident illustrates the problem faced by police when lethal force might be necessary to deal with a life-threatening breakdown in law and order, where rioting and looting has become widespread. On 26 July 1967, the fourth day of the Detroit Riots, police shot and killed Julius Lust after responding to a report that some men had

⁷⁰ Bowden.

climbed the fence of an auto parts yard.⁷¹ The 1967 Detroit riot lasted from 23 to 28 July 1967 and was one of the deadliest and most destructive riots in U.S. history. It resulted in 43 official deaths (with some reports claiming it was over 100), 1189 injuries⁷², over 7200 arrests⁷³, and more than 2500 buildings looted, burned or destroyed.⁷⁴ The previous day, police officers had shot and killed five men believed to be looters.⁷⁵ Detroit police officers had the authority to use their firearms to prevent looting and rioting and to protect life and property. Initially, however, the police took a restrained approach and withdrew from the rioting area. Restraint was fundamental to their training and procedures.⁷⁶ The only instruction the police received (during the riot) about shooting looters was from the Chief Inspector of the department, who notified police that they were to “use discretion.”⁷⁷ The situation then deteriorated as the rioters went on a looting rampage. Consequently, some argued that an unofficial policy of restraint failed since word spread that the police were not shooting looters and the riot grew worse.⁷⁸ In the end, it took a force of about seventeen thousand personnel to quell the riot, and these resources were not solely drawn from the Detroit Police Department and the State Police. Governor George Romney also mobilised the Michigan National Guard (46th Infantry Division) followed by President Lyndon B. Johnson sending paratroopers from the Army.⁷⁹ Although looters – such as Julius Lust – might have been unarmed (which meant the police were not acting in self-defence or defence of others), it is not clear whether such shootings might be justified. The police were no longer working in a law enforcement context, because law and order had temporarily broken

⁷¹ S. Fine, *Violence in the Model City: The Cavanagh Administration, Race Relations, and the Detroit Riot of 1967* (Michigan State University Press, 2007), 230.

⁷² *Ibid.*, 299.

⁷³ *Ibid.*, 249.

⁷⁴ *Ibid.*, 291.

⁷⁵ *Ibid.*, 226.

⁷⁶ *Ibid.*, 174.

⁷⁷ *Ibid.*, 175.

⁷⁸ *Ibid.*, 177.

⁷⁹ *Ibid.*, 233.

down. And military capabilities and methods were required to bring the situation under control.

c. The McCann case in Gibraltar (1988)

This next incident is an example of soldiers performing a military operation under the authority of the police. On 6 March 1988, three suspected Irish Republican Army (IRA) operatives were killed by British soldiers in Gibraltar. According to Maurice Punch, a plain-clothes Special Air Service (SAS) unit had trailed the IRA suspects after British Intelligence had assessed that they were preparing to target a military parade in Gibraltar using a remotely detonated car bomb.⁸⁰ After the suspects parked their car in a nearby square, the SAS moved in on Mairead Farrell and Danny McCann. The SAS soldiers claim that one of the suspects made a “sudden movement” which the troopers interpreted as an attempt to detonate a bomb in the car nearby. In response, both Farrell and McCann were shot, with firing continuing after they had fallen to the ground. The third member of the unit, Sean Savage, was shot and killed soon afterwards at a location nearby. Punch describes the following outcome of the shooting,

It turned out that all three were unarmed; had no remote-control device on them; the car used that day had no bomb in it; and there was no military parade planned for that day. Furthermore, witnesses maintained that no warnings were given, that the couple had first raised their arms and that firing continued after the IRA insurgents had been disabled and were on the ground. Mrs Farrell had been shot at a distance of only three feet and was shot in the face and back; McCann was shot in the head and back; Savage was hit by 16 bullets. The shots were carefully aimed to hit the brain and vital organs. Forensic evidence indicated that firing had continued after all three were on the ground and one expert spoke of a ‘frenzy’ of firing in relation to the multiple wounds inflicted on Savage. There was clearly no warning given and there was no attempt at arrest⁸¹

The McCann case is a non-standard case of using lethal force because the soldiers involved are carrying out a law enforcement task. According to Punch, the purpose of the mission was to apprehend the suspects. So police trained the soldiers in necessary arrest procedures, he suggests, and efforts had been made to find a suitable place to

⁸⁰ Maurice Punch, *Shoot to Kill: Police Accountability, Firearms and Fatal Force* (Bristol: Policy Press, 2010), 16.

detain the suspects.⁸² But the soldiers' military training took over and they end up ambushing and shooting the suspects. The shooting was unjustified in this case because the suspects were not armed, and they were not caught red-handed planting a bomb. If the shooting had occurred in the context of warfighting and the suspects were enemy combatants, however, then the shooting would have been justified.

d. The Entebbe Operation (1976)

The Entebbe Operation is an example of an operation to rescue hostages where the military from one state use lethal force against the military of another state, but the two states are not at war. Mitchell Knisbacher describes how, on 27 June 1976, Air France Flight 139 from Tel Aviv to Paris was hijacked by pro-Palestinian terrorists and flown to Entebbe Airport, Uganda.⁸³ The terrorists threatened to kill their Israeli hostages unless 52 "freedom fighters" were released from prisons in Israel, France, West Germany, Switzerland and Kenya. On 4 July, Israeli commandos landed at Entebbe Airport aboard military transport planes. While a diversion was being created at the far end of the airport, the main force of Israeli soldiers proceeded directly to the building in which the hostages were being held, and immediately opened fire on the guards. Within a matter of minutes seven terrorists had been killed, and the hostages were led across the runway to the planes which had brought the Israeli commandos. Ugandan casualties totalled 20 dead and an unreported number of injured. One Israeli commando and three hostages were killed during the attack.

It might be that the Israeli soldiers were justified in using lethal force to rescue innocent civilians in this case. If we agree that the State of Israel has a duty to protect its citizens, then it is reasonable to conclude that it should seek to rescue Israeli citizens

⁸¹ Ibid.

⁸² Ibid.

from the captivity of Palestinian terrorists (if it can). We might also agree that it is reasonable for Israeli soldiers to use lethal force against the Palestinian terrorists if that is necessary to rescue the hostages. In the process of performing this military operation, however, the Israeli soldiers killed 20 Ugandan soldiers who were guarding the airport. The two states involved in this violent incident are not at war. It was a non-state actor – Palestinian terrorists – that had taken the Air France flight captive and then sought refuge in Uganda. So on what moral grounds could the Israeli soldiers kill Ugandan soldiers? This is unclear.

e. Iraq no-fly zone (1992)

In this next case study, we have an incident where the U.S. military used lethal force as part of a strategy of containment against Iraq. On 28 December 1992, a U.S. F-16 shot down an Iraqi MiG-25 after it breached the no-fly zone in southern Iraq.⁸⁴ The pilot of the downed plane was killed. The incident was the first time that an Iraqi plane had been shot down since they were banned from flying south of the 32nd parallel following the end of the Gulf War in March 1991. U.S. officials believed that the flight was a deliberate attempt to provoke the U.S. and test its resolve to enforce the no-fly zones.⁸⁵ The Iraqi no-fly zones were intended to deter Iraq's use of aircraft against its own people and its neighbors.⁸⁶ According to Timothy McIlmail, no-fly zones (or air exclusion zones) prohibit the entry of unauthorised aircraft into airspace over specified territory.⁸⁷

⁸³ Mitchell Knisbacher, "The Entebbe Operation: A Legal Analysis of Israel's Rescue Action," *Journal of International Law & Economics* 12 (1977): 68-70.

⁸⁴ Michael R. Gordon, "U.S. Shoots Down an Iraqi Warplane in No-Flight Zone," *The New York Times*, 28 Dec 1992.

⁸⁵ *Ibid.*

⁸⁶ The no-fly zones were one part of a containment system that included two other elements. The second part was an embargo intended to prevent the importation of arms. The third part was a UN inspection system that was meant to hamper Iraq's development of weapons of mass destruction. , xiii.

⁸⁷ "No-Fly Zones: The Imposition and Enforcement of Air Exclusion Regimes over Bosnia and Iraq," *Loyola International and Comparative Law Review* 17 (1994): 35.

In this incident, an Iraq fighter is shot down and the pilot killed to enforce the no-fly zone. In a warfighting context, this is a justified use of lethal force. But Iraq and the U.S. were no longer at war. Michael Walzer argues that the Iraq containment regime (1991–2003) demonstrates that states can use lethal measures that fall short of going to war.⁸⁸ Although Walzer acknowledges that embargoes and the enforcement of no-fly zones are understood by international law to be acts of war, he argues that it makes more sense to conclude that such actions are distinct from actual warfare.⁸⁹ The reason he believes that containment of this type should be distinguished from a full-scale attack is because it avoids the full destructiveness of war. His key moral point is that the use, or the threatened use, of lethal force in this case is an exercise of state power that is much less destructive than war.⁹⁰ I examine this argument of Walzer's in more detail in Chapter 6.

f. Drone missile strike in Yemen (2002)

This next incident illustrates the moral problems with the use of targeted killing by a state-sanctioned non-military organisation against a terrorist outside a declared war zone. On 4 November 2002, the CIA used a Predator drone to kill Qaed Salim Sinan al-Harethi, an al Qaeda operative, in Yemen. After gathering information about al-Harethi's movements in the wake of the 9/11 attacks, the CIA operation employed an armed Predator drone from its base in Djibouti, across the Red Sea from Yemen, to perform an armed attack.⁹¹ As the Predator moved into position above a Land Cruiser, it picked up a signal from a mobile phone identified by the U.S. as belonging to al-Harethi. A U.S. analyst confirmed al-Harethi's presence so the CIA fired a missile

⁸⁸ S. Brandt Ford, "Jus Ad Vim and the Just Use of Lethal Force-Short-of-War," in *Routledge Handbook of Ethics and War: Just War Theory in the 21st Century*, ed. Fritz Allhoff, Nicholas G. Evans, and Adam Henschke (New York and London: Routledge, 2013), 64-65.

⁸⁹ Ibid.

⁹⁰ Ibid.

from the Predator, destroying the vehicle and everyone inside. This was the first time since the 9/11 attacks that the CIA had executed a targeted killing outside a declared war zone.⁹²

Again, this type of lethal force is justified when the military is fighting a war against enemy combatants. But this particular case is morally problematic because it is applying warfighting rules of engagement to what is an ongoing criminal conspiracy. The target is not classified as a lawful enemy combatant. Al Qaeda are an international terrorist group who had criminally attacked the U.S. and continued to pose a serious threat to U.S. citizens. Mary Ellen O'Connell argues that international law rejects warfighting as the appropriate means for addressing this type of terrorist threat. Instead, she suggests that the proper means for dealing with terrorists is law enforcement, which includes arrest and improved policing cooperation.⁹³ Furthermore, O'Connell argues that the drone attacks in places such as Yemen and Pakistan, involve a level of force that, measured in terms of firepower, should only be used by the military and not by the police or any other non-military institution.⁹⁴ In the Yemen case, it is a U.S. spy agency – not the military – that targets an al Qaeda leader and his deputies using a missile from a drone aircraft. From this perspective, non-military uses of lethal force, she suggests, should be restricted to much lower levels of firepower than the military routinely use on the battlefield, where soldiers can lawfully make use of weapons such as bombs and missiles.⁹⁵

⁹¹ Mark Mazzetti, *The Way of the Knife: The Cia, a Secret Army, and a War at the Ends of the Earth* (New York: Penguin, 2013), 87.

⁹² Ibid.

⁹³ Mary Ellen O'Connell, "Unlawful Killing with Combat Drones: A Case Study of Pakistan, 2004-2009," in *Shooting to Kill: Socio-Legal Perspectives on the Use of Lethal Force*, ed. S. Bronitt, M. Gani, and S. Hufnagel (Oxford and Portland, Oregon: Hart Publishing, 2012), 291.

⁹⁴ Ibid., 276.

⁹⁵ Ibid.

1.5 The Moral Problem of Non-Standard Cases

a. The state's duty to protect

What makes the lethal incidents in the cases above “non-standard” is that they do not clearly fit the paradigmatic cases for the justified use of lethal force as they are conventionally applied to state actors. This creates a moral problem: police officers and soldiers get confused about when they should or should not use lethal force. The first point to note here is that “the state” has a duty to defend the political community and protect the lives of its jurisdictional inhabitants from serious threats. What do I mean by “the state”? According to Brian Orend, the relevant political community in discussions about the ethics of war and conflict is the state, by which he means the machinery of government that organises life in a given territory.⁹⁶ The state (or state-aspiring political community) is considered to be the appropriate form of legitimate government for holding sovereignty in the modern world.⁹⁷ It is the duty of the sovereign state to secure its citizen's safety. Thomas Hobbes describes this duty in the following way,

The office of the sovereign, (be it a Monarch, or an Assembly,) consisteth in the end, for which he was trusted with the Sovereign Power, namely the procuration of the safety of the people; to which he is obliged by the Law of Nature, and to render an account thereof to God, the Author of that Law, and to none but him. But by Safety here, is not meant a bare Preservation, but also all other Contentments of life, which every man by lawfull Industry, without danger, or hurt to the Common-wealth, shall acquire to himselfe.⁹⁸

⁹⁶ According to Orend, people use “nation” and “state” interchangeably. But he suggests that the classic distinction is Max Weber's: a “nation” is a group which thinks of itself as “a people,” usually because they all share many things in common, such as ethnicity, language, culture, historical experience, a set of ideals and values, habitat, cuisine, fashion and so on. The “nation-state” refers to the relatively recent phenomenon where a nation creates a state for itself. Brian Orend, *The Morality of War* (Ontario: Broadview Press, 2006), 2.

⁹⁷ Orend points out that some associations of people with a political purpose might be considered relevant “political communities” if they aspire to statehood. Ibid.

⁹⁸ Thomas Hobbes, “Leviathan,” in *Hobbes: Leviathan: Revised Student Edition*, ed. Richard Tuck (Cambridge: Cambridge University Press, 1996 [1651]), 231.

According to Tom Sorell, this means governments have an obligation to respond to threats facing its jurisdictional inhabitants and to minimise the need for private rescue.⁹⁹ The Hobbesian state, he suggests, recognises a right to life as the pre-eminent right of citizens.¹⁰⁰

In some cases, when it is necessary, this “duty to defend and protect” requires the state to sanction uses of force. According to Chris Brown, force, coercion and violence are features of all political orders, both domestic and international.¹⁰¹ He suggests that coercion is about removing the options of an adversary so that their state of mind is irrelevant.¹⁰² Brown says that coercion involves the use of force but it does not necessarily involve the use of physical violence. It is possible to prevent someone from doing something (that is, coerce them) without using physical force.¹⁰³ But conventional scholarship on the Westphalia system of states, suggests Brown, also generally draws a clear distinction between the employment of measures of influence that use political violence and those that do not.¹⁰⁴ According to Brown, violence is morally distinctive because it hurts, maims and kills. It is, he suggests, a way of taking away the autonomy of individuals, and perhaps societies, that is more permanent than most other means.¹⁰⁵ Michael Skerker likewise describes the use of coercion as behaviour where the recipient of the action is treated as a means to the actor’s goal – instead of as a free, independent person whose preferences deserve respect – usually by restricting or controlling the victim’s ability to do what he wants. According to Skerker, coercive measures include

⁹⁹ Tom Sorell, *Emergencies and Politics: A Sober Hobbesian Approach* (Cambridge University Press, 2013), xi.

¹⁰⁰ *Ibid.*, 27.

¹⁰¹ Chris Brown, *Sovereignty, Rights and Justice: International Political Theory Today* (Oxford: Polity Press, 2002), 96.

¹⁰² *Ibid.*, 97.

¹⁰³ A related point concerns the concept of “structural violence” by which Brown means specifically exploitative relationships that “although not characterized by the exercise of physical force, can be seen to be (structurally) violent in so far as they involve depriving the disadvantaged party of life-chances to the advantage of the exploiter.” *Ibid.*, 98.

¹⁰⁴ *Ibid.*, 97.

¹⁰⁵ *Ibid.*, 99.

physical force, threats, extortion, emotional manipulation, lying, and other forms of deception.¹⁰⁶

As I indicated above (in 1.3), the state (and its agents) can be a rights violator when it uses force just like any other group or individual. So the use of force by agents of the state, especially violent force, requires moral justification (not simply legal permission or political authorisation). The difference lies in the types of moral justification available to the state rather than the average person. Some theorists, such as Jeff McMahan, argue that there is no difference. He argues that the establishment of political relations among a group of people does not confer on them an exceptional right to harm or kill others, when the harming or killing would be impermissible in the absence of that political relationship.¹⁰⁷ But the argument of this thesis will demonstrate that this is *not* correct. The state does, in fact, have access to additional moral justifications for using lethal force.

This duty to defend the political community and protect jurisdictional inhabitants means that sometimes the state requires its police and/or military use lethal force to stop threats. Chapter 5, for instance, demonstrates how police use of lethal force is morally grounded through the state's duty to preserve public safety. I refer to this as the policing paradigm for the use of lethal force. It holds that individuals should consent to give up some rights to self-defence to allow police the necessary powers to use force on their behalf. According to Jeffrey Reiman, this is because it is a more rational way of protecting individual rights and preventing violence within a given political community.¹⁰⁸ It is, suggests Reiman, the classic social contract answer to the problem of the state of nature: the insecurity caused when "everyone's freedom to use force at

¹⁰⁶ Michael Skerker, *An Ethics of Interrogation* (Chicago: University of Chicago Press, 2010), 13.

¹⁰⁷ Jeff McMahan, "Collectivist Defenses of the Moral Equality of Combatants," *Journal of Military Ethics* 6, no. 1 (2007): 53.

his own discretion undermines everyone else's freedom to work and live as he wishes."¹⁰⁹ The policing paradigm also concludes that the police, as agents acting on behalf of the state, have an obligation to seek the arrest of suspected criminals, investigate them and put them on trial before a court of law.¹¹⁰

The policing paradigm for using lethal force depends, to some extent, on the existence of a minimal *law enforcement context*. The giving up of some individual rights only works when the state in question is, in fact, performing this role effectively. That is, the state resolves conflict between jurisdictional inhabitants fairly and offers reasonable protection from violence. When the context falls short of this standard, so that unresolved violent conflict is a regular feature of life, then a state has failed to reach the minimum conditions for effective law enforcement. In other words, it is only reasonable for people to renounce some freedom to use force at their own discretion, and hand this set of rights over to a public institution such as the police, when the context allows it. Within such a context we should expect that a given police agency effectively manages conflicts that occur between jurisdictional inhabitants. The conventional law enforcement context describes an environment where a sovereign state (or similar political community) effectively manages violent conflict within its own jurisdiction using a common body of law. It presupposes at least a basic form of government with functioning law-making body, criminal justice system and policing institutions. It also means the absence of serious armed conflict, especially recurring violent incidents between large politically-motivated groups. Within the law

¹⁰⁸ Jeffrey Reiman, "The Social Contract and the Police Use of Deadly Force," in *Moral Issues in Police Work* ed. Frederick Elliston and Michael Feldberg (New Jersey: Rowman and Allanheld, 1985), 239.

¹⁰⁹ Ibid.

¹¹⁰ Mark Maxwell, "Rebutting the Civilian Presumption: Playing Whack-a-Mole without a Mallet?," in *Targeted Killings: Law and Morality in an Asymmetrical World*, ed. C. Finkelstein, J.D. Ohlin, and A. Altman (Oxford: Oxford University Press, 2012), 36.

enforcement context, according to Mark Maxwell, belligerents who are party to a conflict are treated as suspected criminals and not as combatants.¹¹¹

In contrast, the Military Paradigm (which I examine in Chapters 4 and 6) presupposes a *warfighting context*. That is, a particular act of violence is part of a larger struggle between two or more political communities engaged in armed conflict. As illustrated above in the case study on the Battle of Buna, the environment faced by Allied soldiers in a conventional war context is complex and hazardous. The origin of the deadly threat they confront is an institutionalised group of people (in this case Japan's armed forces) working together to kill and destroy the Allied forces. Rather than armed conflict being a one-off incident, the Battle of Buna consisted of a series of incidents occurring over three months (and it was only one part of the campaign in Papua New Guinea which, in turn, was one part of the Pacific War). Furthermore, the conflict originates in an international dispute rather than being a domestic issue. The conflict occurs outside of the legal jurisdiction of the state itself. There is no overarching independently-enforced criminal justice system to which they are subject. Instead, the Allied soldiers at Buna were subject to the War Convention and military discipline as administered by superior officers. This means that the incident is classifiable as an armed conflict and part of a warfighting effort. So the individual soldier's use of lethal force occurs within, and must be judged in terms of, an environment morally distinct from what we should expect within a conventional law enforcement context.

b. A theoretical and practical moral problem

If we agree with the state's duty to "defend and protect," then we should agree that this obligation continues to apply in non-standard cases. That is, the state is

¹¹¹ Ibid.

obliged to defend the political community and protect its jurisdictional inhabitants even when the situation does not fit either of the conventional contexts. In the previous section, I described a number of cases where the police (or the military under police authority) used lethal force when the conditions do not fit neatly within the standard cases because they have fallen (or are in danger of falling) outside the law enforcement context. In the Escobar case, the Colombian police are dealing with the leader of a powerful organised criminal gang that has repeatedly demonstrated its willingness to challenge police authority by fighting back, and have significant resources at its disposal. The Detroit Riot case illustrates the uncertainty of police decision-making in a situation where law and order has temporarily disappeared. And the McCann case highlights the problems that arise when military personnel, who are equipped with weapons and trained in a mindset for fighting wars, use lethal force on behalf of the police.

Some non-standard cases are also difficult to judge as either justified or unjustified military uses of lethal force. In the Entebbe case study, it is not clear on what moral grounds the Israeli commandoes kill the Ugandan soldiers since they were not enemy combatants at war with Israel. The Yemen Drone Strike case study illustrates the moral problems with using military firepower against non-state actors, especially when the institution doing the attacking is not military. Then, in the Iraq No-Fly Zone case study, we see an example of a state-on-state military conflict but with a much more limited mandate than we normally expect in conventional warfighting. If soldiers are operating clearly within a warfighting context, then the use of lethal force in each of these cases might be justified. But if the situation is closer to a law enforcement context, then such actions could end up being judged as indiscriminate or disproportionate uses of force. In other words, employing the military for such conflicts short-of-war increases the risk of heavy-handedness or capricious uses of force.

This poses a moral problem at two levels. At the *theoretical* level, we need to understand how state institutions relate to both conditions of conflict and moral justifications. We might conclude that soldiers derive a unique type of authority to use lethal force from the military institution of which they are a part. Likewise, police officers receive an authority to use force by being part of a policing institution. If so, however, is this a form of self-defence or is it based on something else? Do the police and military require the existence of a minimal law enforcement and warfighting contexts respectively to perform their roles? Or is their responsibility in using lethal force independent of context?

Furthermore, the existence of such non-standard cases is a moral problem at the *practical* level. They illustrate the way in which state-sanctioned police or military actors might get confused about what they can and cannot do when deciding to use lethal force in non-standard situations. If state actors are granted exceptional justification to use lethal force in non-standard cases, then which paradigm should be applied? If state actors are *not* granted exceptional justification in non-standard cases, then on what basis should (or can) they use lethal force? If we believe that the state has a responsibility to “defend and protect,” and it demands that its police and/or military use lethal force in some cases to fulfil this obligation, then this should include both *standard* and *non-standard cases*. If so, on what moral basis should (or can) state-sanctioned actors – especially the police and military – use lethal force? And what are the limits?

c. Actor, Context and Target

Having given shape to the moral problem addressed by my thesis, this final subsection outlines three key variables that should be kept in mind throughout the discussion. The first variable is the *actor* making the decision to use lethal force. When

is an actor morally justified in using lethal force? What moral rules apply to them? Can (or should) qualities of the actor change the moral rules that apply to them? In particular, do certain state-sanctioned institutional actors (i.e. police or military) have special moral responsibilities for using lethal force that are not held by other actors? If so, do the state-sanctioned institutional roles of police or military give these actors exceptional moral justification for using lethal force? I argue that the state does give actors, sanctioned to act on its behalf, exceptional justification to use lethal force outside self-defence or defence of others. This is the state-sanctioned use of lethal force.

The second morally relevant variable to consider is the *context* in which the decision to use lethal force is made. Is lethal force being used in the context of law enforcement, is it within the context of a war or can we describe a third context? If we conclude that the morality that applies to the use of lethal force varies significantly in accordance with the context, then this question is important to answer. Bronitt et al argue that context is the difference between, on the one hand, the use of lethal force being a justified act of heroism or, on the other hand, a serious criminal offence.¹¹² This is important if we conclude that a state-sanctioned exceptional justificatory moral framework is contingent on the context in which force is used. It means that the military use of lethal force requires a warfighting context to activate its exceptional moral justification. Likewise, the police use of lethal force requires a law enforcement context to activate its exceptional justification. If the context fits the paradigm of justification, then I call this a standard case of using lethal force. But if the context does not fit the appropriate paradigm, then it is a non-standard case and state-sanctioned justifications become morally problematic. Non-standard cases of using lethal force might be morally out of bounds for state-based exceptional justifications. This is

¹¹² Bronitt, Gani, and Hufnagel, xiv.

because the state-sanctioned use of lethal force does not appear to give actors, acting on its behalf, exceptional justification for using lethal force in non-standard cases.

The third morally relevant variable to take into account is the *target* who is being harmed. This seeks to describe a feature of a person that justifies making them the target of a deadly attack. In Chapters 2 and 3, I argue that the Killing in Self-Defence and Defence of Others paradigms say that the target must be an unjust immediate deadly threat. In Chapter 4, the Military Paradigm requires the target to be an enemy combatant. Soldiers in war target enemy combatants according to their status as members of the opposing military alone. So, on the battlefield in World War II, Allied soldiers deliberately targeted any person positively identified as an enemy combatant belonging to Japan's armed forces. It is *not* necessary for Japan's soldiers themselves to be an immediate threat. Then in Chapter 5, I argue that the policing paradigm demands that the target must be culpable in some way. This is normally because they have committed a serious criminal harm or threaten to commit a serious criminal harm.

1.6 Conclusion

At the end of Chapter 1, we now have a rough outline of four plausible standard paradigms for using lethal force. These are: self-defence paradigm; defence of others paradigm; policing paradigm and military paradigm. We also have some idea of what an unjust use of lethal force looks like and the seriousness with which it should be judged. A set of "non-standard" cases illustrate the moral difficulties for police or military operating in contexts where the conditions for the conventional paradigms are not clear. Importantly, these incidents are "non-standard" because they do not clearly fit either the law enforcement or warfighting contexts for the justified state-sanctioned use of lethal force. This creates a moral problem. States are duty-bound to defend the political community and protect jurisdictional inhabitants from threats, which obliges

the police and military to use lethal force in situations of conflict. In order to meet this obligation, the police and military are sanctioned by the state to use lethal force. This means the police and military have access to exceptional moral justifications in doing harm, which are not granted to the average person. But the police and military do not appear to be granted access to their state-sanctioned exceptional justifications in non-standard cases. So on what moral basis can (or should) state actors – especially the police and military – use lethal force in non-standard cases?

CHAPTER TWO: MORALLY JUSTIFIED KILLING IN SELF-DEFENCE

2.1 Introduction

In Chapter 2, I examine the argument for morally justifying the use of killing in self-defence. I conclude that the moral purpose that permits killing in self-defence is to ward-off an immediate unjust deadly threat. Then I argue that the best explanation for morally justifying killing in self-defence is a rights-based unjust threat account for morally justified killing in self-defence. This says that a person has a moral obligation to *not* pose a deadly threat to the defender. The failure to keep this moral obligation is the source of the moral asymmetry necessary to justify the defender killing the unjust threat in self-defence. I also argue, however, that the unjust threat account should be modified to include calculations of risk and cost. That is, if the threat is non-culpable or only partially culpable, then the defender should share the cost and risk with the threat in order for both parties to survive.

In the first section, I describe the rights-based moral justification for killing in self-defence. Rights-based moral justifications for killing in self-defence begin with the presumption that human beings have a right not to be killed, which they are morally permitted to defend. Rights-based theorists agree that the defender holds a right to not be killed and this is the moral basis for justifying killing in self-defence (if it is necessary to ward-off the deadly threat). I also explain how the threat's right not to be killed can be temporarily suspended in some cases but not permanently lost. Next I briefly examine alternatives to rights-based approaches to morally justifying killing in self-defence. A *pacifist approach* holds that the use of violence in self-defence is *never* morally justified. But this obliges an innocent victim of an unjust attack to sacrifice his

life rather than defend himself. At most, the intentional sacrifice of one's life to an unjust attack is a supererogatory act, not a moral obligation. And a third-party is not morally permitted to sacrifice the defender's life. Second, a *self-preservationist approach* argues that an individual is *always* morally justified in killing if his life is at stake. But there should be limits on the actions one can take to preserve lives; otherwise, morality in life threatening situations is reduced to a matter of brute force. In particular, we should prohibit deliberately harming innocent bystanders. Third, a *personal partiality approach* argues that the defender has a special interest in his own life which permits him to prefer his own life in those cases where one is forced into a choice between two lives. But this view is very close to self-preservation. And the defender should not have permission to kill in self-defence simply because it is *his* life that is at stake. Finally, *consequentialist approaches* attempt to justify killing in self-defence by arguing that the consequences of killing an aggressor are preferable to the consequences of allowing the defender to be killed. But these approaches do not give enough weight to important issues of human rights and justice.

In the third section, I examine three main types of rights-based approaches for morally justifying killing in self-defence. Judith Jarvis Thomson's unjust threat approach suggests that killing in self-defence is morally justified when one person is an immediate deadly threat to another person without a sufficiently just reason. In contrast, Seumas Miller's culpable threat approach requires that a person be morally culpable for posing an immediate deadly threat. That is, the attacker intends to cause serious harm to the defender. Finally, Jeff McMahan's responsible threat approach does not require that an immediate deadly threat intends harm to the defender. But he insists that the threat is sufficiently liable for endangering the defender. I then go on to argue that the main difference between these three rights-based approaches lies in the

additional necessary conditions required by the culpable threat account and the responsible threat account respectively.

The next section then looks in more detail at the necessary conditions for morally justifying killing in self-defence. The first condition says that the defender's life must be in immediate peril from a deadly threat (*immediacy condition*). The second condition says that the defender's primary intention is to preserve his own life, which can be achieved by killing the threat (*defence condition*). The third condition says that the only reasonable option for preventing the defender from being killed is to kill the threat (*necessity condition*). The fourth condition says that the threat lacks a just reason for endangering the defender's life (*unjust condition*). I argue that the unjust threat account, with its four basic conditions, is sufficient for justifying killing in self-defence in cases of forced choice between lives. But then the culpable threat account requires, as a fifth condition, that the threat is culpable for her attack on the defender (*culpability condition*). Likewise, the responsible threat account says that the threat must be sufficiently liable for her threat to the defender's life (*liability condition*).

In the final section, however, I argue that the unjust threat account should be modified to incorporate calculations of risk and cost to both the threat and defender based on the degree of liability to defensive harm. I argue that the use of *strict* forced choice between lives scenarios are misleading for grounding morally justified killing in self-defence because they are less likely to occur than a case where the defender has some leeway to accept risk and cost. That is, discussions about killing in self-defence based on forced choice between lives hypotheticals alone are misleading because they generally describe atypical scenarios. Next I demonstrate that the threat's culpability plays a role if there is any leeway for the defender to take on cost and risk. In contrast, Thomson's unjust threat account makes a mistake in attributing no role to the culpability of an unjust threat. Then I argue that the defender is obliged to share the

cost and risk of harm *equally* from a non-culpable threat in order for both parties to survive. But increasing the culpability of the threat lessens the defender's obligation to accept the cost and risk in order for both parties to survive.

2.2 A Right Not to be Killed

a. Self-defence

Rights-based moral justifications for killing in self-defence presume that human beings have a right to defend themselves from unjust threats. We might imagine a situation where Sam, who is walking from his home to the local store, is attacked by Meg with a gun. Meg tries to shoot Sam in order to kill him and take his wallet. If Sam is fortunate enough, in wrestling with Meg, to turn the gun onto her, and thereby kill Meg, then a reasonable person should conclude that, all other things being equal, Sam was morally justified in killing Meg. That is, it is morally permissible for Sam to kill Meg in a situation where: 1) Meg has intentionally attacked Sam; 2) Meg poses a deadly threat to Sam; and 3) Meg does not have a sufficiently just reason for her attack on Sam. The defender (Sam) is permitted to kill the attacker (Meg) because he is entitled to protect himself from a threat that endangers his life unjustly. This is a straightforward example of justified self-defence. But it still raises important moral questions about how the moral justification of self-defence works. After all, if we accept that killing another human being is normally wrong then how does self-defence morally justify the act of killing in the hypothetical case above?

One method of justificatory reasoning for killing in self-defence is rights-based. A rights-based moral justification for killing in self-defence is grounded in the idea that a victim of aggression has a basic right not to be killed.¹¹³ That is, all human beings

¹¹³ Unless otherwise stated, my use of the term "rights" refers to moral rights.

have a right not to be killed by an unjust aggressor. David Rodin, for example, argues that a coherent explanatory account of self-defence can be constructed around the idea of personal rights.¹¹⁴ And he reserves the term “self-defence” for the right and act of personal self-defence.¹¹⁵ Rodin argues that self-defence is best analysed as a simple liberty to commit homicide in the defence of life. But he believes that one should not confuse this assertion with the claim that they contain, as a constituent element, claims against others.¹¹⁶ According to Rodin, the justification of self-defence consists in a simple Hohfeldian liberty to commit homicide. The exceptional nature of which enables it to function as a genuine right within legal and moral normative systems. It does this, he suggests, by demarcating and protecting important interests and liberties of individual persons and providing grounds for future normative deliberation.¹¹⁷

In moral terms, Rodin suggests, self-defence is most appropriately classified as a justification, not an excuse, because basic self-defence is an act that falls outside the class of culpable homicide. Someone who kills in self-defence, he suggests, does not commit murder for which we exempt him of liability. Rather, the defensive nature of the act makes it fail to be an instance of murder at all.¹¹⁸ Rodin points out that it might be argued that, when a third party comes to the defence of a victim, their action is justified by the victim’s possession of the right of self-defence. But it is not immediately clear to him how the fact that the victim has a liberty to kill the aggressor could justify a third party in taking the aggressor’s life.¹¹⁹ According to Rodin, the right to defend strangers and third parties is best seen as having its basis independently from the justification of the victim’s own right of self-defence. The right to defend one’s own life derives from one’s right to that life, whereas the right to defend a third party

¹¹⁴ Rodin, 2.

¹¹⁵ Ibid., 13.

¹¹⁶ Ibid., 33.

¹¹⁷ Ibid.

¹¹⁸ Ibid., 30.

derives from more general considerations concerning the duty to protect the good and the valuable.¹²⁰ Rodin believes that the general duty to protect goods and values can result in extremely strong duties to act if the end in question is extremely valuable (such as human life) and the costs of action to the subject very low.¹²¹

The protection of the innocent defender's life is the goal of self-defence. But if the justification of self-defence is based on the right not to be killed then it seemingly fails because a human being (the attacker) is killed. Therefore, suggests Fiona Leverick, a satisfactory explanation for justifying killing in self-defence based on a right not to be killed must demonstrate why the defender's life can be preferred to the life of the attacker.¹²² In other words, what establishes the moral asymmetry between the life of the attacker and that of the defender? How is it that the attacker loses his right not to be killed? And what happens to the attacker's right not to be killed that the defender can rightfully override it?

b. Rights forfeiture

A key issue for a rights-based account to explain, in order to justify killing in self-defence, is establishing what happens to the attacker's right not to be killed. Generally, this is done by suggesting that the attacker somehow forfeits his right not to be killed when he threatens another person's life. Suzanne Uniacke, for instance, argues that the use of force in self-defence does not violate its victim's right not to be killed since, as individuals, we possess this right only insofar as we are not "an unjust immediate threat to another person's life or proportionate interest."¹²³ She suggests that a unitary account of justified homicide in self-defence, as an exception to the general prohibition on

¹¹⁹ Ibid., 32.

¹²⁰ Ibid., 38.

¹²¹ Ibid., 39.

¹²² Leverick, 44.

¹²³ *Permissible Killing: The Self-Defence Justification of Homicide*, 196.

homicide, requires that any unqualified right not to be killed be conditional: our possession of an unqualified right not to be killed depends upon our not threatening the equivalent rights of someone else.¹²⁴

We might choose to accept the argument that an attacker's right not to be killed is forfeited when he threatens the rights of others. But how might a person, who is threatening others, forfeit his life? According to Miller, one approach might be to conclude that the right not to be killed is absolute, and it is always wrong to transgress it.¹²⁵ The absolutist approach to the right not to be killed firmly holds that there are no circumstances where forfeiture is justified. At best, one might be excused for taking a life. Miller argues that an absolute right not to be killed would mean that killing in self-defence is never morally justified. But such an absolutist approach to the right not to be killed, he suggests, does not accord well with the intuition that an innocent person has the right to defend her life from an unjust attack.¹²⁶ So Miller concludes that it is unlikely that the right not to be killed is absolute because this means there are no circumstances in which defenders are justified in killing attackers.¹²⁷ Victims of the most heinous violent crimes, if they chose to defend themselves, would be considered blameworthy for the death of their attacker.

A second approach, according to Miller, says that killing in self-defence might be justified by cancelling the attacker's right not to be killed.¹²⁸ In this case, the attacker loses his right not to be killed because he attempted to murder the defender. Thus an attacker is judged as not deserving a right not to be killed because he has not respected the right not to be killed of others. But the problem with this approach, argues Miller, is that it is not clear how or when (or even if) the attacker regains his right not to be

¹²⁴ Ibid., 213.

¹²⁵ 325.

¹²⁶ Ibid.

¹²⁷ Ibid.

killed.¹²⁹ We might imagine a scenario where the attacker – whose right not to be killed is cancelled because of his unjust attack – fails in his attempt but is also not killed by the defender. Having now lost his right not to be killed in this one case, the cancellation of his right not to be killed means that it remains morally permissible for anyone to kill him at any time. This is unreasonable. But having failed to respect the right not to be killed in others, how does he get his right not to be killed reinstated? And if he does, when does it come back? Is he required to earn it back in some way?

A third option is to override the attacker's right not to be killed because it has been discounted in some way. According to Fiona Leverick, this approach attempts to override the attacker's right not to be killed by discounting the life of the attacker. The life of the defender is preferred, she suggests, because the value of the attacker's life has been reduced (or discounted) as a consequence of his moral blameworthiness.¹³⁰ Although this approach solves the problem of permanent forfeiture with the cancelling rights approach, it only accommodates cases involving one attacker and one defender. In situations where multiple aggressors attack one defender, argues Miller, eventually the sum of the "worth" of the attackers will outweigh the worth of the defender's life.¹³¹

Finally, Miller argues that rights forfeiture should be based on the notion of a suspended right. This is when a right is suspended under certain conditions but not permanently cancelled.¹³² A suspendable right not to be killed is not absolute. Its loss is only temporary and it achieves this result without the need to discount the rights of the attacker. This makes it a more effective account for justifying the loss of an attacker's right not to be killed. According to Miller, the attacker's right not to be killed is forfeited insofar as he is a threat to the life of others. The attacker's right not to be

¹²⁸ Ibid., 326.

¹²⁹ Ibid.

¹³⁰ , 46.

¹³¹ Miller, 327.

killed is immediately regained once he ceases to be a threat.¹³³ Rights forfeiture is made plausible by this notion of a suspended right. So it is permissible to kill an attacker in self-defence when he has temporarily forfeited his own life because he is threatening the life of the defender.

2.3 Other Approaches

a. Pacifist approaches

Before moving on to a closer examination of some contrasting rights-based approaches to justified killing in self-defence, this section briefly explores the main alternatives to rights-based justifications for killing in self-defence. This includes the main shortcomings with these alternative approaches. First, pacifist approaches hold the view that the use of lethal force against another human being is unconditionally morally wrong and can never be made right by a justifying principle such as self-defence. Alastair McIntosh, for example, concludes that the pacifist renounces the moral right to kill proportionately in self-defence, believing that nonviolence has a hidden power to transform conflict.¹³⁴ And Chris Brown describes pacifism as the view that the use of physical force against another human being is unconditionally wrong, and cannot be made right by another principle, such as self-defence.¹³⁵ But an important problem with dismissing killing in self-defence as a justifying principle in this way is that an innocent victim of an unjust attack is judged as acting wrongly if he attempts to protect himself by killing his attacker. The pacifist can never conclude that the details of a particular case might permit the defender to *justifiably* kill in self-defence because it concludes that this is irrelevant to our moral judgment on the defender. There can

¹³² Ibid.

¹³³ Ibid.

¹³⁴ Alastair McIntosh, "A Nonviolent Challenge to Conflict," in *Ethics, Law and Military Operations*, ed. David Whetham (Palgrave Macmillan, 2010), 46.

¹³⁵ Brown, 99.

only be degrees of acting wrongfully. This means that the pacifist is saying that an innocent victim of an unjust attack should sacrifice his life rather than defend himself, if it means using lethal force. As McIntosh states, “while both the soldier and the pacifist share in common a willingness to die for their values, the pacifist refuses to kill for them. If necessary the pacifist accepts the path of suffering and death.”¹³⁶

But, at most, the intentional sacrifice of one’s life to an unjust attack is a supererogatory act, not a moral obligation. Consider an incident where a person is the innocent victim of a brutal and unprovoked attack. In 2012 New Delhi, India, a group of men attacked, raped and murdered a young law student – Jyoti Singh.¹³⁷ If we agree with the Pacifist premise that the killing in self-defence is always wrong (i.e. never morally justifiable), then we should conclude that an innocent victim, such as Jyoti, is morally blameworthy if she fights back and kills an attacker. But who is willing to conclude that an innocent victim, such as Jyoti, would be acting unjustly by killing her attackers in self-defence (if that option was available to her at the time)?

Furthermore, a third-party is not morally permitted to sacrifice the defender’s life. The pacifist view of killing in self-defence condemns a third-party for using lethal force to protect the life of a victim of an unjust attack. We might believe that someone is permitted to sacrifice his own life when faced with an unjust attack. But this does not then mean that a third-party is permitted to allow the sacrifice of another person’s life. In Jyoti’s case, her friend, Awindra Pandey, fought the assailants and consequently received a broken leg.¹³⁸ Yet a pacifist view will conclude that Awindra should allow the group to rape and murder his friend rather than resort to lethal intervention.

¹³⁶ McIntosh, 46.

¹³⁷ Annalisa Merelli, "No, Jyoti Singh Is Not India’s Daughter," Quartz, <http://qz.com/356299/no-jyoti-singh-is-not-indias-daughter/>.

¹³⁸ Francis Elliott, "Jyoti Singh Pandey's Rape Ordeal Needs 'to Wake up India' " The Australian, <http://www.theaustralian.com.au/news/world/jyoti-singh-pandey-s-rape-ordeal-needs-to-wake-up-india/story-fnb64oi6-1226550662862>.

It is incorrect to conclude that the defender *always* acts wrongly if he kills in self-defence. But advocates of a pacifist approach that *always* condemns killing in self-defence will allow unacceptable violations of the right to not be killed.¹³⁹ This benefits the violators but not the victims. Pacifists who hold this view hope that this will create a better overall result. In Dustin Howes's approach, the pacifist attitude to violence is that it is always counter-productive if we are committed to the right objectives.¹⁴⁰ That is, the use of violence in response to violence will always produce more violence, since it is all part of the same problem. Howes argues that violence is no more or less effective than any other political method.¹⁴¹ But it is unproven that stepping back and allowing unjust attacks will then lead to less violence or just outcomes or a better society. Accepting this approach will certainly allow innocent victims to be harmed and have their rights violated. And it is not then clear that permitting such unjust attacks will prevent the use of more unjust violence. As I demonstrate throughout this thesis, the better approach is to distinguish between just violence and unjust violence.

b. Self-preservationist approaches

The self-preservationist (or Hobbesian) view of killing in self-defence is at the other end of the scale to pacifism. It says that a person is *always* justified in using lethal force if it is necessary to preserve her life. Jenny Teichman suggests that self-preservation is an act (or set of actions) intended to prevent or reduce harm to a person

¹³⁹ I acknowledge that there are more nuanced discussions of pacifism. The emerging discussion around "Contingent Pacifism," for example, has a more complex view of moral justification and violence. According to Ned Dobos, contingent pacifism says that war is morally justifiable *in theory* if it meets the requirements of Just war criteria but that *in fact* no war meets these criteria. Ned Dobos, "Pacifism," in *Key Concepts in Military Ethics*, ed. Deane-Peter Baker (Sydney: NewSouth Publishing, 2015). See also: Ned Dobos, Igor Primoratz, and Andrew Alexander, *The New Pacifism: Just War in the Real World* (Oxford, UK: Oxford University Press, forthcoming).

¹⁴⁰ Dustin E. Howes, *Toward a Credible Pacifism: Violence and the Possibilities of Politics* (New York: State University of New York Press, 2010), 2.

¹⁴¹ *Ibid.*, 3.

from a deadly threat.¹⁴² As an action, self-preservation is not necessarily a bad thing. But the self-preservation approach to self-defence is based on the belief that survival is the only human interest that matters. This view – the rational avoidance of death – plays a central role in Hobbes's political theory (which is why it can also be referred to as the Hobbesian approach to killing in self-defence).¹⁴³ Hobbes states that,

The Right of Nature . . . is the Liberty each man hath, to use his own power, as he will himself, for the preservation of his own Nature; that is to say, of his own Life; and consequently, of doing any thing, which in his own Judgement, and Reason, he shall conceive to be the aptest means thereunto¹⁴⁴

Hobbes held that self-defence is an inalienable right, which is grounded in one's rational concern with his own self-preservation.¹⁴⁵

An act of self-defence is a subset of self-preservation but we can (and should) distinguish them from one another. First of all, self-defence is like self-preservation in that it is an act that intends to prevent or reduce harm to one's self from a deadly threat. But, according to Teichman, acts of self-defence are an important subset of self-preservation in the sense they are "those acts of self-preservation which presuppose an immediate threat from an agent who intends . . . to kill or seriously injure you, and which themselves consist of immediate counter-attacks directed at that agent and at no one else."¹⁴⁶ For example, returning to the hypothetical case – *Deadly Attacker* – Meg attempts to kill Sam because she wants to take his money. So Meg points a gun she is carrying at Sam and pulls the trigger with the intention that shooting Sam will kill him. If Sam shoots Meg first in order to defend himself, then he is justified in acting in self-defence. But if Sam was to grab hold of an innocent bystander – Bobby – and use him as a human shield to protect himself from Meg's attack, then this would be an act of

¹⁴² Jenny Teichman, *Pacifism and the Just War: A Study in Applied Philosophy* (Basil Blackwell, 1986), 84.

¹⁴³ B. Gert, "Hobbes and Psychological Egoism," *Journal of the History of Ideas* (1967): 518.

¹⁴⁴ Hobbes, 91.

¹⁴⁵ Gert, 518.

¹⁴⁶ Teichman, 84.

self-preservation and *not* justified self-defence. Sam unjustly sacrifices Bobby's life as a means to save himself. In other words, self-defence is a legitimating moral principle that justifies an act (or series of actions) of self-preservation.

There are a number of reasons why we should be careful to maintain this distinction and reject the view that one's life being at stake is sufficient justification for killing. First, in situations where lives are at stake, there should be limits on the actions one can take to preserve lives. For example, Judith Jarvis Thomson asks us to consider a case she calls "Transplant" where a medical doctor has the opportunity to save the lives of five sick patients by killing and removing the organs of one healthy man. The preservation of the five lives in this case does not justify killing the healthy man.¹⁴⁷ A second problem with the self-preservationist view is its failure to prohibit harm to innocent bystanders in situations of mortal danger. As described above, we might imagine a situation where Meg is shooting at Sam and the only way Sam can save his own life is by pushing Bobby, an innocent bystander who happens to be within reach, into the line of fire. This act of self-preservation is morally impermissible because it uses an innocent human life as a mere means to an end.¹⁴⁸

A third problem with a self-preservationist account of killing in self-defence is the concern that it reduces morality in conflict to brute force. If we accept this approach to killing in self-defence, then moral justification becomes simply a matter of who is the strongest in the moment to survive. But not just anything goes in self-defence. As Thomson points out, we cannot simply say that "all bets are off when you will otherwise die."¹⁴⁹ She argues that the premise "A will otherwise die" is not sufficient for the conclusion that A may kill B.¹⁵⁰ One's life being threatened is a necessary but

¹⁴⁷ Judith J. Thomson, "Turning the Trolley," *Philosophy & Public Affairs* 36, no. 4 (2008): 373.

¹⁴⁸ Rachels, 128.

¹⁴⁹ Judith J. Thomson, "Self-Defense," *Philosophy & Public Affairs* 20, no. 4 (1991): 305.

¹⁵⁰ Ibid.

not solely sufficient condition to justify killing in self-defence: there needs to be something more to make an act of self-preservation count as morally justified killing in self-defence. According to McMahan, there must be the relevant “moral asymmetry” between you and another human being for you to be justified in killing the other (if that were necessary to defend your life).¹⁵¹ That is, there must be some moral difference between the two parties that counts.

c. Personal partiality approaches

Having rejected the conclusions of the pacifist and self-preservationist approaches, what other options might we now consider? Another alternative to the rights-based justification for killing in self-defence is the personal partiality approach. This argues that a better explanation than rights-based approaches to justifying killing in self-defence is to say that the defender has a special interest in her own life which permits her to prefer her own life in those cases where one is forced to choose between two lives. Phillip Montague, for example, argues that personal partiality permits the defender to kill the attacker in self-defence in some situations where one is faced with a forced choice between lives.¹⁵² But the defender is only permitted to kill the person who caused the scenario where one or the other person must die. The defender is not permitted to kill an innocent bystander to save his own life. According to Cecile Fabre, personal partiality permits the defender to confer greater weight to her own interests relative to the interests of others.¹⁵³ It gives pre-eminence to the intuition that the defender is in a special relationship to her attacker: he is threatening her life and no one else’s. The defender has a vested interest, which others lack, in thwarting the attack. Consequently, Fabre suggests that the defender has a special reason, which others lack,

¹⁵¹ Jeff McMahan, "The Ethics of Killing in War," *Ethics* 114 (2004): 720.

¹⁵² "Self-Defense and Choosing between Lives," *Philosophical Studies* 40, no. 2 (1981): 209.

for killing the attacker.¹⁵⁴ Leverick describes a personal partiality justification as one where an individual is entitled to give preference to her own life when confronted with a choice between lives because she personally values her own life more than the lives of others.¹⁵⁵

But personal partiality approaches are largely equivalent to self-preservationist approaches and we should reject both. Personal partiality does not satisfactorily explain why the defender's preference trumps other morally worthy considerations. What makes self-preference the overwhelmingly decisive factor? What about other potentially morally worthy considerations, such as the utility of the lives at stake or the ages of the people involved? The personal partiality answer does not explain why self-preferential killing is sometimes permissible in forced choice situations. As demonstrated in the discussion on self-preservation above, the defender should not have permission to kill others to save his own life simply because it is his life at stake. After all, both parties are likely to value their own lives. Instead, the defender must establish that there is a relevant moral asymmetry between himself and the other party.

A further problem with personal partiality is that it allows a defender to protect himself on the basis of a special stake in his own life but not to protect the life of another he values or to whom he has a special responsibility. If we base the permissibility for killing in self-defence on agent-relative considerations, then it might also rule-out potentially important agent-relative considerations. So, for example, a parent could kill in self-defence but not in defence of his child.¹⁵⁶

Most problematically for the personal partiality approach is that it cannot give preference to the defender over the attacker. Personal partiality allows an attacker to

¹⁵³ Cecile Fabre, "Permissible Rescue Killings," *Proceedings of the Aristotelian Society* 109, no. 2 (2009): 163.

¹⁵⁴ *Ibid.*, 154.

claim that he is acting justifiably in cases where the defender fights back. For example, let us imagine a situation where Meg unjustly attacks Sam. She attempts to shoot him but misses. This gives Sam enough time to shoot back at Meg in self-defence. Unfortunately for Sam, he also misses, which gives Meg the opportunity to take a second shot. She hits Sam and kills him. Meg can now argue that she acted in self-defence because, according to the personal partiality approach, she has a right to prefer her own life over Sam's. This is the case even though Meg was the one who unjustly attacked Sam in the first place.

d. Consequentialist approaches

Consequentialist approaches attempt to justify killing in self-defence by arguing that the consequences of killing the attacker are preferable to the consequences of allowing the defender to be killed. In her discussion of various consequentialist approaches for justifying killing in self-defence, Leverick suggests that act-utilitarianism weighs the benefits of either killing the attacker or allowing the defender to die according to the direct consequences of the act.¹⁵⁷ She suggests that there are two ways to go about justifying killing in self-defence by using act-utilitarian reasoning. First, a discount account argues that the attacker's moral blameworthiness makes her life less valuable than the defender's life.¹⁵⁸ Second, a future harm account argues that killing the attacker will lead to a net saving of lives in the future because the attacker is more likely to go on to harm others.¹⁵⁹

Next, Leverick describes rule-utilitarian approaches. She argues that rule-utilitarian approaches rely on deterrence because they hold that a rule permitting killing

¹⁵⁵ Leverick, 50.

¹⁵⁶ I further examine these types of agent-relative considerations in Section 3.4.

¹⁵⁷ Leverick, 48.

¹⁵⁸ Ibid.

¹⁵⁹ Ibid.

in self-defence will save lives by deterring aggression.¹⁶⁰ Leverick concludes, however, that there have been few attempts to morally justify killing in self-defence on the basis of rule consequentialism alone and it is normally combined with some form of act consequentialism so that,

if the benefits to society in having a rule likely to deter aggression are placed on the 'same side of the scales' as the life of the victim, then self-defensive killing is justified on the balance of interests¹⁶¹

So, according to Leverick, consequentialist approaches to morally justifying killing in self-defence attempt to argue that the attacker has rendered her life less valuable than that of the defender in some way. And she argues that most consequentialist accounts of justified killing in self-defence end up using a combined view for arguing that the attacker's life is less valuable than the defender's life. That is, the attacker's life is discounted due to a combination of her moral blameworthiness and the need to protect the social-legal order.¹⁶² But attempts to base justified killing in self-defence by discounting the value of the attackers runs into the problem that enough morally discounted attackers will eventually outweigh the life of the defender.

Moreover, if we agree with Leverick's conclusions, then the problem with consequentialist approaches to self-defence is that judging an action simply on the basis of its consequences leaves out important issues of human rights and justice.¹⁶³ For example, Richard Norman argues that a problem with utilitarian approaches is that they oversimplify moral theory. As a result, they fail to take into account that the wrongness of killing human beings carries its own independent moral weight.¹⁶⁴ And Jeremy Waldron suggests that theories of welfare maximisation, such as utilitarianism, make a mistake when they too easily trade-off civil liberties against other important goods, such

¹⁶⁰ Ibid.

¹⁶¹ Ibid., 49.

¹⁶² "Defending Self-Defence," *Oxford Journal of Legal Studies* 27, no. 3 (2007): 566.

¹⁶³ *Killing in Self-Defence*, 48.

¹⁶⁴ Richard J. Norman, *Ethics, Killing, and War* (Cambridge University Press, 1995), 73-74.

as security.¹⁶⁵ He says that, “rights versus rights is a different ball-game from rights versus social utility.”¹⁶⁶ His point being that human rights should not to be so easily disregarded.

In sum, a problem with the pacifist approach to self-defence is the conclusion that a defender (or third-party) is judged as doing something morally wrong if she attempts to protect herself using lethal force against an attacker. The death of an unjust attacker is not only considered a bad outcome; the pacifist approach goes further and blames the defender for acting wrongly. The self-preservationist approach puts insufficient limits on the actions that a defender can take to preserve his life. The personal partiality approach does not explain why preference for one’s own life is a sufficient moral justification for a defender to kill an attacker. And consequentialist approaches to morally justifying killing in self-defence do not give adequate weight to important issues of human rights and justice.

2.4 Rights-Based Accounts

a. Unjust threat

This third section now examines more closely the different types of rights-based accounts for morally justifying killing in self-defence. One rights-based approach to justifying killing in self-defence is the unjust threat account. Uniacke, for example, says that the necessity of killing in self-defence is grounded in the act of repelling or warding off an unjust immediate deadly threat. The right to kill to defend a life derives

¹⁶⁵ Jeremy Waldron, *Torture, Terror, and Trade-Offs: Philosophy for the White House* (Oxford: Oxford University Press, 2010), 136.

¹⁶⁶ *Ibid.*, 31.

from the defender's danger, from the fact that the defender's life is unjustly threatened.¹⁶⁷

A well-known example of the unjust threat justification for killing in self-defence is provided by Thomson. She concludes that an unjust threat lacks a right not to be killed when he is about to violate a defender's right not to be killed and this can be prevented only by killing him.¹⁶⁸ She argues that it is because of the "impersonal fact" that the unjust threat will otherwise violate the defender's right not to be killed that the defender may kill the unjust threat in self-defence.¹⁶⁹ Thomson starts out her argument by asking the following question: "What if in order to save one's life one has to kill another person?" In some cases, she suggests, this is obviously permissible.¹⁷⁰ In a case she calls *Villainous Aggressor*, Thomson describes a scenario where a man in a truck is deliberately trying to run you down and the only way you can save yourself is by blowing up the truck. She argues that it is *morally justified*, not merely *excusable*, for you to blow up the truck and kill the driver in defence of your life.¹⁷¹ That is, killing the driver becomes the right thing to do rather than an action that is wrong but for which you are not entirely to blame. Thomson adds, however, that if you had an alternative way of protecting yourself that did not kill the driver, and you could stop the truck without blowing it up, then that is what you ought to do. It would be wrong to kill even a villainous aggressor, she suggests, when it is not strictly necessary.¹⁷²

In a second case that Thomson refers to as *Innocent Aggressor*, the driver of the truck is still trying to run you down but this time he is entirely without fault for what he is doing. Perhaps, she suggests, someone has injected him with a drug that makes him

¹⁶⁷ Uniacke, *Permissible Killing: The Self-Defence Justification of Homicide*, 184.

¹⁶⁸ Thomson, "Self-Defense," 301.

¹⁶⁹ *Ibid.*, 308.

¹⁷⁰ *Ibid.*, 283.

¹⁷¹ *Ibid.*

¹⁷² *Ibid.*, 284.

go temporarily insane.¹⁷³ It is not his fault that he is going to kill you but he will kill you if you do not blow up the truck. Thomson argues that killing in self-defence is justified in this case just as it was in the case of *Villainous Aggressor*. Despite the fact that it is not the driver's fault that he is a deadly threat to you, you have the right to kill him in self-defence. The attacker's fault has no bearing on your right to defend yourself.¹⁷⁴

Thomson's third case describes a scenario based on an *Innocent Threat*. In it, she suggests that a fat man, who has been pushed off a cliff, will fall on you and kill you unless you shift the position of an awning. But if you do this, the falling man will be deflected onto the road below and he will die.¹⁷⁵ Although the falling man has done nothing at all to contribute to the deadly threat to you, Thomson argues that it is permissible to shift the awning to defend yourself, even though you know that your actions will kill the falling man.¹⁷⁶

Thomson refers to these three cases – where it is permissible for you to kill a person in defence of your life – as “Yes” cases.¹⁷⁷ In contrast, Thomson's “No” cases describe three scenarios where a person uses a bystander to defend themselves. Thomson argues that in all three cases of killing a bystander, it is not true in any of them that the person you kill will otherwise kill you.¹⁷⁸ She argues that it is plausible to think we can explain the permissibility of proceeding in all three “Yes” cases by appeal to the fact that the man you kill will otherwise kill you.¹⁷⁹ In short, Thomson's unjust threat account of killing in self-defence argues that Sam is morally justified in killing Meg in self-defence when the following conditions are met: 1) Meg is an immediate deadly threat to Sam's life (*immediate deadly threat*); 2) Sam's intention is to preserve

¹⁷³ Ibid.

¹⁷⁴ Ibid.

¹⁷⁵ Ibid., 287.

¹⁷⁶ Ibid.

¹⁷⁷ Ibid., 288.

¹⁷⁸ Ibid., 292.

¹⁷⁹ Ibid., 288.

his own life, which can be achieved by killing Meg (*defensive*); 3) Sam's only reasonable option for preventing being killed is to kill Meg (*necessary*); and 4) Meg does not have a just reason for threatening Sam's life (*unjust*).

b. Culpable Threat

A second main type of rights-based approach for morally justifying killing in self-defence is the culpable threat account. This differs from the unjust threat account in that it requires that the threat is *morally culpable* for his attack on the defender. Like Thomson's unjust threat account, the culpable threat account for justified killing in self-defence holds that a defender is entitled to kill in self-defence when his life is threatened and he will be killed unless he kills his attacker first. Unlike Thomson's account, however, the culpable threat account insists that moral fault must be attributable to the attacker to justify self-defence.¹⁸⁰ That is, the person posing a deadly threat is an attacker *intending* to harm the defender. Consequently, it is not sufficient that there is a deadly threat that can only be removed by killing the person who constitutes the deadly threat: there must be the relevant intention to harm the defender. According to Miller's culpable threat approach to killing in self-defence, moral justification hinges on establishing the attacker's moral fault. It is not sufficient for justification of killing in self-defence that there is a deadly threat which can only be removed by killing the person who constitutes the deadly threat.¹⁸¹ By moral fault, Miller means that the attacker intends to kill the defender and he is responsible for having this intention to kill the defender.¹⁸² If it can be established that the attacker is morally culpable for his deadly threat to the defender, then this account concludes there is the required "moral asymmetry" between the attacker and the defender. As explained above, the notion of

¹⁸⁰ Miller, 331.

¹⁸¹ Ibid.

¹⁸² Ibid.

moral asymmetry gives the defender an impartial moral reason sufficient to prefer his own life over the attacker's life in a situation of forced choice between two lives.

To illustrate the distinction between the unjust threat account and the culpable threat account, consider the difference between Thomson's *Villainous Aggressor* and *Innocent Threat* hypothetical cases described above. The truck driver in *Villainous Aggressor* is intentionally and unjustly trying to kill the defender. So both accounts agree that the defender is morally justified in destroying the truck and killing the driver in self-defence. But the two accounts disagree about the falling fat man. Although the deadly threat posed by the falling fat man in *Innocent Threat* is unjust, he is not intending to harm the defender. This means the falling fat man is not morally at fault and so the culpable threat account says that killing him in self-defence is not justified. In contrast, on the unjust threat account, it is enough that the falling fat man lacks a justification for posing a deadly threat in order for the defender to be justified in killing him.

In short, Miller's culpable threat approach argues that Sam is justified in killing Meg in self-defence when the following conditions are met: 1) Meg is an immediate deadly threat to Sam's life (*immediate deadly threat*); 2) Sam's intention is to preserve his own life, which can be achieved by killing Meg (*defensive*); 3) Sam's only reasonable option for preventing being killed is to kill Meg (*necessary*); 4) Meg does not have a sufficiently just reason for threatening Sam's life (*unjust*); and 5) Meg intended to attack Sam and she is responsible for that intention (*culpable*).

c. Responsible Threat

A third main type of rights-based account for justifying killing in self-defence is McMahan's responsible threat account. This steers a middle course between the unjust

threat and culpable threat approaches. He argues that non-responsible threats are not liable to being killed in self-defence.¹⁸³ According to McMahan, a non-responsible threat is a person who, without sufficient justification, threatens to harm someone but who is not morally responsible for doing so. He suggests that if a defender's life is threatened by a non-responsible threat, so that the defender must choose between intentionally killing the non-responsible threat and allowing himself to be killed, the presumption opposes killing in self-defence.¹⁸⁴

An important area where McMahan's responsible threat account agrees with the culpable threat account to killing in self-defence (and disagrees with the unjust threat approach) is in the requirement for the threat to have done something to establish the necessary moral asymmetry between the threat and the defender. In order to overcome or defeat the presumption against intentional killing, according to McMahan, the threat must have done something morally decisive enough to make him liable to be killed.¹⁸⁵ McMahan claims that the threat becomes liable when he "voluntarily engaged in a risk imposing activity and is responsible for the consequences when the risks he imposed eventuate in harms."¹⁸⁶ And when it is established that the threat is to a sufficient degree responsible for posing a threat of unjust harm to the defender then the threat has made himself liable to defensive harm. McMahan points out that the relevant difference between the threat and the defender might be of comparatively slight moral significance. But he suggests that in cases where the costs cannot be divided (i.e. either one or the other will be killed) then he argues it is fair that the threat who has

¹⁸³ *Killing in War*, 168.

¹⁸⁴ *Ibid.*

¹⁸⁵ *Ibid.*, 169.

¹⁸⁶ Jeff McMahan, "The Basis of Moral Liability to Defensive Killing," *Philosophical Issues* 15, no. 1 (2005): 394.

voluntarily engaged in a risk-imposing activity should suffer death rather than impose it on the defender.¹⁸⁷

Importantly, McMahan's responsible threat account does not require the threat to be morally at fault or intending to harm the defender for killing in self-defence to be justified. In this way it differs from the culpable threat approach. Returning again to Thomson's hypothetical cases above, the truck driver in *Villainous Aggressor* is intentionally and unjustly threatening to kill the defender. So all three accounts agree that the defender is morally justified in destroying the truck and killing the driver in self-defence. In contrast, the deadly threat posed by the falling fat man in *Innocent Threat* is unjust so the unjust threat account says that the defender is morally justified in killing him in self-defence. But because the falling fat man is neither morally at fault nor responsible for the threat he poses, both the culpable threat account and responsible threat account say that killing in self-defence is not justified.

Turning to *Innocent Aggressor*, however, we find that the culpable threat account does *not* justify killing in self-defence because the truck driver is not morally at fault for the deadly threat he poses to the defender. The unjust threat account concludes that killing in self-defence *is* justified because the deadly threat posed by the truck driver is not justified. The responsible threat account agrees that killing in self-defence is justified in this case but not because the threat is unjust or because the truck driver is morally at fault. Rather, it is because the truck driver is engaging in the risk-imposing activity of truck driving and he is responsible for ensuring the truck does not threaten any innocent lives.

In short, McMahan's responsible threat approach argues that Sam is justified in killing Meg in self-defence when the following conditions are met: 1) Meg is an

¹⁸⁷ Ibid.

immediate deadly threat to Sam's life (*immediate deadly threat*); 2) Sam's intention is to preserve his own life, which can be achieved by killing Meg (*defensive*); 3) Sam's only reasonable option for preventing being killed is to kill Meg (*necessary*); 4) Meg does not have a just reason for threatening Sam's life (*unjust*); and 5) Meg is responsible for the risk-imposing activity that threatens Sam's life (*liable*).

2.5 Explaining the Conditions for Justified Self-Defence

a. Necessary conditions: Immediate, defensive, necessary and unjust

This next section outlines the necessary conditions for morally justified killing in self-defence. The first requirement of a rights-based moral justification for killing in self-defence is the *immediate threat condition*. This says the threat is an immediate danger to another person's life. The danger is both likely to occur and of a seriously harmful nature. That is, the subject of the danger is likely to either be killed or seriously injured by the Threat. In 1.2, for example, I described the following hypothetical case, *Deadly Attacker*: Meg attempts to kill Sam because she wants to take his money. She Meg points a gun she is carrying at Sam and pulls the trigger with the intention that shooting Sam will kill him. An important feature of this case is the immediacy of the threat posed by Meg. If Sam has the capability to defend his life by killing Meg first, then he only has moments to make the decision and act. What role does immediacy play? According to Uniacke, where a threat is immediate, the use of force in self-defence blocks the infliction of irreparable unjust harm.¹⁸⁸ The immediacy requirement permits the defender to ward-off an unjust deadly threat to the defender's life in the moment that it clearly presents itself. But it also obliges the defender to take reasonable measures to avoid the deadly confrontation. After all, as Uniacke notes

¹⁸⁸ Uniacke, *Permissible Killing: The Self-Defence Justification of Homicide*, 228.

“killing is an extreme last resort when my safety cannot otherwise be secured.”¹⁸⁹

Reasonable measures are not costly or risky to the defender and they include escape from the situation and/or seeking police intervention. There are further debates about the “imminence”¹⁹⁰ or “inevitability”¹⁹¹ of a threat, but I do not have the space to properly address those discussions here. Instead, I merely note that the purpose of the immediacy requirement is to balance the defender’s right not to be killed with the requirement to take reasonable measures to avoid the deadly confrontation.

The second requirement of a rights-based moral justification for killing in self-defence is the *defence condition*. This says that the defender’s primary intention is defensive. That is, the defender’s goal is to preserve his own life and this can be achieved by killing the threat. Thus, as Uniacke argues, the justification of self-defence is morally grounded in the act of resisting, repelling or warding off an unjust immediate threat.¹⁹² She suggests that this defensive intention is based in a long history of natural law accounts of justified self-defence, which hold that the positive right of self-defence derives from the defender’s danger.¹⁹³ The crucial fact, according to Uniacke, is that the defender’s life is unjustly threatened rather than considerations such as the attacker’s culpability or claims of the greater general good of the victim surviving rather than the attacker.¹⁹⁴ This is where the doctrine of double effect plays an important role.

According to Shelly Kagan, this doctrine tells us that it may be permissible to perform an act with both a good effect and a bad effect, provided that the bad effect is a mere

¹⁸⁹ Ibid., 66.

¹⁹⁰ To me, the notion of immediacy is more restrictive in terms of time: the incident is happening in the moment. In contrast, the notion of imminence can leave time unspecified. Imminence suggests that a specific threat is inevitably going to manifest at some point but it can allow the passage of time. Thus the problem with “imminence” is that it is too permissive when acting in self-defence.

¹⁹¹ A further angle to this debate is the notion of inevitability within self-defence. This requires that there be a history between the Attacker and the Defender. It gets explored specifically in legal discussions relating to the problem of battered wives, which is examined in the Victorian Law Reform Commission discussion on the subject (under the title ‘The Battered Woman Syndrome’) in “Defences to Homicide: Options Paper,” (Melbourne: Victorian Law Reform Commission, 2003).

¹⁹² Uniacke, *Permissible Killing: The Self-Defence Justification of Homicide*, 184.

¹⁹³ Ibid.

¹⁹⁴ Ibid.

side effect. If harm is either your goal or a means to your goal, then the act is forbidden.¹⁹⁵ It was Thomas Aquinas who held that any act might have two consequences: one that is intended and one that is not.¹⁹⁶ According to Aquinas,

Nothing prevents a single act from having two effects, only one of which is intended while the other is beside the intention. Now moral acts take their species from what is intended, not from what is beside the intention, since this is accidental . . . Accordingly, an act of self-defence may have two effects, one of which is the saving of one's own life while the other is the slaying of an attacker. If one's intention is to save one's own life, the act is not unlawful, because it is natural for everything to keep itself in being as far as possible.¹⁹⁷

Rather than focusing on the attacker's intentionality, the crucial factor is the intention of the defender: that his action is defensive. And this emphasis on the defender's intention in all cases of self-defence, suggests Uniacke, represents the important insight that the moral permissibility of the use of force in self-defence is grounded in the fact that the act is defensive.¹⁹⁸

The third requirement of a rights-based moral justification for killing in self-defence is the *necessity condition*. This says that the only reasonable option available for preventing the defender from being killed is to kill (or seriously harm) the threat. According to Joanna Firth and Jonathan Quong, the necessity condition states that one cannot be liable to defensive harm unless the imposition of that harm is necessary to serve a sufficiently just cause, such as defending an innocent person from a threat.¹⁹⁹ If harming a person is unnecessary for the achievement of self-defence, suggests McMahan, then that person cannot be liable to be harmed.²⁰⁰ Thus, Sam's only reasonable option for surviving *in the present moment* is to kill Meg before she shoots him.

¹⁹⁵ Kagan, 103.

¹⁹⁶ Alex J. Bellamy, *Just Wars: From Cicero to Iraq* (Cambridge: Polity Press, 2006), 39.

¹⁹⁷ Thomas Aquinas, "Aquinas: Political Writings," ed. R.W. Dyson (Cambridge, UK: Cambridge University Press, 2002), 263-64.

¹⁹⁸ Uniacke, *Permissible Killing: The Self-Defence Justification of Homicide*, 185.

¹⁹⁹ Joanna Firth and Jonathan Quong, "Necessity, Moral Liability, and Defensive Harm," *Law and Philosophy* (2012): 2.

²⁰⁰ McMahan, *Killing in War*, 8-9, 157, 219-20.

The fourth requirement of a rights-based moral justification for killing in self-defence is the *unjust condition*. This says that the threat does not have a just reason for threatening the defender's life. In the absence of a sufficient moral justification on the part of the threat, the defender has the right to protect his own life. A threat is required to morally justify her threatening status because there is a "wrong" in that the defender's rights are violated. If the threat is inflicting an irreparable *unjust* harm, suggests Uniacke, then the unoffending defender is morally permitted to use necessary and proportionate force to block the violation of his right not to be killed.²⁰¹ In this sense, the defender has a moral claim against the threat. The recognition that the defender has been wronged is based on the defender's right not to be killed and the threat's moral obligation to justify the harm she does or the threat she poses.

In sum, rights-based accounts for justified killing in self-defence mostly agree on the four basic conditions outlined above.²⁰² Where they fundamentally disagree is in the additional conditions attached to the culpable threat account and the responsible threat account respectively. As I outlined in the previous section, the culpable threat approach requires, as an additional condition, that the threat is an attacker who is intending to harm the defender (*culpability condition*). Whereas the responsible threat account requires, as an additional condition, that the threat is liable for the risk-imposing activity that threatens the defender (*liability condition*). So an important disagreement between the unjust threat, responsible threat and culpable threat accounts is the role that the threat's culpability or liability plays in justifying killing in self-defence.

²⁰¹ Uniacke, *Permissible Killing: The Self-Defence Justification of Homicide*, 157.

²⁰² This is not to say that everyone agrees on what features exist within each of the conditions. But the basic conditions themselves exist across accounts.

b. Additional conditions: Culpability and Liability

The culpable threat approach requires, as an additional condition, that the threat is morally culpable for an attack on the defender to justify killing in self-defence. But moral culpability is *not* a necessary condition because justified killing in self-defence is *not* based on desert of punishment. Thomson rejects two possible reasons for why it might be thought permissible for the defender to blow up the truck in *Villainous Aggressor* but only excusable in *Innocent Aggressor*. First, the villainous aggressor might be judged to be less worthy than the fault-free driver. She dismisses this argument on the basis that the fault-free driver might also not be a worthy person, all things considered.²⁰³ Second, the villainous aggressor deserves to be punished whereas the fault-free driver does not. In this case, Thomson makes the point that it is not up to the private person defending herself to mete out punishment in such situations.²⁰⁴

According to Leverick, criticism of the rights-based approach to killing in self-defence has tended to focus on discomfort with the idea that the right not to be killed can be temporarily forfeited. This is, she suggests, especially the case with an innocent aggressor who forfeits the right through no fault of their own.²⁰⁵ But when rights forfeiture is not linked to fault, because it is not based on the notion of punishment, then the right not to be killed is only forfeited by virtue of becoming an immediate threat to the life of another. So the unjust threat approach avoids these criticisms because it is not saying the threat *deserves* to be killed or is being punished for the threat he poses to the defender.

McMahan's responsible threat account also has an additional condition that relates to the threat but is of a weaker variety than the culpability threat approach. This

²⁰³ "Self-Defense," 285.

²⁰⁴ Ibid.

²⁰⁵ Leverick, "Defending Self-Defence," 572.

says that the threat must be sufficiently responsible for the risk-imposing activity that threatens the defender's life (*liability condition*). McMahan's responsible threat account agrees with the unjust threat account that liability to defensive harm is not based on desert of punishment. But it then disagrees on the question of where the onus for moral justification lies.

The unjust threat account of killing puts the "burden of proof" on the threat to justify the danger he poses to the defender. It says that the threat must justify the deadly danger she poses to the defender in order to *not* be liable to defensive harm. There exists an important moral presumption against killing human beings and, to overcome this presumption, there needs to be a sufficient ethical justification that changes its status from an action (or intention) that is morally wrong to one that is morally neutral or right. The defender, for his part, must prove that his own intentions are defensive when confronted with the reality of an unjust immediate deadly threat. In contrast, the responsible threat and culpable threat accounts demand that the defender finds some additional quality in the threat to establish the necessary moral asymmetry between the two parties. The "burden of proof" then lies with the defender to justify his actions by demonstrating the threat has this asymmetric quality. For the culpable threat account, this means the defender must prove that the threat was morally at fault because he intended the attack. Whereas the responsible threat account demands the defender prove that the threat was sufficiently responsible for the risk-imposing activity that threatens the defender's life.

c. Forced choice between lives

So what are we to conclude? My claim is that the unjust threat account for justifying killing in self-defence is correct in cases where one faces a strict forced choice between lives. According to Montague, a forced choice between lives situation

is one where Person B will certainly kill Person A unless Person B is killed first. In other words, he suggests that if the threat is not prevented from doing so, he will in fact kill the defender.²⁰⁶ For example, let's imagine a hypothetical case where Hans attempts to *intentionally* push John off the edge of a tall building. If Hans is successful then the fall onto the pavement below will certainly kill John.²⁰⁷ In order to prevent Hans pushing him off the building edge, John grapples with Hans. But Hans is physically stronger and will inevitably win out. The only choice that John has, if he wants to survive, is to twist his body in a way that forces Hans to go off the building edge instead. So either Hans or John will certainly die. In this case, all three accounts agree that John is morally justified in killing Hans in self-defence. Hans is unjustly threatening John's life, his attack is a risk-imposing activity and he intends to harm John.

But now let us consider a hypothetical case where the threat is innocent of wrongdoing. Imagine that Martin and Roger are window cleaners working high-up on the outside of a building. Martin stumbles and, as he loses his balance, he instinctively grabs at Roger to steady himself. Unfortunately, this action causes Roger to also lose his balance and consequently Roger is faced with two choices. He can do nothing and allow himself to fall from the cleaner's platform and the fall will certainly kill him. Or he can firmly push Martin away, which will cause Martin to fall and be killed instead. The unjust threat account says that Roger is morally justified in pushing Martin away because he is warding-off a threat to his life. In contrast, both the culpable threat and responsible threat accounts hold that it is *not* morally justifiable to kill either a non-responsible threat or an innocent threat in self-defence because the threat, in this case, is

²⁰⁶ Montague, 210.

²⁰⁷ That is, excluding a miraculous intervention that saves him, John will almost certainly be killed or seriously injured.

not liable for his threatening action.²⁰⁸ McMahan argues that if the defender's life is threatened by a non-liable threat – so that he must choose between intentionally killing the threat and allowing himself to be killed by him – the presumption opposes killing in self-defence.²⁰⁹ It is integral to the culpable threat and responsible threat accounts of justified killing in self-defence that there is a sufficient moral difference between the threat and the defender. That is, “the threat must have done something morally decisive enough to make them liable to be killed.”²¹⁰ So, according to both the culpable threat and responsible threat accounts, Martin should allow himself to fall from the cleaner's platform rather than push Roger away.

But why should Roger's life be preferred to Martin's life in this case? In a situation where there is a forced choice between two innocent lives, it is unfair that the defender is obliged to sacrifice his life in this way. If we accept the conclusion that Roger is not justified in defending his life against the threat from Martin, then this means that choosing to defend himself makes Roger liable to be killed instead. That is, if Roger attempts to intentionally push Martin away, then Martin is morally justified in killing Roger. But this conclusion cannot be correct. It is absurd that the defender would make himself liable to being killed by the threat because he attempted to defend himself from the threat. Roger's intention, in this case, is to protect himself from an unjust immediate deadly threat rather than to kill his work colleague.

It is also unfair that the burden of proof is on the defender to justify his actions rather than on the threat. As I explained above, both the culpable threat and responsible threat accounts oblige the defender to prove the threat has an additional quality other than the fact that he is posing an unjust immediate deadly threat. The culpable threat

²⁰⁸ According to McMahan, an innocent Threat is someone who objectively acts impermissibly in posing a threat to another but also acts subjectively permissibly, or even with subjective justification. A non-responsible Threat is a person who threatens to harm someone without justification but who is not morally responsible for doing so. McMahan, *Killing in War*, 163, 68.

account demands proof that it is an intentional attack and the responsible threat account demands proof that the threat was sufficiently responsible for the risk-imposing activity that threatens the defender's life. But why should the burden of proof be on the defender to prove the threat's sufficient intentionality or responsibility for a risk-imposing activity and not on the threat to justify his deadly status? If we take seriously the notion that the defender has a right not to be killed, then it is reasonable to conclude that a person posing an immediate deadly threat to the defender should be required to justify himself. For the defender's part, he should only have to prove that his own intentions are defensive when confronted with the reality of an immediate deadly threat.

It has been argued that cases where the threat is incapable of exercising moral agency, so that he is merely an object, prove that the unjust threat account is wrong. Noam Zohar, for example, suggests that a falling body is the equivalent of a falling piano. A piano cannot commit a rights violation, he suggests, because it is an object and not a moral agent.²¹¹ Uwe Steinhoff makes the point that an obligation to justify being a threat would *not* make sense because one cannot be obliged to do things which are beyond one's control.²¹² So I can have no right that the falling body not kill me and, Zohar argues, if the person, as moral agent, is not about to violate my right not to be killed, then it is misleading to say that he is "about to kill me." Therefore, he concludes that self-defence cannot serve as the grounds for permitting the deflection, unless we are prepared to broaden the notion of self-defence to permit any destruction of another to buy one's own life.²¹³

This argument is incorrect because if a mere object, such as a piano, is threatening my life then moral justification using rights forfeiture is not required (or at least not

²⁰⁹ Ibid., 169.

²¹⁰ Ibid.

²¹¹ Noam J Zohar, "Collective War and Individualistic Ethics: Against the Conscription of" Self-Defense", *Political theory* 21, no. 4 (1993): 608.

appropriate as a moral justification). But rights forfeiture is the appropriate approach for justifying killing a human being in self-defence. A human being is not merely an object in the same way as a piano. Human beings are rights holders. Perhaps, if the person was already dead then they would be an object in the same way as the piano. But the person acting in self-defence does not need to justify destroying a dead body in the same way as a live human being. The relevant moral difference is that a live person is unjustly posing a deadly threat to the Defender.

According to Victor Tadros, there is sense in saying that the Threat's duty to not harm others persists even when he is unable to perform it.²¹⁴ How can it matter whether a person's body is the threat if their body is not under the control of their own agency? Tadros answers this question by suggesting that a person has a special responsibility to ensure that his body is not the source of a threat.²¹⁵ In general, Tadros argues, a person has much more control over the threats that his own body imposes than others do. This means that if we each have to bear a greater cost to avert the threat that our own bodies impose on others then we will nevertheless normally have control over which costs we have to bear, as well as how and when they are imposed.²¹⁶ So he concludes that it is plausible to justify killing the innocent threat in self-defence on the grounds that everybody has a primary responsibility for ensuring that his body does not impose deadly threats on others.²¹⁷

This might *not* be convincing for some (or potentially even most) people. They might insist that, at least in the case of the falling fat man, the key point is that he is in no way morally responsible for the threatening situation. So killing him in self-defence cannot be morally justified. But it is at least plausible to argue that the culpability of the

²¹² Uwe Steinhoff, *On the Ethics of War and Terrorism* (Oxford: Oxford University Press, 2007), 82.

²¹³ Zohar, 608.

²¹⁴ Tadros, 255.

²¹⁵ *Ibid.*, 252-53.

threat *does not* have a role to play in judging situations where there is a strict *forced choice between lives*. This is because morally justified killing in self-defence aims to resist or ward-off an unjust immediate threat to a person's life. The use of lethal force in self-defence is morally justified on the basis that it is aiming at preventing harm to the defender. It is not primarily concerned with punishment or with what the threat deserves. The area where culpability does play a key role, however, is when there is *leeway* for the defender to take on cost and risk.

2.6 A Modified Unjust Threat Account

a. *Misleading atypical scenarios*

This final section suggests that the unjust threat account should be modified to incorporate calculations of risk and cost to both the threat and defender based on the degree of liability to defensive harm. Specifically, the defender is obliged to share the cost and risk of harm *equally* from a non-culpable threat in order for both parties to survive. It is misleading to use *strict forced choice between lives* scenarios to ground moral justifications for killing in self-defence. This is because a case of strict forced choice between lives is *atypical*. That is, it is less likely to occur than a case where the defender has some leeway to accept risk and cost. A strict forced choice between lives case is where the defender *cannot* – by accepting some risk or cost – increase the likelihood of the threat surviving and yet can do enough to preserve his own life if he kills the threat first.

For example, referring back to the case of Martin and Roger in the previous section, it is *certain*: 1) Roger will be killed (by Martin) if Roger does nothing; and 2) Roger can preserve his own life *if and only if* he kills Martin first. But these types of

²¹⁶ Ibid., 253.

cases – where the threat will certainly kill the defender unless he is killed first – are *atypical*.²¹⁸ It requires an unusual set of circumstances to be certain (or almost certain) that the defender will be killed (by the threat) if the defender does nothing and the defender can preserve his own life *if and only if* he kills the threat first. More often than not, the defender will have some leeway to increase the likelihood of the threat surviving if he chooses to either accept some risk of being killed or some cost to himself. For example, Roger has no intention of harming Martin, so rather than pushing Martin to his death perhaps Roger can see a nearby ledge just below them to which he can jump instead. This choice might be riskier for Roger (he might misjudge his jump and fall to his death) or it might be costly if he lands awkwardly on the ledge and breaks his leg. But the cost and/or risk to Roger might be acceptable if it means both parties survive.

In the above hypothetical case, *cost* is the loss that either party suffers in a threatening situation where persons are harmed and/or property destroyed. Although my main concern so far has been decision-making about killing and the loss of life, there are many lesser (albeit still serious) degrees of loss. McMahan acknowledges that it might be reasonable to demand that the defender share the costs with the threat, if possible, when threat is not culpable for the threat of unjust harm he poses.²¹⁹ He suggests that if the defender can defend his life in a way inflicts non-lethal harm on the threat and allows her action to inflict a non-lethal injury on him, then he might be obliged to suffer this non-lethal harm rather than kill the threat.²²⁰ McMahan agrees that

²¹⁷ Ibid., 252-53.

²¹⁸ I acknowledge that the hypotheticals employed by philosophers are oftentimes deliberately atypical: ethics is done at the margins so to speak. But this focus on atypical cases is problematic, a point I return to later.

²¹⁹ McMahan, "The Basis of Moral Liability to Defensive Killing," 394.

²²⁰ Ibid.

killing the threat is wrong when such an alternative is available, particularly when the harm suffered by the defender would not be severe.²²¹

For example, let us imagine a hypothetical case where James is driving his car along the highway when the driver of a truck on the other side of the road heading in the opposite direction – Money Penny – loses control of her vehicle and swerves towards James. If James does nothing (or attempts to brake), then the truck will collide with him head-on and likely kill him. But, as it happens, James’s car is armed with an anti-tank missile so he has the option to defend himself by destroying the truck and killing Money Penny. Although James (in this case) cannot brake in time to avoid hitting the other vehicle, perhaps he does have the option to swerve and miss Money Penny. But this means that he will drive off the side of the road and hit one of the trees on the side of the road. If James chooses this third option, the cost to him is that his car is wrecked.

Risk, on the other hand, is the probability of harm being done to one (or both) of the parties and the likely seriousness of that harm. Sven Hansson suggests that definitions of the word “risk” generally have two major characteristics in common: it denotes something undesirable and indicates lack of knowledge.²²² He also believes that the definition of risk as “expected utility” is better than the definition of risk as “probability” because it includes the severity of the negative outcome, which is a major factor that influences our assessments of risk.²²³ So risk is not merely the likelihood of a bad outcome, it also takes into account severity.

A defender might have the choice to increase or lessen the risk to themselves, or to others, depending on their actions. For example, in the case above, the cost of a wrecked car is not James’ only consideration in deciding whether to swerve or not. If

²²¹ Ibid.

²²² S.O. Hansson, *The Ethics of Risk: Ethical Analysis in an Uncertain World* (Palgrave Macmillan, 2013), 4.

James chooses to swerve, then he is more likely to be harmed by hitting a tree than if he chooses not to swerve and uses his anti-tank missile to destroy the truck instead. The cost to James might be a wrecked car but there is also a risk that he will be seriously injured, or even killed, by hitting a tree at high speed.

If it is true that strict forced choice between lives cases are atypical, then we should not build our understanding of morally justified killing in self-defence on one type of case if another type of case is much more likely to occur in fact. There have been criticisms of the use of hypothetical cases for ethical analysis along these lines. Michael Davis, for example, has cautioned against the excessive use of imaginary cases by philosophers. He says that the more the case departs from this world the greater the chance that it will prove to be flawed.²²⁴ Rather than conclude that imaginary cases should be ruled out of ethics, however, Davis suggests that certain routines should be followed when they are used, such as choosing the more realistic version of a case where one has a choice between it and a less realistic one.²²⁵

Likewise, I have no in-principle objection to using hypothetical cases for the purposes of illustrating a point (as I have demonstrated on a number of occasions in my own work). But one should be skeptical about the more unlikely philosophical cases. It is implausible to think, for instance, that the average person will normally have access to an anti-tank missile capable of stopping a truck dead in its tracks.²²⁶ And if we take away his truck destroying capability, then the most likely options for James in the hypothetical case above is to either collide with the truck or swerve and take his chances with the trees. In this case, he has no capability to stop the truck or harm Moneypenny. But if it turns out that James does have the capability to destroy an out-of-control truck

²²³ Ibid., 7.

²²⁴ Michael Davis, "Imaginary Cases in Ethics," *International Journal of Applied Philosophy* 26, no. 1 (2012): 14.

²²⁵ Ibid., 6.

speeding towards him (which is no easy feat), then it seems just as likely that this capability will also give him additional reasonable options to stop the truck that are also less likely to kill the driver. For example, James might aim his missile at one set of wheels, rather than the centre of the truck, so that the speeding vehicle veers away and Money Penny has some chance of survival.

Furthermore, the likelihood of the right set of circumstances necessary for a strict forced choice between lives scenario is lessened even further in cases where the threat is not intending to harm the defender. The culpable threat who is intending to harm the defender can renew his attack after his initial threat has been foiled and might persevere in his efforts to harm the defender over time. In contrast, the threat that is not intending to kill the defender will *not* persevere in posing a threat in the same way. Consequently, it is unlikely (or at least less likely) that the defender will confront a case where: 1) it is *certain* that the defender will die; 2) unless he kills the threat first; 3) the defender has no other reasonable options that increase the threat's chance of surviving; and 4) the threat is not intending to harm the defender. Instead, the defender is more likely to confront a situation where he either has no capability to stop the threat by killing him or he has a number of options that involve varying levels of cost and risk to himself. If this is true, then the moral justification for killing in self-defence should normally include calculations of risk and cost to both the threat and the defender.

b. The role of culpability

Thomson's unjust threat account holds that moral culpability in an attacker – what Thomson refers to as the culpable aggressor – is irrelevant for morally justifying killing in self-defence in a strict forced choice between lives case. She says that what she thinks is clear is that “if the aggressor will (certainly) take your life unless you kill him,

²²⁶ McMahan, "The Basis of Moral Liability to Defensive Killing," 393.

then his being or not being at fault for his aggression is irrelevant to the question whether you may kill him.”²²⁷ For Thomson, establishing the threat’s culpability is *not* a necessary condition for morally justifying cases of killing in self-defence. As I argued above, this is correct for a strict forced choice between lives scenario. But Thomson’s unjust threat account of morally justified killing in self-defence leaves aside the issue of the threat’s culpability when there are cases where fault is a determinative factor. Thomson acknowledges that there might be room for argument about the role of culpability between “the extremes of very grave bodily harm on the one hand, and loss of wallet or hat on the other hand.”²²⁸ But she deliberately leaves aside the question of whether the threat’s culpability makes a difference when it comes to the defender’s obligation to share costs. She also leaves open what should be said about cases in which it is not certain that the threat will cause the defender harm.²²⁹ She argues that “fault is also irrelevant when the aggressor would otherwise blind you, or cut off your legs: the aggressor’s fault or lack of fault has no bearing on whether you may kill the aggressor to defend your eyes or legs.”²³⁰ Thomson insists that the culpability of the threat simply plays no role at all in the defender’s moral justification for using force.

But Thomson’s approach here is a mistake. In some situations, culpability plays a determining role in justifying decisions to use lethal force rather than direct threat. That is, Miller suggests there are cases where “one ought to kill the person at fault rather than the person who constitutes a threat to one’s life.”²³¹ Robert Fullinwider, for example, describes a case where mobsters kidnap Smith’s children and threaten to kill them unless he kills Jones. Driven by the threat, Smith seeks out Jones to shoot him. In the place that Smith finds Jones, the unarmed mobsters are parked across the street to make

²²⁷ Thomson, "Self-Defense," 286.

²²⁸ Ibid.

²²⁹ Ibid.

²³⁰ Ibid., 285.

sure he goes through with the mob hit.²³² Fullinwider's point is that, after killing Smith, Jones could not then turn his gun on the mobsters (perhaps because he realised they were unarmed). Despite the mobsters' culpability in the attack on Jones, it was only Smith who was the agent of immediate threat to Jones. The mobsters were not posing a direct and immediate danger and so, he argues, should not be killed in self-defence.²³³ Lawrence Alexander agrees that after killing Smith, Jones may not invoke self-defence to then turn and kill the mobsters. At most, he suggests, the mobsters may be punished for their guilt in instigating the murder.²³⁴ But, he asks, "may Jones invoke the Principle of Self-Defense to kill the mobsters instead of Smith if by doing so he will cause Smith to relent?" If the mobsters had a gun trained on Smith and had ordered him to kill Jones, and he were about to comply, then Alexander argues that Jones not only could, *but should*, kill the mobsters rather than Smith. This is because the mobsters and Smith are both necessary causes of the danger to Jones (and killing either the mobsters or Smith removes the danger). If true, then Jones should kill the ones who are morally at fault for the attack (the mobsters) rather than killing the innocent attacker (Smith).²³⁵ The point here is that culpability matters.

Another limitation of Thomson's unjust threat account is her argument that intention is irrelevant for morally justifying killing in self-defence. Thomson disagrees with the distinction, made in the literature on the doctrine of double effect, between foreseen and intended effects arguing that "if fault is irrelevant to permissibility, then so also is intention."²³⁶ She then describes a hypothetical case to support her contention. In this case, Thomson explains that Alfred's wife is dying and he wishes to hasten her

²³¹ Seumas Miller, "Judith Jarvis Thomson on Killing in Self-Defence," *Australian Journal of Professional and Applied Ethics* 3, no. 2 (2001): 69.

²³² Robert K. Fullinwider, "War and Innocence," *Philosophy & Public Affairs* 5, no. 1 (1975): 92.

²³³ *Ibid.*, 93.

²³⁴ LA Alexander, "Self-Defense and the Killing of Noncombatants: A Reply to Fullinwider," *ibid.*, no. 4 (1976): 409.

²³⁵ *Ibid.*, 410.

²³⁶ Judith J. Thomson, "Self-Defense," *ibid.* 20 (1991): 295.

death by poisoning her. But he doesn't know that the poison is actually the only existing cure for her ailment. Thomson suggests that it is permissible for Alfred to give his wife the poison because "how could his having a bad intention make it impermissible for him to do what she needs for life."²³⁷ But this is incorrect because if it turns out that Alfred's true intention is revealed to the authorities (perhaps he told a third-party about his plan to kill his wife and they reported him to the police), then he would be guilty of attempted murder. The fact that Alfred inadvertently heals his wife, rather than killing her, would not be relevant in our condemnation of his action in attempting to poison his wife.²³⁸ In all cases of genuine self-defence, suggests Uniacke, the agent's aim is to stop the threat. Strictly-speaking, the death of the threat is not required to achieve this intended goal.²³⁹ In justified self-defence, the defender's primary intention must be to repel the threat to his life rather than kill the threat. If true, this means the defender's intention is a necessary feature of the defence condition.

c. Sharing cost and risk

So what does this mean for the unjust threat account of justified killing in self-defence? It means that the unjust threat account should be modified to incorporate the role of the threat's moral culpability (i.e. the threat's moral fault) in judgments about justified killing in self-defence. It can do this by acknowledging that there are degrees of liability to defensive harm. According to Bradley Strawser, this suggests that the threat's liability to defensive harm varies according the degree to which she is culpable

²³⁷ Ibid., 294.

²³⁸ Thomson also does not make clear Alfred's ultimate motivation for attempting to kill his wife. Is he maliciously trying to get rid of her or does he love her and believes he is mercifully ending her inevitable suffering? If it is the latter, then we might say that while Alfred's immediate intention was to kill his wife, given all the facts he would choose to save his wife. In this case, his immediate intention to kill means his action is still morally impermissible but his ultimate motivation makes for a fully-exculpating excuse.

²³⁹ Uniacke, *Permissible Killing: The Self-Defence Justification of Homicide*, 108.

for the threat she poses.²⁴⁰ This is consistent with McMahan's way of approaching the real-life complexity of killing in self-defence and the role of culpability. He suggests that the harmfulness of the defensive action to which the partially-excused threat is liable varies with the degree of her moral culpability.²⁴¹ A partially-excused threat is a person who unjustifiably poses a threat of wrongful harm to others but whose actions are excused to some extent without being fully justified.²⁴²

It also means that two factors that Thomson puts aside – cost and risk – play an important role in how morally justified killing in self-defence works in practice. The defender's obligation to share the cost and risk of harm will vary depending on whether the threat is non-culpable, partially-culpable or fully-culpable. This is based on the notion that the defender's obligations to take on risk and cost are contingent on the threat's culpability. In cases where the threat is non-culpable, the defender is strongly obliged to share the cost and risk. If, in the process of defending himself, the defender has an opportunity to preserve the life of the innocent threat then he should do so up to the point where the risk or cost is about the same for both parties. Neither party is morally blameworthy for the situation, so fairness suggests that both parties should share the misfortune equally (if that is possible). In the case of the *Innocent Threat*, the defender should choose to accept a severe injury if it means the innocent fat man will survive. The defender might also judge that he has some chance of surviving if the fat man falls on him, whereas the fat man will have no chance of survival if he is deflected away. In this case, the defender should accept the risk of being killed.

In cases where the threat is partially-culpable, however, the defender has a lessened obligation to share some of the cost and risk, including the potential for serious injury. That is, the defender should share the cost and risk when the threat is non-

²⁴⁰ Bradley Jay Strawser, "Walking the Tightrope of Just War," *Analysis* 71, no. 3 (2011): 540.

²⁴¹ *Killing in War*, 161.

culpable or partially-culpable but the degree varies. This is the *variable culpability condition*. This says that the defender's obligation to share the cost and risk required for the threat to survive varies according to the culpability of the threat. In the case of the *Innocent Aggressor*, the defender is justified in destroying the truck, but he has an obligation to accept a moderate amount of cost and/or risk to preserve the life of the truck driver. So the defender might be obliged to accept a broken arm but not a severe injury that leads to a permanent disability.

Finally, the defender is only obliged to accept a negligible amount of cost and/or risk to preserve the life of the threat who is fully-culpable. The obligation exists but it is of a much weaker variety. For example, a thief might snatch a woman's purse and run off. This would cause her an inconvenient loss (e.g. she loses her purse) and there might be a slight risk of harm (e.g. perhaps she falls over and grazes her knee). It would not be justified to kill a thief who poses this type of threat, however.²⁴³ In cases where the danger from the attacker is negligible, the defender should accept the minor loss and/or very slight risk of harm rather than kill him. But this obligation to accept some risk or cost from a culpable attacker is much weaker than the obligation that applies to the threat who is either non-culpable or partially-culpable. Hence, in the case of the *Villainous Aggressor*, the defender is justified in destroying the truck with an obligation to accept only a negligible amount of cost and/or risk to preserve the life of the truck driver. In short, the defender should apply a variable culpability condition in cases where the threat is non-culpable or partially-culpable. This says that the defender's obligation to share the cost and risk required for the threat to survive decreases as the threat's culpability increases. This means that Meg's culpability for the threat she poses to Sam weakens Sam's obligation to share the cost and risk required for

²⁴² Ibid., 159.

both parties to survive (*variable culpability condition*). In other words, I am advocating a different position to the culpability or liability-based accounts.

2.7 Conclusion

In conclusion, the best explanation for morally justifying killing in self-defence is a modified rights-based unjust threat account. This says that killing in self-defence is morally justified by the necessity of repelling or warding off an unjust immediate deadly threat. In addition, the general thrust of McMahan's argument is correct: the obligation to be restrained in the use of force, and accept higher levels of risk and cost, has an inversely proportional relationship to the moral culpability of the attacker. This means that in a choice between the lives of two innocent persons there is an obligation on the defender to first seek to share the cost and risk between himself and the threat who is non-culpable, if it means that both are more likely to survive. Failing that, the unjust threat's moral obligation to *not* pose a deadly threat to the defender creates the moral asymmetry necessary to justify the defender killing in self-defence. In cases where the unjust threat is culpable (or partially culpable), the obligation to share cost and risk diminishes accordingly. If this is correct, then we can conclude that Sam is justified in killing Meg in self-defence when all the following conditions are met:

1) Meg is an immediate deadly threat to Sam (*immediate threat condition*); 2) Sam's primary intention is to preserve his own life, which can be achieved by killing Meg (*defence condition*); 3) Sam's only reasonable option for preventing being killed is to kill Meg (*necessity condition*); 4) Meg does not have a sufficiently just reason for threatening Sam's life (*unjust condition*); and 5) Meg's culpability for the threat she poses to Sam weakens Sam's obligation to share the cost and risk required for both parties to survive (*variable culpability condition*). In the next chapter, I explore the

²⁴³ Of course, the defender still has a proportionate right to defend herself and her property. It would be permissible, for example, for the defender (or third party) to yell at the thief, push him away or tackle him

implications of this modified unjust threat account of killing in self-defence for the moral justification of killing in defence of others.

to the ground in order to prevent the theft.

CHAPTER THREE: DEFENDING THE LIVES OF OTHERS

3.1 Introduction

Having outlined my approach to morally justified killing in self-defence in Chapter 2, I now explain how this applies to defending others. To recap, I argued that the unjust threat account of justified killing in self-defence is morally grounded in the necessity of warding off an immediate unjust deadly threat. Then I argued that this account of killing in self-defence should be modified so that in cases where the threat is non-culpable (or partially-culpable) the defender is obliged to accept an appropriate amount of cost and risk in order for both parties to survive. Now I explore the implications of this modified unjust threat account for the moral justification of killing in defence of others. These are what Judith Jarvis Thomson describes as third-party cases; where a third person comes to the rescue of the defender.²⁴⁴

I argue that a third-party should use forceful intervention (including lethal force) to protect an innocent human life in cases where the use of force against threat is morally permissible and the intervener has a duty to rescue the defender. All other things being equal, a third-party intervener is *permitted* to use lethal force against an unjust threat with reasons that satisfy the same *impartial* moral requirements that hold for killing in self-defence. This means that when a third-party intervenes to defend the victim of a deadly attack, a rescuer's action is still morally justified by the victim's possession of the right not to be killed. But I also argue that we all have a humanitarian duty to protect innocent humans from being unjustly killed. Furthermore, I argue that a potential intervener's *obligation* to rescue the defender is stronger when he has an *agent-relative* responsibility for the wellbeing of the defender.

²⁴⁴ Thomson, "Self-Defense," 305.

The first section gives a brief overview of what gets included when I talk about defending other's lives using lethal force. I briefly describe the legal history for justifying killing in self-defence. This highlights that morally justified killing in self-defence or defence of others relies on the notion that human lives are of weighty moral value. This means that humans have a right not to be unjustly killed. I then argue that the right to not be killed is inclusive of the right to preserve bodily integrity, protect the necessary means for survival and maintain the dignity of one's humanity. I then connect this to the moral grounds for justifying killing in defence of others (or third-party defence). I argue that the permissibility of killing in defence of others should be morally grounded in an impartial perspective.

Next, in the second section, I put forward an argument for a humanitarian duty to forcefully intervene in cases where an innocent human life is threatened with unjust violence. I argue that a potential intervener should use forceful intervention to rescue an innocent human life in cases where the use of force against an attacker is morally permissible and the intervener has a duty to rescue the life of the defender. The third section then argues that agent-relative responsibilities increase a potential intervener's obligation to accept the risks and costs associated with forcefully intervening to save the life of an innocent human life. I provide some relevant examples of a potential intervener's agent-relative responsibilities. These examples illustrate how agent-relative responsibilities adjust the strength of a potential intervener's obligation to rescue the defender.

3.2 Defending Human Lives

a. A legal history of self-defence

Human lives are morally valuable and this makes them worth defending. Or, to be more specific, the life of a human being is something that is intrinsically valuable and should be protected. The moral justification of self-defence is grounded in the notion that human lives are of weighty moral value. This moral weight gives a human the right not to be killed by a person who unjustly threatens him. The legal history for justifying killing in self-defence provides a historical context for understanding the moral and legal grounding that is the basis for killing in self-defence and defence of others. According to George Fletcher, the Western tradition of law draws on three distinct sources of the contemporary right to defend oneself and to defend others. The first officially recognised form of self-defence in the common law tradition was *se defendendo* (defending himself), a defence that came into judicial practice by way of the Statute of Gloucester in 1278.²⁴⁵ *Se defendendo* applied when someone's back was to the wall and there was no choice but to kill or be killed. Asserting *se defendendo* conceded the illegality of the killing but sought to avoid the penalty of capital punishment by instead forfeiting his property to the Crown. It provides the origin of the common-law concept of excusable homicide, a category of liability that occupied the halfway station between total liability and total acquittal.²⁴⁶

A second source of the modern notion of justifiable self-defence, suggests Fletcher, was the introduction of the Statute of Henry VIII (1532). This statute primarily aimed to permit defence against robbers and highwaymen.²⁴⁷ The killing of an overt aggressor was not considered a criminal wrong. In this case, the aggressor

²⁴⁵ George P. Fletcher, "Defensive Force as an Act of Rescue," *Social Philosophy and Policy* 7, no. 02 (1990): 171.

²⁴⁶ *Ibid.*

violates the right or *ius* (the law, the sense of a just social order) and repelling the attack restores the right, upholds the principles of *ius*, and for that reason is justified.²⁴⁸

A third source of justifiable self-defence originated in the writings of the legal theorist Sir William Blackstone. According to Fletcher, Blackstone balked at the idea of permitting deadly force against petty criminals, like thieves, when they would not ordinarily be executed for such crimes.²⁴⁹ No act, Blackstone reasoned, “may be prevented by death unless the same, if committed, would also be punished by death.” If punishment must fit the gravity of the crime, then that defensive force must also fit the threatened act.²⁵⁰ Fletcher says that Blackstone’s view of justifiable self-defence grew in popularity in the late 19th century. Subsequently, a justification of necessity was adopted in most jurisdictions around the world and this refashioned the common perception of self-defence.²⁵¹

The legal history of the self-defence justification demonstrates the view that a “human being” is something of value sufficient to be worth defending. It presumes that the life of a human being is intrinsically valuable. Some might dispute the presumption that human life has intrinsic value. What property of a human life, after all, gives it intrinsic value when compared to other forms of life? I do not have the opportunity to address this debate here. But I will note that a view which holds that human life is no more valuable than other forms of life, strikes me as implausible if it puts a human life morally on par with that of bacteria. According to Ronald Dworkin, something is intrinsically valuable if “its value is independent of what people happen to enjoy or want or need or what is good for them.” In contrast, he suggests, something is instrumentally valuable if its value depends on its usefulness in getting something else

²⁴⁷ Ibid.

²⁴⁸ Ibid.

²⁴⁹ Ibid., 172.

²⁵⁰ Ibid.

they want.²⁵² To say that a human has intrinsic value then is to make it the primary moral ends. That is, it is the main goal of protection rather than the means to secure other rights.

But on what basis is a human being of intrinsic value? James Griffin suggests that a human being is intrinsically valuable because personhood is valuable; what he describes as a “substantive” account of personhood.²⁵³ A potential problem with basing the intrinsic value of human life on personhood, however, is that it might not include selves who lack a sufficient level of normative agency, such as infants and the severely mentally retarded. But when we talk about defending the lives of others, I am presuming that most people would include children as proper subjects of rescue. Infants have the capacity to become persons and, under normal conditions, will become persons (whereas bacteria and puppies do not have the underlying capacity and thus will not become persons). And severely mentally retarded people are human beings with damaged underlying capacity and, therefore, diminished properties of persons (as opposed to not having those properties at all). It might be the case that they require a slightly different analysis but they can still be morally distinguished from non-humans. The key point of Griffin’s substantive account of personhood is that human life is qualitatively “different from the life of other animals.”²⁵⁴ Human life is valuable because it is “human” life.

We human beings have a conception of ourselves and of our past and future. We reflect and assess. We form pictures of what a good life would be . . . And we try to realize these pictures. This is what we mean by a distinctly human existence.²⁵⁵

²⁵¹ Ibid.

²⁵² Ronald Dworkin, *Life's Dominion: An Argument About Abortion and Euthanasia* (Hammersmith, London: Harper Collins, 1993), 71.

²⁵³ James Griffin, *On Human Rights* (New York: Oxford University Press, Inc, 2008), 33-37.

²⁵⁴ Ibid., 33.

²⁵⁵ Ibid.

His point here is that we “value our status as human beings especially highly.”²⁵⁶ And human rights should be seen as “protections of our human standing or . . . our personhood.”²⁵⁷

b. Defending the lives of other human beings

If we hold the view that human life is intrinsically valuable, then it is a morally weighty consideration in our decision-making. This means that human life should be defended when threatened with unjust harm. What is not clear at this point, however, is where to put the boundaries for the defence of a human life. We might believe, for example, that defending the lives of others should only be on a “life for a life” basis. So the only time one is justified in using lethal force in defence of other’s lives is when a life would otherwise be physically extinguished. But what about cases where this is not strictly true? The victim of an attack might be physically left alive but still suffer severe injuries. Or consider cases where the victim is not killed immediately but will die slowly (and perhaps painfully) as a direct consequence of the attack, such as might occur with radiation poisoning. The strict interpretation of choosing between lives would prevent the defender from using lethal force in these cases. Therefore, I seek to explain what gets included when we talk about defending a human life.

First of all, defending human lives includes the right to preserve bodily integrity. This is the bodily aspect of being human and it includes the physical parts (such as eyes, ears, arms and so on) that together make up a human body. Generally speaking, a human has the right to protect his body from the harm of an attacker. But the methods we use to protect ourselves should be proportionate to the level of harm we are threatened with. So we are permitted to punch someone who is trying to punch us, for

²⁵⁶ Ibid.

²⁵⁷ Ibid., 34.

example, but it is disproportionate to gun them down in a fist-fight, all other things being equal. As I have already argued, using lethal force is morally permissible when an unjust attack will otherwise kill the defender. But it might also be permissible in cases where the harm of an attack permanently damages the body of a victim in a way that is beyond repair or replacement. I say “might be permissible” because some permanent physical losses are not sufficient to undermine bodily integrity. For example, the loss of a finger is not serious enough a physical harm to justify killing an attacker as part of one’s defence of a human life. This is because the loss of a finger is unlikely to significantly undermine the functionality of a human. Many people live sufficiently good lives with a missing finger. It might be argued, however, that the loss of a finger could justify using lethal force if the livelihood of the defender was somehow dependent on having all her fingers. For example, the loss of a finger would severely impact the livelihood of a concert pianist. The point here is that the permanent destruction of a human’s body part that seriously hampers her livelihood is sufficient to justify the use of lethal force as part of defence of a human life.

Second, the right to protect the necessary means for one’s survival should also be included as part of defending a human life. These are the things a human must have in order to continue living. For example, Grant depends upon a respirator to breathe and will quickly die from suffocation if the life-saving device is removed. Although Phil is not harming Grant’s body directly, he attempts to take the respirator away with the intention that Grant will die as a result. In this situation, Grant is justified in using lethal force if that is the level of force necessary to protect his ongoing access to the respirator.²⁵⁸ This principle is also illustrated by those cases where a human (or group of humans) is dependent upon something for their lives but the destruction or removal of

²⁵⁸ Here I put aside questions of who owns the respirator and whether or not Phil also requires the respirator to survive. Judith J. Thomson, "A Defence of Abortion," in *Applied Ethics*, ed. Peter Singer (Oxford: Oxford University Press, 1986), 38-39.

this thing takes some time to cause their likely deaths. Examples include taking away medicine which someone requires to treat an otherwise life threatening disease or the destruction of foodstuffs to cause deliberate starvation amongst a group of people.²⁵⁹ In such cases, the action causes a threat to human lives even though the resulting deaths might occur sometime later.

Third, humans have a right to use lethal force to defend themselves against serious attacks on their inherent dignity. Such attacks are permanently harmful but not necessarily of a sort that does damage to the defender's physical body. Respect for the inherent dignity of human lives is important. Henry Shue, for example, cites Joel Feinberg in saying that "a world of claim-rights is one in which all persons, as actual or potential claimants, are dignified objects of respect, both in their own eyes and in the view of others."²⁶⁰ Examples of this category of attack include serious offences against the dignity of a human life, such as rape, enslavement and/or torture. Anybody who suffers these types of wrongs might experience serious and permanent harm, even in cases where the damage to their physical body is not extensive or permanent. Rape, enslavement and psychological torture do not necessarily require physical damage to do serious permanent harm to a victim. They are serious moral wrongs in themselves. They are affronts to human dignity therefore they justify the use of lethal force, if that is what is necessary to prevent such serious harm to the defender.

c. Impartial moral justification

Having made the point that human lives are morally valuable enough to be worth defending and then outlining what gets included in the right not to be killed, I now

²⁵⁹ A "scorched earth" policy, where an invading army destroys the crops of the local population, is a well-known yet unlawful tactic in war. Kenneth Bush, "Polio, War and Peace," *Bulletin of the World Health Organization* 78, no. 3 (2000).

develop the argument that a third-party intervener is morally *permitted* to use lethal force against an unjust threat with reasons that satisfy the same *impartial* moral requirements that hold for killing in self-defence. When a third-party intervenes to defend the victim of a deadly attack, the intervener's action is still morally justified by the defender's possession of the right not to be killed. This means that a threatened person's right to not be killed exists independently of a third-party's personal preferences or interests. The use of third-party lethal force must be morally justified from this impartial standpoint, which holds for *any* reasonable observer. Such impartiality demands a disinterested approach to the facts of any situation. In contrast, a partialist approach does not require the third-party to demonstrate an impartialist justification to intervene. Partialism allows a third-party to consider personal interests, preferences and/or responsibilities. Thomas Nagel describes the distinction in the following way,

The impersonal standpoint in each of us produces . . . a powerful demand for universal impartiality and equality, while the personal standpoint gives rise to individualistic motives and requirements which present obstacles to the pursuit and realisation of such ideals.²⁶¹

An impartial justification for the use of lethal force is important because it establishes the equality of all humans: that one human is *not* worth intrinsically more than another human. A third-party should not base the use of lethal force on a personal preference for one person over against another because one human life is not intrinsically morally worthwhile than another. Hence, we should consider only impartial moral reasons as valid when an intervener is deciding whether to give preference to the life of a defender over an attacker. In the absence of the necessary impartial moral reasons that permit intervening, a third-party must refrain from acting and allow fate to take its course.

²⁶⁰ Henry Shue, *Basic Rights: Subsistence, Affluence and U.S. Foreign Policy*, 2nd ed. (Princeton, New Jersey: Princeton University Press, 1996), 15; Joel Feinberg, *Social Philosophy* (Prentice-Hall, 1973), 58-59.

²⁶¹ Thomas Nagel, *Equality and Partiality* (USA: Oxford University Press, 1991), 4.

Many moral justifications for killing in defence of others rely on impartiality to permit the intervener to choose the life of the defender over the life of the threat. Judith Jarvis Thomson's account, for example, is impartial because she argues it is the fact that an unjust threat will otherwise kill a defender that justifies both killing in self-defence and killing in defence of others. According to Thomson, the permissibility of Sam killing Meg in self-defence goes hand-in-hand with the permissibility of Dean killing Meg in defence of Sam.²⁶² Her account of morally justified killing in self-defence shares a common moral ground with her account of killing in defence of others. Moreover, because they derive moral justification from the same source, it is true to say that it is morally impermissible for Meg to fight back in both situations.²⁶³ What this means, according to Thomson, is that it is not because of the personal interest in preserving his own life that Sam is justified in killing Meg in self-defence.²⁶⁴ Rather, it is because of the disinterested fact that Meg will otherwise violate Sam's right not to be killed that Sam may proceed in killing Meg. And this impartial moral ground is the basis for forceful intervention by a third party such as Dean.²⁶⁵

In a similar vein, Jeff McMahan argues for an approach to morally justified killing in self-defence that is based on the impartial principle of moral liability. According to McMahan, a person who acts with justification to threaten another with harm, to which the other is morally liable, does not threaten to wrong that other person.²⁶⁶ He suggests that "it is not implausible to suppose that third parties must not intervene" in cases during war where neither innocent civilians nor the just combatants who threaten them are all equally non-liable to be killed.²⁶⁷ This is because, according to McMahan, there must be an impartial reason to justify the intentional killing of non-

²⁶² Thomson, "Self-Defense," 306.

²⁶³ Ibid.

²⁶⁴ Ibid., 308.

²⁶⁵ Ibid.

²⁶⁶ McMahan, "The Basis of Moral Liability to Defensive Killing," 400.

liable persons for a third party to intervene on one side or the other.²⁶⁸ Michael Gorr also puts forward an argument for an impartial principle that determines when it is morally permissible to inflict lethal harm on another human in order to protect oneself or some innocent third party. He refers to this moral principle as “private defense.”²⁶⁹ His intent is to specify the necessary and sufficient conditions for the justifiable infliction of serious harm upon another human that can be applied equally well in either cases of self-defence or defence of others. He argues that,

proportional defensive measures are warranted against any person who lacks justification for causing an otherwise unavoidable threat to the interests of another, regardless of whether or not that person is in any obvious sense an “aggressor” and even whether or not she is culpable in bringing about such a situation²⁷⁰

In short, the moral permissibility of killing in self-defence and killing in defence of others both have a common moral source. This is the impartial fact that the unjust threat will kill (or seriously injure) the defender unless lethal force is used against the unjust threat. And, according to Thomson, this source of moral justification is sufficient to explain why it is morally impermissible for the person who is the unjust threat to fight back.²⁷¹ Referring back to the hypothetical cases *Deadly Threat* and *Deadly Intervener* (from 1.2), the permissibility of Sam killing Meg in self-defence is the same moral basis that permits Dean killing Meg in defence of Sam. Meg threatens Sam’s life by shooting him, and Dean can intervene by killing Meg first. Dean is justified in killing Meg because he has an impartial reason for doing so: Meg is an unjust immediate deadly threat to Sam’s life.

²⁶⁷ *Killing in War*, 49.

²⁶⁸ *Ibid.*

²⁶⁹ Michael Gorr, "Private Defense," *Law and philosophy* 9, no. 3 (1990): 241.

²⁷⁰ *Ibid.*

²⁷¹ Thomson, "Self-Defense," 306.

3.3 A Humanitarian Duty to Forcefully Intervene

a. Protecting innocent humans

My next step is to examine whether or not there might be a moral obligation on a potential intervener to act on behalf of the defender. This section argues that a third-party *can* hold a humanitarian duty to use forceful intervention to protect an innocent human whose life is threatened by an unjust immediate threat. This moral obligation is based on the humanitarian “duty to rescue.” This says that a third-party should attempt to rescue someone facing immediate life-threatening danger, all other things being equal. John Locke suggests, for example, that the protection of innocent human lives should be made a priority in situations of mortal danger, “For by the Fundamental Law of Nature, Man being to be preserved, as much as possible, when all cannot be preserv’d, the safety of the Innocent is to be preferred.”²⁷² An innocent human, in such a case, is someone who is harmless. That is, she is not likely to harm other humans.²⁷³ Harmlessness is determined in any one of the following three ways. First, someone might be harmless because they have little or no capacity to harm. There is no *actus reus*. For example, a young child or infant is unlikely to be a serious threat to a grown adult. Or, in another example, unarmed civilians are not likely to threaten a pilot of a bomber flying over them. A particular moral concern with such innocent humans is their incapability of fighting back if attacked. They are vulnerable humans. A child is vulnerable to the superior power of an adult just as unarmed civilians are vulnerable to the pilots of bombers flying overhead.

²⁷² John Locke, *Two Treatises of Government*, ed. P. Laslett (Cambridge: Cambridge University Press, 1988 (1689)), 278-79.

²⁷³ This raises an interesting question about what Locke means by “innocence,” which I do not attempt to address here. It might be that he was thinking in terms of guilt and moral culpability. But as I go on to explain, what I describe as innocence is primarily concerned with threat (or non-threat).

Second, someone might have the capability to harm but is still an innocent human because she does not *intend* to harm another human. There is no *mens rea*. This lack of intention makes it unlikely (or at least less likely) that they will harm others. For example, the driver of a car has the capability of killing or seriously injuring others. Cars can kill if they hit people or other vehicles. But in most cases we consider other drivers on the road to be harmless people. The capability to harm others is not sufficient by itself to judge a person as non-innocent. This is because a person who has no intention of harming others is unlikely (or less likely) to do serious harm.

There are, however, two qualifications that I should make about this point. One is that someone is *not* harmless if she makes a conditional real threat to another human's life. For example, if Meg threatens to kill Sam unless he gives her his wallet, then we should *not* conclude that Meg is harmless. In this case, Meg *is* threatening Sam's life, albeit with a condition attached. The other qualification is that someone is *not* harmless if she engages in reckless behaviour that is likely to harm others. We would judge an especially reckless driver as negligent and therefore not harmless. If the negligent driver unintentionally causes an accident that kills or seriously injures someone, we might conclude that they are *not* guilty of murder. But we would not describe them as innocent. The person who acts recklessly and risks other human's lives is not harmless.

Third, someone is *not* harmless if she is intentionally contributing to others being a serious threat to human lives. That is, she is plotting with others to do harm or knowingly assisting others to do harm or inciting others to do harm. For example, let's return to the hypothetical case used by Robert Fullinwider (described in 2.6), where mobsters kidnap Smith's children and threaten to kill them unless he kills Jones.²⁷⁴ Lawrence Alexander argued that Jones not only could, *but should*, kill the mobsters rather than Smith. This is because the mobsters and Smith are both necessary causes of

the danger to Jones (and killing either the mobsters or Smith removes the danger). If true, then Jones should kill the ones who are morally at fault for the attack (the mobsters) rather than killing the innocent attacker (Smith).²⁷⁵ The mobsters are not harmless if they intentionally contribute to a group effort to kill Jones. Similarly, they are not harmless if they provide assistance to another person (or group) intending that their help is contributing to their killing of Jones. And the mobsters would not be harmless if they were to encourage or incite a person (or group) to kill Jones.

In short, the contention here is that the protection of innocent human lives is an important moral concern. This is important for understanding how the duty to rescue applies to cases where forceful intervention is necessary to rescue a defender from an unjust threat.

b. A duty to rescue

The next aspect of my argument posits that there is a humanitarian duty to rescue human lives in danger. That is, we all have an obligation to intervene and rescue a human when his life is in danger. Imagine a situation where a child is swimming at the beach, and he has been struck by an unusually big wave so that he is now panicking and struggling to stay afloat. You happen to be taking a stroll along the shallows when you notice the stricken child, and you quickly recognise you are the only person who can get to him in time before the next wave strikes. Without your immediate help, he will almost certainly drown. Since you are an experienced beachgoer and good swimmer, the risk to you is insignificant. But your brand new iPhone is in your pocket and it will be wrecked if you dive into the waves to save the child. We should agree that in such a situation we all have a duty to rescue the child when the risk and cost to us is so

²⁷⁴ Fullinwider, 92.

comparably insignificant. Peter Singer describes this humanitarian “duty to rescue” in the following way:

If it is in our power to prevent something bad from happening, without thereby sacrificing anything morally significant, we ought, morally, to do it. An application of this principle would be as follows: if I am walking past a shallow pond and see a child drowning in it, I ought to wade in and pull the child out. This will mean getting my clothes muddy, but this is insignificant, while the death of the child would presumably be a very bad thing.²⁷⁶

Both these hypothetical cases highlight a number of considerations in relation to a humanitarian duty to rescue. First, in a case where a human’s life is threatened, but can be preserved by the intervention of another person, then choosing to rescue a life is clearly a morally good choice. Protecting the life of a child who is about to drown is a better outcome than letting him die, all other things being equal. Additionally, a capable person should intervene if the child is dependent on the capable person to save his life. We might imagine that we are the only person on the scene who can save the child. As Scott James points out, we should rescue a human who is uniquely dependent on us to intervene; that is, an individual who relies on you and only you for help.²⁷⁷ If we are the only person who is in a position to save the child, then we have a moral responsibility to intervene because the child is depending upon us alone for his life. Nobody else can save the child.

But what if the potential intervener cannot swim? He might be putting his own life in serious jeopardy by attempting to save the child. If the potential intervener was likely to die or be seriously injured, then the attempt to rescue the child would be a supererogatory act (and/or possibly foolish). This does not then mean that the potential intervener’s duty to rescue has disappeared, however. The intervener should still seek other means to rescue the child, such as calling for help or throwing the child a rope.

²⁷⁵ LA Alexander, "Self-Defense and the Killing of Noncombatants: A Reply to Fullinwider," *ibid.*, no. 4 (1976): 410.

²⁷⁶ Peter Singer, "Famine, Affluence, and Morality," *ibid.* 1, no. 3 (1972): 231-32.

²⁷⁷ Scott M. James, "Good Samaritans, Good Humanitarians," *Journal of Applied Philosophy* 24, no. 3 (2007): 238.

And a capable person should personally intervene to rescue the child's life if it is not significantly costly or risky to him. After all, it would be a callous person who would allow a child to drown because he did not want to wreck his iPhone.

In short, a capable person is morally obliged to rescue an innocent person's life if it is not unreasonably costly or risky to the rescuer. This is especially the case if we are the only person who is in a position to intervene and rescue the innocent person.

c. A duty to forcefully intervene

We might agree, up to this point, that there is a humanitarian duty to rescue human lives. But the use of forceful intervention complicates the issue, particularly when the act of rescue is likely to be lethal. One might agree that we all have an obligation to rescue another human when faced with a situation meeting the conditions listed above, but then object if the act of rescue requires him to deliberately harm another human. He might believe that it is wrong for him to rescue someone if it means deliberately harming another human. Is there still a duty to rescue (in order to protect a human life) when it is necessary to forcefully intervene? This is the question to which I now turn.

I argue that the humanitarian duty to rescue humans from being killed includes the use of forceful intervention in some cases. Let us imagine a situation similar to the one described above, where a child is close to drowning and you are the only person who can intervene to save the child's life. But in this particular case, the source of the threat to the child's life is an adult who is deliberately holding the child under the water. Let us also assume that the child in this case is innocent (i.e. he is not a threat to the adult or anybody else). In saying that the child is innocent, we are concluding that the attack on the child is unjustified. So the murderous adult does not have a sufficiently just reason

to infringe the child's right not to be killed. You yell at the murderous adult to stop but he ignores you. The only way to rescue the innocent child is to use physical force to stop the actions of the murderous adult. If the level of force necessary to save the child is minimal, such as physically restraining the adult or pushing him over, then I suspect those of us who agreed to the principle of a duty to rescue (as outlined above) would have no problem agreeing to its application here. It is difficult to see how it would not apply since any harm to the adult is likely to be incidental and very minor in comparison to the child's death.

Furthermore, we should also agree to more serious uses of forceful intervention that are non-lethal. If we agree that minimal harm to the murderous adult is justifiable when it is necessary to save the child's life, then we should agree to more serious harms – such as breaking the adult's arm or giving him concussion – if this saves the child's life. After all, the harm we are doing to the adult by using forceful intervention is well short of the harm the adult is inflicting upon the child. If this is correct, then this means that we have a duty to use some degree of forceful intervention if it is necessary to save the child's life.

But should the duty to rescue still apply in cases where it is necessary to use lethal force to save the child's life or where there is a significant risk that our intervention will kill the murderous adult? In other words, do we have a duty to kill the murderous adult if that is the only reasonable way to save the child's life? I argue that we do. Let me explain. We know that unjust killing is a serious moral wrong and killing a human is to destroy something that is of great moral value. The lives of both the murderous adult and the child are morally valuable and should be preserved, if at all possible. But, as I explained in Chapter 2, it is morally permissible to kill an unjust immediate deadly threat in self-defence. In this case, the adult is unjustly threatening the child's life. This means that the murderous adult does not have the same protection as the innocent child.

Since we know that killing a culpable attacker to save the life of an innocent defender is morally justifiable, then killing the murderous adult to save the life of the child is morally permissible in this case.

If it is true that it is morally permissible to kill the murderous adult and it is also true that we have a duty to rescue the innocent child, then we should agree that we have a duty to kill the murderous adult if this is necessary to save the child's life. In other words, we have an obligation to use lethal force against an unjust threat when it is necessary to prevent an innocent human from being killed. This is because, without our intervention, the innocent human will otherwise die. Therefore, if we agree that we have a duty to rescue the child, then it seems plausible to suggest that, in combination with the permissibility of killing the adult, we are duty-bound to forcefully intervene by killing the adult, if that is the level of force necessary to save the child.

There is, however, a particular purpose in emphasising a humanitarian duty to forcefully intervene to rescue innocent humans from being killed. Fletcher suggests that there is little need to constrain our natural impulses with an imperative to save ourselves.²⁷⁸ As Locke argues in reference to self-preservation,

The first and strongest desire God Planted in Men, and wrought into the very Principles of their Nature being that of Self-preservation, that is the Foundation of a right to the Creatures, for the particular support and use of each individual Person himself²⁷⁹

But, we do, sometimes, need to be reminded of our obligation to rescue others. In cases where there is little cost or risk for us, it might be clear that we should intervene to save the life of an innocent human. But this becomes less clear when the intervention is costly or risky. Think again of the original case of the child who is drowning and needs us to rescue him. We should rescue someone who is dependent upon our intervention. But what if there is a shark in the water or a storm has whipped up the surf so that the

²⁷⁸ Fletcher, 175.

waves are extremely hazardous? Are we obliged to accept high levels of cost and risk to ourselves in order to save others? And if so, where are we draw the line on the amount of sacrifice we are obliged to make for the lives of others? According to Fletcher, thinking about defensive intervention as a duty-based act of rescue seems to threaten the universality of the right to defend others. After all, he asks, is one under a duty to rescue everyone?²⁸⁰

Any situation requiring forceful intervention is likely to be risky, particularly when lethal force is necessary.²⁸¹ The most obvious source of danger to us in forcefully intervening is from the attacker (whom we are using force against), if he chooses to fight back. In addition, a forceful intervener has two other sources of risk and cost to consider. There could be other interveners who might choose, for whatever reason, to side with the attacker. The intervener might end up having to deal with a number of attackers. Furthermore, a forceful intervener is likely to face serious consequences for killing or injuring the attacker. If the intervener makes a mistake, and wrongfully kills an innocent human, then he is likely to face criminal charges. If eventually acquitted, the experience of being taken to court to face a serious criminal charge (especially unlawful killing or murder) is still likely to be harrowing, and it might drag on for years. And even if the intervener proves to be justified in his actions, he still must live with the psychological and emotional burden of killing another human being. He might also be the subject of retaliation if family or friends of the attacker seek revenge.

In short, the obligation to forcefully intervene is weakened for the average person, when the intervention is risky and/or costly. The riskier and costlier the intervention, the weaker the obligation to rescue. Although the humanitarian duty to forcefully

²⁷⁹ Locke, 206.

²⁸⁰ Fletcher, 176.

²⁸¹ There are also likely to be a raft of broader issues relating to the problem of “vigilantism.” But I will not address those issues here. Instead, refer to my discussion in 1.5 on “The State’s Duty to Protect.”

intervene continues to exist, we should expect that most situations requiring the use of deadly force will be risky and/or costly. This helps explain why some people might believe that intervention using lethal force is not an obligation. If the only way I could save the innocent child from being drowned was to risk my own life by attacking the murderous adult, then I suspect many people would consider it a supererogatory act rather something one is duty-bound to do. In contrast, it is more difficult to object to rescuing a life that requires little or no sacrifice on our part.

The moral calculus changes significantly, however, when a potential intervener has a special responsibility for the child's wellbeing, such as we might expect from a parent or a police officer. An intervener's obligation might be weakened by the risk to his own life, but then the obligation to rescue might also be strengthened by the additional moral responsibilities he holds. For example, there might be several people at the scene, all capable of saving the drowning child, but one of them is a trained lifeguard on duty. In this case, the lifeguard has a stronger obligation to save the child because it is part of her duty in her professional role of lifeguard. Her obligation is stronger than the other onlookers because she has the specialist training, equipment and back-up to rescue drowning humans. This is especially true when the conditions are too dangerous for the average person to attempt a rescue. In this case, the best thing we can do is leave the situation "in the hands of the experts." Likewise, police officers have a stronger obligation to save lives when on duty than do civilians. I refer to these types of additional moral responsibilities as the agent-relative duties of an intervener.

3.4 Agent-Relative Duties of an Intervener

a. Agent-relative considerations

Agent-relative considerations have moral weight and might, in some cases, make a decisive difference to the moral obligations of a potential intervener. That is to say, the intervener's moral responsibility for the wellbeing of the defender is an important moral consideration for understanding morally justified killing in defence of others. Agent-relative duties strengthen the intervener's duty to forcefully intervene by obliging him to accept higher levels of risk and cost. But when does a potential intervener have a moral responsibility for the wellbeing of a defender? And what agent-relative duties are we talking about specifically? A moral obligation is agent-relative if an agent should give greater (or lesser) weight to a consideration in his moral calculations than others are normally required to give to that same consideration.

According to Jeremy Waldron, a moral theory is agent-relative (or partialist) if it assigns different agents different goals.²⁸² He suggests that an agent-relative moral theory (he uses the example of Egoism in this case) says that X is to pursue the wellbeing of X, Y the well-being of Y, and so on. In contrast, he suggests that a moral theory is agent-neutral if it assigns different agents the same goal. Then he provides utilitarianism as a contrasting example because it says that X should pursue the well-being of X and Y and Z..., Y should pursue the well-being of X and Y and Z ..., and so on.²⁸³ Jeremy Waldron's argument is that we may want to consider self-defence as establishing something like an agent-relative prerogative.²⁸⁴ Waldron points out that Samuel Scheffler defends a theory of agent-relative permissions (which he calls agent-centered prerogatives) as a modification of utilitarianism in *The Rejection of*

²⁸² Jeremy Waldron, "Self-Defense: Agent-Neutral and Agent-Relative Accounts," *California Law Review* 88, no. 3 (2000): 711.

²⁸³ *Ibid.*

Consequentialism.²⁸⁵ According to Scheffler, an agent-centred prerogative is a permission to “devote attention to one’s projects out of proportion to the weight in the impersonal calculus of one’s doing so.”²⁸⁶ Agent-centred prerogatives, he suggests, have the effect of denying that one is always required to produce the best overall states of affairs.²⁸⁷

Cecile Fabre argues that the partiality argument for self-defence can and should stipulate that one is permitted intentionally to kill in self-defence (on grounds of partiality) if, and only if, the following two conditions are met: a) one’s survival is at stake; and b) one is directly threatened by the target of one’s self-defensive actions.²⁸⁸ Unlike impartialist arguments in general, she claims, partiality makes sense of the intuition that the defender stands in a special relationship to her attacker, as a result of which she has a special reason, which others lack, for killing him. That is, he is threatening her life and no one else’s, so she has a vested interest, which others lack, in preventing his harm.²⁸⁹ Fabre argues that partiality entitles an individual to confer greater weight to her own interests relative to the interests of others. This means that in addition to the general permission to defend herself against a culpable attacker, she also has the power to confer on a potential rescuer the permission and right to kill the attacker.²⁹⁰

But others argue that this exception does not transfer to partialist associations outside the protection of oneself. It only applies to cases of killing in self-defence. Jonathan Quong, for example, suggests that in relation to cases involving innocent threats, an innocent party possesses a partialist prerogative to harm, or even kill, non-

²⁸⁴ Ibid., 712.

²⁸⁵ Ibid.

²⁸⁶ Samuel Scheffler, *The Rejection of Consequentialism: A Philosophical Investigation of the Considerations Underlying Rival Moral Conceptions* (Clarendon Press, 1994), 41.

²⁸⁷ Ibid., 5.

²⁸⁸ Fabre, 153.

²⁸⁹ Ibid., 154.

liable people in defence of her own life.²⁹¹ But since neither party is liable to defensive harm, it is impermissible for third parties to intervene on behalf of either person by killing the other. This is because in intervening, the third-party would be contravening the doctrine of doing and allowing by imposing harm on an innocent person to avert an equivalent harm befalling another innocent person. Although *allowing* harm is certainly morally important, suggests Shelly Kagan, *doing* harm is even more important. He suggests that there is something especially morally significant about doing harm to a person, a significance which is lacking if you have not actually brought about the harm but instead have merely allowed it to happen. Kagan suggests that for the deontologist, it matters tremendously how a given harm has been brought about – whether it is a harm you yourself have caused, or merely one that you have failed to prevent. In contrast, he maintains that the consequentialist sees no intrinsic moral significance to the distinction between doing and allowing.²⁹²

The introduction of agent-relative prerogatives says that a defender has a special interest in his own life that does not apply to a third-party. In this sense, it is an egoist approach. As Waldron suggested, egoism is a specific type of partialism where an agent pursues his own wellbeing in preference to others.²⁹³ That is, Sam pursues the wellbeing of Sam, Dean the wellbeing of Dean, and Meg the wellbeing of Meg. So if the defender's life is at stake, then he is morally permitted to prefer his own life by using lethal force to protect himself from the threat.

But this returns us to the problems of the self-preservationist and personal partiality approaches to killing in self-defence (outlined in 2.3). The self-preservationist account of killing in self-defence, for instance, favours the stronger party in any conflict

²⁹⁰ Ibid., 163.

²⁹¹ Quong, "Liability to Defensive Harm," 74.

²⁹² Kagan, 95.

²⁹³ Waldron, "Self-Defense: Agent-Neutral and Agent-Relative Accounts," 711.

situation. And personal partiality approaches do not try to explain why the defender's preference for his own life trumps other morally worthy considerations. In situations where lives are at stake, there are limits on the actions one should take to preserve one's own life.²⁹⁴ If we agree with this point, then we should reject the view that one's life being at stake is sufficient moral justification, on its own, for killing.

b. Personal role duties

Although we should reject the argument that one's own survival is sufficient – on its own – to make killing an innocent threat morally permissible, I suggest that agent-relative considerations can still play a significant role in strengthening obligations for a third-party to intervene. Quong argues that each person is understood to have an agent-relative permission to avoid sacrificing or significantly risking their own life for the sake of others.²⁹⁵ But in cases where the impartialist reasons are morally sufficient, partialist reasons can add something more like an obligation. That is, certain types of agent-relative responsibilities give a potential intervener special duties for the wellbeing of the defender. And this can strengthen the humanitarian duty to forcefully intervene using lethal force. For example, the parent of a child has a special responsibility for the wellbeing of her child. So we would expect a parent to accept greater risks and costs to rescue her child from life-threatening danger.

My discussion so far has presumed that an initial consideration for anyone confronting a seriously harmful threat is the risk and cost to himself. Does this imply that the intervener has agent-relative duties he owes to himself? Jens Timmerman suggests that the Kantian conception of "duties to the self" does not include one's own

²⁹⁴ Thomson, "Self-Defense," 305.

²⁹⁵ Quong, "Killing in Self-Defense," 516-17.

wellbeing or long-term interests.²⁹⁶ But moral decision-making is not only a social or other-regarding phenomenon. If we agree that human life is *intrinsically* valuable, then this also applies to one's own life. So we should agree there is a duty to respect the intrinsic value of one's own life. Fletcher suggests that Western legal systems typically take the case of self-help to be fundamental, and the third-party case is an extension of the right to protect oneself. He concludes that that everyone has a duty to preserve himself that is at least as strong as his duty to rescue others; everyone is his own closest "neighbour" and therefore no one should be idle if he himself is bleeding to death.²⁹⁷ Miller suggests that "one's legitimate interest in one's own life, and the responsibility for it, is different from another person's legitimate interest in, or responsibility for, one's life."²⁹⁸ Care for oneself is a duty in the sense that one has to attend to certain basic functions to continue living. These include feeding oneself, seeking to remedy ill-health, finding a place to live, and so on and so forth. In this sense, a person should be attentive to one's own wellbeing in a way that others are not required to be. Hence, regard for one's wellbeing should play an important role in judging whether to intervene forcefully or not.²⁹⁹

The flipside to an agent-relative obligation to one's own wellbeing is the liberty to make sacrifices. A person might choose to sacrifice a variety of things of value to her; she might even choose to sacrifice her own life if the issue is important enough. We might believe that such self-sacrifice is morally praiseworthy.³⁰⁰ But if we do, this contradicts the notion that we have an agent-relative obligation to our own wellbeing.

²⁹⁶ Jens Timmermann, "Kantian Duties to the Self, Explained and Defended," *Philosophy* 81, no. Jul (2006): 506; *ibid.*, 508.

²⁹⁷ Fletcher, 175.

²⁹⁸ Miller, "Killing in Self-Defense," 331.

²⁹⁹ A duty to be self-regarding, however, requires some minimum level of capability. An infant, for example, cannot be expected to care for herself in the same way as a fully-functioning adult. But to the extent that she is capable, a person has an agent-relative obligation to care for herself.

³⁰⁰ Thomas Nagel describes self-sacrifice as an act that is morally supererogatory and altruistic. But he also suggests that altruism, which he describes as "any behaviour motivated merely by the belief that

The moral dilemma is particularly severe in cases where one intentionally sacrifices one's own life to benefit others. Alison McIntyre examines this moral dilemma in her discussion of double effect and heroic self-sacrifice. She describes the case of Captain Oates, who, weakened by scurvy and frostbite and incapable of going on, walked away from R. F. Scott's party in Antarctica in order to ensure that the others would continue on without him.³⁰¹ McIntyre cites R. A. Duff's comment that,

An Absolutist Oates might believe that he must enable his friends to go on, but that he may not commit suicide (intend his own death) as a means to that end. He would be a suicide if he shot himself or walked out so that they would go on because they knew he was dead: but he may walk out, knowing he will die, if he intends simply to leave his friends and that they should respect his decision and go on without him.³⁰²

McIntyre concludes that where an absolute prohibition on intentional self-destruction is assumed to hold, double effect is invoked to explain why self-destruction might be permissible while aiming at self-destruction as an end would always be forbidden.³⁰³

Moving beyond questions of duties to oneself, another type of agent-relative responsibility are the obligations we owe to family and friends. Fletcher suggests that the way we think about the duty to rescue in modern, secular legal systems is that the scope of the duty is limited to family members and a special set of persons with whom one stands in a special relationship of trust and responsibility.³⁰⁴ Starting from the premise of a duty limited in this way, he then invokes the duty to rescue as the basis for a general right of forceful intervention against aggression.³⁰⁵

someone else will benefit or avoid harm by it," does not necessarily involve self-sacrifice. Thomas Nagel, *The Possibility of Altruism* (Princeton University Press, 1978), 16.

³⁰¹ Scott said of Oates in his posthumously recovered diary, "He said 'I am just going outside and may be some time.' He went out into the blizzard and we have not seen him since. Though we tried to dissuade him, we knew it was the act of a brave man and an English gentleman." Alison McIntyre, "Doing Away with Double Effect," *Ethics* 111, no. 2 (2001): 245-47.

³⁰² *Ibid.*, 245; R. Antony Duff, *Intention, Agency and Criminal Liability: Philosophy of Action and the Criminal Law* (Oxford: Blackwell, 1990), 9.

³⁰³ McIntyre, 244-45.

³⁰⁴ Fletcher, 176.

³⁰⁵ *Ibid.*

Most of us would agree that we have a duty to protect members of our family when they are threatened. As I mentioned above, this is certainly the case for parents who take on the special responsibility of raising children. Children are vulnerable human beings who require the protection of parents and cannot properly take care of themselves. Ferdinand Schoeman, for example, examines the needs and welfare of (small) children and the duties of their parents. He regards it as given that parents have a duty to protect their children from abuse and neglect, both physical and emotional.³⁰⁶ Hence, if a parent or guardian fails to promote the child's wellbeing at some threshold level of adequacy, he suggests, a form of intervention might be required, including counselling, punishment or loss of parental rights to the child.³⁰⁷ The same might be said about other members of a family who are vulnerable to being harmed. For example, they might have ongoing health problems or another debilitating condition that makes self-care impractical. It is thus plausible to conclude that an intervener has an agent-relative duty to protect the lives of vulnerable family members.

An agent-relative duty to protect family members might be less relevant, however, when they are not vulnerable. If someone from my family is capable of self-care, do I still have an agent-relative duty to forcefully intervene to protect her? There are other potential grounds for such an agent-relative duty. One grounds might be a formal promise (or covenant) to take on special responsibility for the wellbeing of another human being. An example of this is marriage, where one promises to care for their spouse. This includes an obligation to protect the promisee. Another grounds might be the trust that has accumulated in a friendship. Friends are people whom we trust to have a special interest in our wellbeing. Again, this includes a mutual obligation to protect one another from harm.

³⁰⁶ Ferdinand Schoeman, "Rights of Children, Rights of Parents, and the Moral Basis of the Family," *Ethics* 91, no. 1 (1980): 7.

³⁰⁷ *Ibid.*, 7-8.

c. Impersonal role duties

So far, I have examined what might be termed “personal” role duties. These are the agent-relative responsibilities that are grounded in the intimate relationship between parties. But what about the role duties that are impersonal; where there is no intimate relationship between the two parties? Our lifeguard, from the example above, may or may not have some pre-existing relationship with someone he rescues, but this is not relevant to doing his job. We expect lifeguards to rescue drowning human beings because this is what the profession of lifeguard requires. Moreover, we would want this to be independent of intimate relations. Professions create role responsibilities where the personal relationship between the parties is irrelevant.

Michael Davis defines a profession as “a number of individuals in the same occupation voluntarily organised to earn a living by openly serving a certain moral ideal in a morally-permissible way beyond what law, market, and morality would otherwise require.”³⁰⁸ Davis then builds on his definition and argues that professional codes impose moral obligations on the members of a profession.³⁰⁹ In other words, professionals have agent-relative duties by virtue of their role. And such professional agent-relative duties might include intervening to save lives.

The particular type of impersonal role duties with which I am concerned in the following chapters are the agent-relative obligations of the state’s agents. As we shall see, state agents derive their agent-relative duties from the purposes of the state and act as the state’s representatives. There are a number of important responsibilities a state

³⁰⁸ Davis’ definition requires that a members of a profession are “organized to earn a living” and so he excludes “organizations of amateurs.” But it is not clear that this is a necessary condition for a profession. For example, in the United States, both the Lifeguard and the Coast Guard services are paid full-time occupations. In Australia, however, both of these services are staffed by many volunteer non-paid personnel who are highly trained and consider themselves equally as “professional” as their paid counterparts. Michael Davis, *Profession, Code, and Ethics* (Ashgate, 2002), 3.

³⁰⁹ *Ibid.*, 4.

takes upon itself that it then delegates to state agents to implement. An example of an important responsibility is to administer impartial justice. Another is the creation of the laws by which the inhabitants of a jurisdiction are to live. As explained in Chapter 1, however, what concerns us here is the state's duty to protect and the way this sanctions the use of force by the police and military. It might be true to say that the police and military use of lethal force can *only* be morally justified within the killing in self-defence or defence of others paradigm. If so, then we should expect the agent-relative responsibilities of the police and/or military to strengthen their humanitarian obligation to rescue by demanding they take on more risk and/or cost. Importantly, it should leave the moral permissibility of their actions unchanged. But if it turns out that the police and/or military use of force is justified by a distinct moral paradigm, then it is possible that the moral permissibility of their actions also changes. The police and/or the military then might have access to additional moral permissions for using lethal force. And these additional moral permissions would not normally be available to the average person. This is the issue to which I now turn in Part Two of this thesis.

3.5 Conclusion

There is a humanitarian duty to forcefully intervene in order to protect innocent humans from an immediate deadly unjust threat. This means that a third-party should use forceful intervention (including lethal force) to protect an innocent human life in cases where the use of force against an unjust threat is morally permissible and the intervener has a duty to rescue the defender's life. This humanitarian duty includes forcefully intervening when: 1) we are capable of intervening; 2) our intervention is necessary to prevent the wrongful death of an innocent human; and 3) intervention is *not* unreasonably risky or costly. Furthermore, the moral permissibility of forcefully intervening is built on a principle of impartialism. All other things being equal, a third-party must satisfy the same impartial moral requirements that hold for killing in self-

defence. In the absence of an impartial moral justification, an intervener who uses lethal force is liable to defensive force himself. Agent-relative considerations play an important complementary role because they might strengthen the risk and/or cost that a potential intervener is obliged to accept. This means that a third-party has a stronger duty to intervene using lethal force when they have an agent-relative duty to protect the defender. So although an impartial justification is necessary, agent-relative considerations still have moral weight when making a decision to forcefully intervene, and these can make a substantial difference to the outcome.

If this is correct, then the moral justification for killing in defence of others concludes that it is *morally permissible* for Dean to defend Sam by killing Meg when the following conditions are met: 1) Meg is an immediate deadly threat to Sam (*immediate threat condition*); 2) Dean's intention is to defend Sam's life, which can be achieved by killing Meg (*defence condition*); 3) Dean's only reasonable option for preventing Sam being killed is to kill Meg (*necessity condition*); 4) Meg does not have a sufficiently just reason for threatening Sam's life (*unjust condition*); and 5) if the threat is non-culpable or partially-culpable then Dean should attempt to share the cost and risk between Sam and Meg in order for both parties to survive (*variable culpability condition*). In addition, it is *morally obligatory* for Dean to kill Meg in order to rescue Sam when the above permissibility conditions hold and: 6) Dean is capable of intervening to rescue Sam's life; 7) Dean's intervention is necessary to prevent Sam's wrongful death; and 8) Dean's intervention is *not* unreasonably risky and/or costly for Dean (if Dean has an agent-relative responsibility for Sam's wellbeing, then Dean should accept more risk and/or cost to himself in order to rescue Sam).

CHAPTER FOUR: JUST KILLING IN WAR

4.1 Introduction

In Part One of this thesis, I pointed out that there exists an important moral presumption against killing human beings and, to overcome this presumption, there needs to be a sufficient ethical justification (i.e. self-defence or defence of others) that changes its status from an action (or intention) that is morally wrong to one that is morally neutral or right. Chapter 2 argued that the unjust threat account of justified killing in self-defence is morally grounded in the necessity of warding off an immediate unjust deadly threat. I further argued that this unjust threat account should be modified so that in cases where the threat is non-culpable (or only partially-culpable) the defender should share the cost and risk in order for both parties to survive. Chapter 3 then demonstrated that defence of others morally permits a third-party to forcefully intervene and kill an immediate deadly unjust threat in order to protect an innocent human life. In addition, I argued that a third-party *should* use forceful intervention (including lethal force) to protect an innocent human life in cases where the use of force against an unjust threat is morally permissible and the intervener has a duty to rescue the defender's life. This obligation is weakened when intervention is risky and/or costly to the third-party. But if the intervener has an agent-relative responsibility for the defender's wellbeing, then the intervener should accept higher levels of risk and/or cost in order to rescue the defender.

Part Two of this thesis now argues that the state sanctions certain agents to use force on its behalf, and this creates moral permissions that are distinct from either justified killing in self-defence or defence of others. I demonstrate that this moral distinction can be most clearly seen in the large moral gulf that exists between an individual killing in self-defence when compared with soldiers fighting a conventional

war. This chapter explains how conventional just war thinking justifies a military's morally exceptional use of lethal force in war and the way in which this approach is being challenged.

The first section of this chapter describes the conventional just war account for morally justifying the military's exceptional permissions to use lethal force in war. I start out by providing a brief overview of the way in which the just war tradition is conventionally applied through the law of armed conflict. In particular, I highlight the "moral exceptionalism" that is at work in the just war tradition. Then, I outline the main elements of conventional just war thinking. The purpose of the first set of just war criteria (*jus ad bellum*) is to prevent the harms of war by limiting its initiation. The purpose of the second set of just war criteria (*jus in bello*) is to minimise the harms in war by restraining its conduct. By "harms of/in war" I mean to include the killing, destruction of property and serious rights violations that inevitably occur when wars are fought.

The second section describes how the conventional just war account justifies a military combatant's moral exceptionalism to kill when fighting a war. I argue that the conventional just war account of killing derives its moral exceptionalism from the attempt to balance military necessity with a principle of restraint. Then I demonstrate the way in which the just war approach to moral exceptionalism in armed conflict is distinct from the "amorality" of political realism. Next I argue that the exceptions to standard morality permitted by the conventional just war approach are contingent upon the features of war existing. That is, the military special permissions for killing enemy combatants are dependent upon the warfighting context. Finally, I discuss the way in which the conventional just war explanation for the ethics of war has been challenged by the individualist approach to just war theory. Just war individualists argue that killing in war should *not* be treated as morally distinct from any other kind of justified

killing. In particular, I outline Jeff McMahan's individualist critique of the conventional just war justification for the moral exceptionalism of killing in war.

The third section then describes the limitations of the conventional just war approach as a way of justifying the military's morally exceptional use of lethal force in modern armed conflict. I argue that recent trends in modern conflict are challenging the conventional notion of war, and this has made application of conventional just war criteria increasingly problematic. One set of challenges I examine are the problems caused by non-conventional armed conflicts. A second set of challenges are the emerging technologies of harm. A third set of challenges for conventional just war is the failure to acknowledge the peacetime (or non-war) role played by military capabilities. These challenges contribute to the problem of non-standard cases, particularly in relation to a state's use of military force.

The fourth section of this chapter then briefly considers the types of responses typically proposed to solve the problem of non-standard cases. The first approach defaults to the policing paradigm. The second approach seeks to extend the boundaries of war and apply just war criteria to non-standard cases. The third approach examines the individualist argument that there is nothing morally exceptional about the use of lethal force in war or by any state-sanctioned agents. The fourth approach recommends the development of a "hybrid" ethical framework that draws on appropriate elements of both military and policing paradigms.

4.2 The Just War Tradition

a. A brief history of just war thinking

But first, let us examine the tradition of just war thinking and what it does (or attempts to do) in applying ethical principles in war. The just war tradition attempts to

explain the “rightness” or “wrongness” of the decision to fight a war and the way in which a war should be conducted. According to David Whetham, the just war tradition provides an ethical framework for distinguishing justifiable military action from mass murder. It provides a common language within which the rights and wrongs of armed conflict can be intelligibly discussed and debated rationally.³¹⁰ That is, destructive acts that are disproportionate and/or indiscriminate are morally off limits. So the just war tradition demands that military combatants exercise restraint in their pursuit of military goals.

Some authors, such as James Turner Johnson, emphasise the judicial function of war, however. This suggests that the just war focuses on a “conception of sovereignty as responsibility for the common good of society that is to be exercised to vindicate justice after some injustice has occurred and gone unrectified or unpunished.”³¹¹ I *do not* dispute that the just war tradition is also concerned with justice. But these notions are not incommensurate. The just war tradition is a complex, long-standing historical discussion about both harm mitigation *and* the pursuit of justice. Rather than engaging with this debate, however, my purpose here is merely to highlight the way in which the just war tradition develops a principled approach to the moral exceptionalism that applies to killing in war. This moral exceptionalism is an attempt to balance military necessity with the principle of humanitarianism; what Michael Walzer refers to as the adaption of ordinary morality to the “moral reality of war.”³¹²

The modern variant of just war thinking is part of a long historical tradition that stretches back through the centuries, with roots in various intellectual traditions around

³¹⁰ David Whetham, *Ethics, Law and Military Operations* (Palgrave Macmillan, 2011), 84-85.

³¹¹ James Turner Johnson, *Sovereignty: Moral and Historical Perspectives* (Washington D.C.: Georgetown University Press, 2014), 19.

³¹² Michael Walzer, "Response to McMahan's Paper," *Philosophia* 34, no. 1 (2006): 45.

the world.³¹³ Alex Bellamy explores the historical development of just war thinking and its impact on shaping contemporary uses of military force in his 2006 book “*Just Wars: From Cicero to Iraq*.”³¹⁴ Here he argues that the earliest systematic writings that link directly to the modern understandings of the just war tradition derive from the work of Ambrose and Augustine in the late 4th and early 5th centuries.³¹⁵ They synthesised the previously existing ideas in Greco-Roman thought. The ancient Greek writer Thucydides (460-395 BC), for example, examined the customs of warfare in his analysis of the Peloponnesian War.³¹⁶ And, according to Bellamy, the Roman philosopher Cicero developed an even more comprehensive account of the laws of war than the Greeks.³¹⁷ The 4th century Christian bishop Ambrose of Milan (340-397) argued that Jesus’ teaching forbade an individual from killing another in self-defence. So he was against the complete acceptance of Cicero’s laws of war, which presumed killing in self-defence is always legitimate. Instead, Ambrose held that an individual might act in the defence of others.³¹⁸ Augustine of Hippo (354-430) was taught by Ambrose, which influenced him in formulating his own views of the ethics of war. According to Walzer, Augustine is important to the development of just war because he replaced the pacifism of Christian piety with the reasoning necessary to support the active ministry of the Christian soldier.³¹⁹

³¹³ For detailed discussions of the historical development of the Just war Tradition see: David Whetham, "The Just War Tradition: A Pragmatic Compromise," in *Ethics, Law and Military Operations*, ed. David Whetham (Basingstoke, Hampshire: Palgrave Macmillan, 2011); Bellamy; J.T. Johnson, *Just War Tradition and the Restraint of War: A Moral and Historical Inquiry* (Princeton University Press, 2014); Neff.

³¹⁴ Bellamy’s study of Just war thinking is particularly useful to my discussion here because he examines the Tradition in the context of contemporary issues of conflict. Bellamy.

³¹⁵ *Ibid.*, 17.

³¹⁶ Ned Lebow argues that although Thucydides is frequently cited as the original advocate of a ‘might is right’ approach to warfare, his overarching story is about moral decline contributing to the demise of the Hellenic society of city-states. His particular concern is that the erosion of the more restrained traditional customs of war damaged Greek civilization as a whole. Richard Ned Lebow, *The Tragic Vision of Politics: Ethics, Interests and Orders* (Cambridge: Cambridge University Press, 2003).

³¹⁷ Bellamy, 18.

³¹⁸ *Ibid.*, 24.

³¹⁹ Michael Walzer, *Arguing About War* (New Haven & London: Yale University Press, 2004), 3.

Centuries later, Gratian's *Decretum* (1148) made an important contribution, Bellamy suggests, when it established defence of the *patria* (political community) as a just cause. He claims that Gratian's approach to justified war was a "quasi-legal" procedure for defending the rights of individuals in contexts where no higher authority was able to arbitrate effectively.³²⁰ According to James Turner Johnson, Gratian held that war was justified *only* when fault could be found in the party against whom war was being waged. That is, he suggests, war is justified "in order to regain what has been stolen or to repel the attack of enemies" or "when it is necessary by war to constrain a city or a nation which has not wished to punish an evil action committed by its citizens."³²¹

Then, in the century following Gratian, Thomas Aquinas (1225-1274) used the authority of Augustine's arguments in an attempt to define the conditions under which a war could be just. Aquinas's starting point was a presumption against war and violence. In order for a war to be just, says Aquinas, three things are required: the authority of the prince by whose command the war is to be waged; those who are attacked deserve it on account of some fault (*culpa*); and the intention to advance good and avoid evil.³²² Importantly, Aquinas said that it was not the business of a private individual to declare war when he can take his grievance before a public official to be judged. Neither is it the business of a private person to mobilise the people for war. Instead, he suggested that it is the duty of those who are in authority to "rescue the poor and deliver the needy out of the hand of the sinner"; that a political order conducive to peace requires public officials to have the responsibility to authorise wars.³²³ According to Bellamy, this

³²⁰ The Decretists elaborated on the *Decretum* (in the period between 1140 and 1190) with a particular focus on the nature of the just cause and the rightful authority for war. Bellamy, 33-35.

³²¹ James Turner Johnson, *Ideology, Reason, and the Limitation of War: Religious and Secular Concepts, 1200-1740* (Princeton University Press, 1975), 36.

³²² Thomas Aquinas, "Just War and Sins against Peace," in *The Ethics of War: Classic and Contemporary Readings*, ed. Gregory Reichberg, Henrik Syse, and Endre Begby (Oxford, UK: Blackwell Publishing, 2006), 177.

³²³ *Ibid.*

meant that Aquinas agreed with Augustine that private persons and public officials were bound by different moral rules.³²⁴ Like Augustine, he suggests, Aquinas derived this position from a belief in the inherent sociability of man and the need for government, arguing that “man is by nature a political and social animal” who uses reason and speech to build political communities that satisfy important human needs.³²⁵

Niccolo Machiavelli (1469-1527) also made a significant impact on the just war tradition when he argued that morality and law are products of political communities.³²⁶ According to Bellamy, the prince’s primary role in Machiavelli’s schema is to protect the political community through force of arms and justice. To do this, however, he must remain “above” the law and be free to act according to the dictates of necessity.³²⁷ The “Legalists” later departed from Machiavelli’s political realism by insisting international society was constituted by laws and norms governing the mutual relations between states.³²⁸ In particular, Alberico Gentili published *De Jure Belli* in 1589, which rejected the realist idea that sovereigns could justifiably wage war whenever they saw fit and argued that such decisions were subject to scrutiny under international law. This is, suggests Bellamy, because while princes were “above” positive law, they remained “below” natural law and international law. For Gentili, international law governed relations between states and comprised rules to which they consented.³²⁹ But the legalists broadly accepted the Machiavellian view that states were inherently valuable,

³²⁴ Bellamy, 38.

³²⁵ Ibid.

³²⁶ Niccolo Machiavelli, "The Prince," in *Machiavelli: The Prince*, ed. Q. Skinner and R. Price (Cambridge, UK: Cambridge University Press, 1988).

³²⁷ Humans created laws within such communities to punish wrongdoers and protect the community. Justice is a product of the political community but is not part of the innate human condition nor does it extend beyond the state. Physical force is essential for such communities insofar as it is necessary for the state’s survival and growth. Machiavelli maintained that as justice is confined to the state, the world beyond is an ungoverned anarchy. In order to protect the political community in this environment, princes must be directed by the virtue of necessity and guided only by considerations of prudence, not of law and morality. Thus, in Machiavelli’s approach to war, everything is subordinated to military power and its prudential use. Bellamy, 57.

³²⁸ Ibid., 58-59.

³²⁹ Ibid., 59.

suggests Bellamy. Balthazar Ayala, for example, argued that the question of whether recourse to war was justified was a matter for the ruler alone.³³⁰

Then, according to Bellamy, the devastation wrought by Europe's religiously-motivated ideological wars between 1570 and 1660 produced a profound intellectual reaction that reshaped the just war tradition. For example, Thomas Hobbes' *Leviathan* (1651) was written in response to the English Civil War.³³¹ These wars were brought to an end by two treaties collectively known as the Peace of Westphalia (1648), which is usually seen as the birth of the era of the modern nation-state and the beginning of the modern system of international diplomatic relations.³³²

Hugo Grotius' *De Jure Belli et Pacis* (1625) attempted to construct a system of law that would prevent such religiously-motivated ideological conflict in the future.³³³ Grotius (1583–1645) argued that the only just cause for war was in a context where impersonal tribunals were either ineffective or without jurisdiction. He allows private persons the use of force to ward off injury but argues that it is “much more consistent with moral standards, and more conducive to the peace of individuals, that a matter be judicially investigated by one who has no personal interest in it.”³³⁴ According to Bellamy, Grotius made an important distinction between the duties of the sovereign and the average person when it comes to moral decision-making. When the sovereign is confronted with situations where failing to act might facilitate a wrong or let a wrong go unpunished, she is obliged to choose the least evil option rather than do nothing. In

³³⁰ Ibid.

³³¹ See 4.3 below for more on Hobbes' political realism. Hobbes.

³³² Bellamy, 67.

³³³ Hugo Grotius, "The Law of War and Peace," in *The Law of War and Peace: Student Edition*, ed. S.C. Neff (Cambridge: Cambridge University Press, 2012 [1625]).

³³⁴ "The Theory of Just War Systematized," in *The Ethics of War: Classic and Contemporary Readings*, ed. Gregory Reichberg, Henrik Syse, and Endre Begby (Oxford, UK: Blackwell Publishing, 2006), 395.

contrast, if the average person *does not know* whether his action will be right or wrong, then Grotius says that he *should* do nothing.³³⁵

After Grotius, legalism split into two sub-traditions that emphasised natural law and positive law, respectively. The *natural law tradition* was headed by Samuel von Pufendorf (1632-1694) and Christian Wolff (1679–1754) who attempted to develop a more coherent natural law theory, which predominated in European intellectual circles for much of the eighteenth century before heading into decline, says Bellamy. The *positive law tradition* was reflected in the work of Emmerich de Vattel (1714-1767) and Cornelius van Bynkershoek (1673-1743) who focused on a conception of international law based on sovereign consent.³³⁶

Political realism then dominated much of the period from 1789-1945. Bellamy suggests that this meant that sovereigns believed they enjoyed an unlimited right to wage war wherever they deemed it prudent and that normative restrictions on the conduct of war should be tempered by military necessity. But these prerogatives were challenged by legalists from the mid-eighteenth century onwards who argued that states had a responsibility to care for the wounded and sick in war and limit war's violence.³³⁷ Bellamy suggests that since 1945 the positive laws of war have developed into a comprehensive system of rules comprising "a presumption against aggressive war, rules governing the principle of non-combatant immunity and legitimate conduct in war, and a system, albeit partial, for prosecuting those accused of grave breaches."³³⁸

³³⁵ Bellamy describes Grotius as conceiving three "images" of just war: 1) war as judicial act; 2) war as litigation; and 3) war as defence of the common good. Grotius argued that war in defence of the state was justifiable because the state itself had value beyond the amalgamation of individual rights to self-preservation, which derived from its role as protector of society, economy, culture and the like. Thus, he maintained that war was not forbidden by either natural law or volitional law but that the contradictions inherent in the concept of collective self-preservation necessitated laws governing recourse to war and its conduct. Bellamy, 73, 75.

³³⁶ Ibid., 76.

³³⁷ Ibid., 89.

³³⁸ Ibid., 112-13.

What is today conventionally understood as just war theory is largely influenced by Michael Walzer's work, particularly as reflected in his 1977 book *Just and Unjust Wars*.³³⁹ According to Endre Begby, Gregory Reichberg, and Henrik Syse, Walzer's book was responding to the dominance of structural realism in U.S. foreign policy and the heated debates about the Vietnam War.³⁴⁰ Walzer builds his just war theory on the notion that states have a right of self-defence much like individuals, which he refers to as the "domestic analogy."³⁴¹ This comparison of international society to civil society is crucial for understanding Walzer's theory of aggression.³⁴² It says that states possess a right of self-defence in an analogous way to individuals. Therefore, according to Walzer, international aggression is a criminal act equivalent to armed robbery or murder and "the world of states takes on the shape of a political society the character of which is entirely accessible through such notions as crime and punishment, self-defence, law enforcement, and so on."³⁴³ Walzer refers to this approach to justifying war as the "legalist paradigm" because he believes it reflects the conventions of law and order, and he argues that it should be treated as the baseline for the moral comprehension of war.³⁴⁴

³³⁹ Michael Walzer, *Just and Unjust Wars: A Moral Argument with Historical Illustrations*, 1st ed. (New York: Basic Books, 1977).

³⁴⁰ Endre Begby, Gregory Reichberg, and Henrik Syse, "The Ethics of War. Part I: Historical Trends," *Philosophy Compass* 7, no. 5 (2012): 317; Kenneth N. Waltz, *Theory of International Politics* (New York: Random House, 1979).

³⁴¹ For a discussion of the domestic analogy, Walzer recommends reading the two essays by Hedley Bull, "Society and Anarchy in International Relations," and "The Grotian Conception of International Society," in *Diplomatic Investigations*, chps. 2 and 3. H. Butterfield, M. Wight, and H. Bull, *Diplomatic Investigations: Essays in the Theory of International Politics* (Allen and Unwin, 1966).

³⁴² Walzer argues that his theory of aggression can be summed up in six propositions: 1) there exists an international society of independent states; 2) this international society has a law that establishes the rights of its members, especially the rights of territorial integrity and political sovereignty; 3) any use of force or imminent threat of force by one state against the political sovereignty or territorial integrity of another constitutes aggression and is a criminal act; 4) aggression justifies two kinds of violent response, a war of self-defence by the victim and a war of law enforcement by the victim and any other member of international society; 5) nothing but aggression can justify war; and 6) once the aggressor state has been militarily repulsed, it can also be punished. Walzer, *Just and Unjust Wars: A Moral Argument with Historical Illustrations*, 61-62.

³⁴³ *Ibid.*, 58.

³⁴⁴ *Ibid.*, 61.

Walzer argues that state aggression is a direct threat to international society that is beyond the capabilities of domestic law enforcement. This means that it is up to the members of international society to uphold the right of self-defence by policing state aggression. Walzer believes that failure by international society to protect states' rights to self-defence will ultimately lead to either the collapse of international order into widespread war or an equally undesirable universal tyranny.³⁴⁵ This led him to advocate a presumption in favour of military resistance against aggression in order to both preserve the rights of states and deter future aggressors. If we can agree that this type of resistance is a form of law enforcement then, Walzer argues, we should accept his second presumption that there must be some states against which the law can and should be enforced.³⁴⁶ According to David Luban, the conventional view is that a war is just if it is for the purposes of self-defence against aggression. This is reflected in the Kellogg-Briand Pact, Article 2(4) of the UN Charter, the relevant clause in the Nuremberg Charter and Article 51 of the UN Charter.³⁴⁷

A noteworthy aspect of the ongoing historical dialogue about ethics and war in the just war tradition has been the thread of humanitarian thinking that continues to reassert itself. Bellamy suggests that the "Martens clause" formally expresses the principle of humanity that exists within the Tradition.³⁴⁸ First proposed by the Russian delegate F.F. de Martens at the 1899 Hague peace conference, the Martens clause stipulates that:

Until a more complete code of the laws of war is issued, the High Contracting parties [to the 1899 Hague Convention] declare that in cases not included in the Regulations adopted by them, populations and belligerents remain under the protection of the principles of international law, as they result from the usages established between civilized nations, from *the laws of humanity*, and the requirements of public conscience.³⁴⁹

³⁴⁵ Ibid., 59.

³⁴⁶ Ibid.

³⁴⁷ David Luban, "Just War and Human Rights," *Philosophy & Public Affairs* 9, no. 2 (1980): 163.

³⁴⁸ Bellamy, 94.

³⁴⁹ Ibid.

Humanitarianism is concerned with reducing (or even eliminating) the unnecessary, disproportionate and/or indiscriminate harm caused by war.³⁵⁰ Michael Gross says that the Geneva Conventions understand the laws of armed conflict as “a compromise based on a balance between military necessity (that is, those measures essential to attain the goals of war) and the requirements of humanity.”³⁵¹ Gross suggests that humanitarian reasoning (the principle of humanitarianism) guides combatants in their treatment of one another and of noncombatants (including soldiers who are no longer a threat). A principle of humanitarianism in war says that military combatants should only do the harm necessary to achieve victory in a conflict. It infuses the law of armed conflict (LOAC) and international humanitarian law (IHL), and is enshrined in the 1949 Geneva Conventions and the 1977 Protocols (I and II) to the Geneva Conventions.

Humanitarianism prohibits torture, summary execution and weapons that cause unnecessary suffering, while protecting noncombatants from direct attack, pillage, reprisals, indiscriminate destruction of property and kidnapping.³⁵² Hence, according to Gross,

A state engaged in a conflict will seek to destroy or weaken the enemy’s war potential . . . in three ways: death, wound or capture . . . All three are equally capable of eliminating the enemy’s strength. *Humanitarian reasoning is different.* Humanity demands capture rather than wounds, and wounds rather than death; that non-combatants shall be spared as far as possible; that wounds inflicted be as light as possible, so that the injured can be treated and cured; that wounds cause the least possible pain; that captivity be made as endurable as possible.³⁵³

In short, humanitarian reasoning is at the core of the just war tradition. Its concern is to reduce the unnecessary, disproportionate and/or indiscriminate harm

³⁵⁰ The “principle of humanitarianism” that runs through the just war tradition should not be confused with the “doctrine of humanitarian intervention.”

³⁵¹ Gross, 24-25.

³⁵² *Ibid.*, 2.

³⁵³ *Ibid.*; Jean S. Pictet, *Development and Principles of International Humanitarian Law* (Dordrecht: Martinus Nijhoff Publishers, 1985), 62.

caused by war. These harms include killing, maiming, destruction of property and serious rights violations that inevitably occur when wars are fought.³⁵⁴

b. Jus ad bellum: Preventing initiation of war

One set of considerations that make up the just war are *jus ad bellum* criteria.³⁵⁵ *Jus ad bellum* consists of six basic criteria for deciding when fighting a war is morally justified. The purpose of this first set of just war criteria is to prevent the harm of war by restricting its initiation to cases where it is justified (e.g. it is a necessary course of action to pursue justice). The first *ad bellum* criterion of *just cause* serves this purpose by demanding that war is only justified on the basis of a specific and restricted set of moral reasons. This notion, that the initiation of war requires a just cause, has manifested in various forms throughout history. The Romans, for example, believed that victory depended on satisfying the gods and therefore followed fetial law (*ius fetiale*) as a process necessary to please the gods when deciding to wage war.³⁵⁶ But the moral reasoning has changed significantly over time. For instance, Francisco de Vitoria (1483-1546) ruled out three potential just causes: religious differences, claims of

³⁵⁴ In response to my characterization of the just war tradition here, Ned Dobos observes that I seem to want to say that the point of just war theory is to limit the total harm caused by war – so the theory is justified in consequentialist or rule utilitarian terms. Consider all the just war theorising around who is liable to attack/a legitimate target, he suggests. If we took a consequentialist approach to the question of who is liable, we would think about it this way: “Which account of liability would most effectively limit the harmful consequences of war, if generally observed?” But, he points out, that is not how most just war theorists approach the question. Most of them think about it deontologically: “which people have forfeited their human right not be attacked through their own culpable or threatening behaviour?” In other words, all this just war theorising is geared towards figuring out how to make war “rights consistent,” he argues, rather than figuring out how to limit the total costs of war. So he does not think just war theory is simply about minimising the overall costs and harms of war. For Dobos, it is also about making war consistent with individual rights and deserts, even if this *does not* always minimise the total costs/harms. Certainly, it is not my goal here to develop a utilitarian theory of the just war. Rather, I am saying that just war thinking is concerned with mitigating the harms of war, which I take to include serious rights violations.

³⁵⁵ Here I only provide a brief outline of the Just war criteria. For more detailed descriptions see: Whetham, "The Just War Tradition: A Pragmatic Compromise."; Endre Begby, Gregory M. Reichberg, and Henrik Syse, "The Ethics of War. Part II: Contemporary Authors and Issues," *Philosophy Compass* 7, no. 5 (2012); C. A. J. Coady, *Morality and Political Violence* (Cambridge: Cambridge University Press, 2008); Bellamy; Walzer, *Just and Unjust Wars: A Moral Argument with Historical Illustrations*; Orend; A.J. Coates, *The Ethics of War* (Manchester University Press, 1997).

³⁵⁶ Bellamy, 18-19.

universal jurisdiction and the personal ambitions of sovereigns.³⁵⁷ Begby, Reichberg and Syse suggest that the conventional approach to just cause restricts initiation of war to the Walzerian right of “national self-defence against territorial aggression” where there is an apparent threat to state sovereignty.³⁵⁸ In more recent times, however, just cause has been extended, by some, to include humanitarian intervention.³⁵⁹

The second *ad bellum* criterion of *right intention* says that those leaders responsible for deciding to go to war should have morally appropriate intentions. That is, the intentions of the state’s decision-makers must remain aligned with the initial just cause. According to Begby, Reichberg and Syse, the moral concern here is that a state may possess just cause, yet use it as a pretext to pursue war for unrelated reasons, such as the aim of maintaining regional hegemony or seizing the opportunity to oust a competitor in natural resource trade.³⁶⁰ James Turner Johnson suggests that the origin of right intention is traced to Augustine who believed a positive indicator of right intention is pursuing the goal of peace.³⁶¹ And, according to Bellamy, Augustine argued that killing was justified when conducted with right intentions: to correct an injustice and restore peace.³⁶² Augustine also argued that soldiers and public officials did not sin when they acted on an order from the monarch to use violence, and they acted with the intent of promoting the common good.³⁶³

The third *ad bellum* criterion tells us that the war should involve *proportionate costs*. That is, the overall cost of the war (not merely the financial cost but the harm it

³⁵⁷ Ibid., 50.

³⁵⁸ Begby, Reichberg, and Syse, 329.

³⁵⁹ See: David Lefkowitz, "On a Duty of Humanitarian Intervention," in *New Wars and New Soldiers: Military Ethics in the Contemporary World*, ed. Paolo Tripodi and Jessica Wolfendale (Surrey, England: Ashgate Publishing Limited, 2011), 87; Andrew Altman and Christopher H. Wellman, *A Liberal Theory of International Justice* (Oxford: Oxford University Press, 2009), 97; Nicholas J. Wheeler, *Saving Strangers: Humanitarian Intervention in International Society* (Oxford: Oxford University Press, 2000); Walzer, *Arguing About War*, xiii; James Pattison, *Humanitarian Intervention and the Responsibility to Protect: Who Should Intervene?* (Oxford: Oxford University Press, 2010).

³⁶⁰ Begby, Reichberg, and Syse, 332.

³⁶¹ J.T. Johnson, *Morality and Contemporary Warfare* (Yale University Press, 1999), 42.

³⁶² Bellamy, 28-29.

causes) must be proportionate to the benefit that will be obtained by going to war.

Begby, Reichberg and Syse suggest that a state may possess just cause, but the war will not be just unless it is proportionate to the wrong that it seeks to set right.³⁶⁴ According to Thomas Hurka, this criterion says that the destructiveness of war must not be out of proportion to the relevant good the war will do. Just cause might be satisfied, yet resort to war is still morally wrong if the damage it causes is going to be excessive.³⁶⁵ Tony Coady dismisses a simple utilitarian or consequentialist approach to this criterion that says violence is proportionate if it brings about more overall benefits than harms, however.³⁶⁶ For Coady, the criterion of proportionate costs in resort to war is more demanding than this. It requires decision-makers to “assess the proclaimed necessities of military means to military ends against the tragic human certainties of death and injury to combatants and non-combatants (on both sides) and the moral and political purposes of the conflict.”³⁶⁷

The fourth *ad bellum* criterion is *prospect of success*, which says there must be a reasonable probability of winning the war. Whetham suggests that most people would accept the idea that it is unethical to sacrifice lives and cause suffering if there is little or no chance that choosing to fight will make any difference.³⁶⁸ Begby, Reichberg and Syse state that a reasonable prospect of success seeks to restrain states from undertaking military action that is judged likely to fail: either because the state lacks the military capability to fight effectively or the political will to follow through. Part of the moral concern in such cases, they suggest, is that a state may substantially wrong its own citizens by committing to a futile conflict.³⁶⁹

³⁶³ Ibid., 28.

³⁶⁴ Begby, Reichberg, and Syse, 332-33.

³⁶⁵ T. Hurka, "Proportionality in the Morality of War," *Philosophy & Public Affairs* 33, no. 1 (2005): 35.

³⁶⁶ Coady, 96.

³⁶⁷ Ibid., 97.

³⁶⁸ Whetham, "The Just War Tradition: A Pragmatic Compromise," 79.

³⁶⁹ Begby, Reichberg, and Syse, 334.

The fifth *ad bellum* principle is *legitimate authority*, which says that war must be publicly declared and authorised by the appropriate authority. According to Begby, Reichberg and Syse, the purpose of this criterion is to ensure that only the highest political authority – with responsibility for the common good – can instigate wars.³⁷⁰ Suzanne Uniacke points out that the right to wage war is grounded in the duty of a political authority to protect the community. This is part of its wider duty, she suggests, to act for the good of the community for whose welfare it is responsible; a duty on which its authority depends and on the basis of which it has a right to commit the nation to war.³⁷¹ Begby, Reichberg and Syse add that today this means that *only* states have the authority to initiate just wars.³⁷²

The sixth *ad bellum* criterion of *last resort* says that initiating war should only be considered after all other *reasonable* non-war avenues have been attempted. Whetham describes last resort as the requirement that all other practical non-violent options (e.g. diplomacy, international political pressure and economic sanctions) should be tried before initiating military action.³⁷³ Walzer makes the point that, taken literally, last resort would make armed conflict morally impossible because “there is always something else to do: another diplomatic note, another United Nations resolution, another meeting.”³⁷⁴ He suggests that if war is justified in the first place then it is “justifiable at any subsequent point when its costs and benefits seem on balance better than those of the available alternatives.”³⁷⁵ Hence, Walzer concludes the purpose of last resort is to create an obligation to attempt effective methods of confronting aggression

³⁷⁰ Ibid., 331.

³⁷¹ Suzanne Uniacke, "Self-Defence, Just War, and a Reasonable Prospect of Success," in *How We Fight: Ethics in War*, ed. Helen Frowe and Gerald Lang (Oxford: Oxford University Press, 2014), 71.

³⁷² Begby, Reichberg, and Syse, 331.

³⁷³ Whetham, "The Just War Tradition: A Pragmatic Compromise," 80.

³⁷⁴ Walzer, *Arguing About War*, 88.

³⁷⁵ Ibid.

before choosing actual fighting.³⁷⁶ It does not demand that decision-makers pursue unreasonable non-violent measures that are likely to be ineffective.

In short, these *jus ad bellum* requirements give us principles to tell us when the moral exceptionalism of killing in war (which I examine below) can be switched on and applied. They work to restrict access to the more extensive harming that occurs in warfare.

c. Jus in bello: Reducing harm in war

Once armed conflict is initiated, the just war tradition has a second important moral purpose: reducing the harms in war by “adapting morality to its reality.” As Walzer says, the war conventions represent the adaption of ordinary morality to the circumstances of war.³⁷⁷ By this, he means that war is a coercively collectivising enterprise that overrides individuality and makes the kind of attention that we would like to pay to each person’s moral standing impossible. According to Walzer, this means that “justice in the theory lives under a cloud.”³⁷⁸ Walzer believes that the just war hinges on the notion that we cannot effectively apply any reasonable ethical standard without accepting the reality of war as a circumstance that is morally distinct from ordinary life.³⁷⁹

The moral concern to restrain the harms in war is described as *jus in bello*. It has the two conventional criteria for right conduct in war. The first conventional *in bello* criterion is *discrimination*, which is concerned with answering the question, “Who is a legitimate target?” This is answered by making a distinction between combatants and non-combatants, then seeking to target the former while minimising harm to the latter.

³⁷⁶ Ibid., 88-89.

³⁷⁷ "Response to McMahan's Paper," 43.

³⁷⁸ Ibid.

³⁷⁹ Ibid., 45.

According to Begby, Reichberg and Syse, the criterion of discrimination says that only combatants can be targeted in war. But then they go on to clarify that although the principle of non-combatant immunity means that non-combatants should not be targeted, the doctrine of double effect permits combatants to pursue military goals that foreseeably result in harm to non-combatants.³⁸⁰ Uwe Steinhoff uses the following example to illustrate how a principle of non-combatant immunity prohibits intentionally attacking innocents while at the same time permitting military actions that foreseeably kills non-combatants,

Consider a bomber pilot who has the intention to destroy a certain ammunition factory. He knows that in this attack innocents will also die . . . but their death is not his goal (perhaps he even deplors it); rather, he merely accepts it, since it is an inevitable side effect of the destruction of the factory . . . If he were to learn later that the factory was destroyed by his attack but that, miraculously, no innocents lost their lives, he would judge their survival not as a partial failure of his mission (but perhaps even as a greater success).³⁸¹

The second *in bello* principle is *proportionality*, which is concerned with the question, “How much force is allowed to be used?” The answer is that combatants should use the least harmful means to achieve the military objective. A. J. Coates suggests, for example, that combatants should use only “as much force as is necessary to achieve legitimate military objectives and as is proportionate to the importance of those targets.”³⁸² Begby, Reichberg and Syse argue that Walzer is primarily concerned with strategies for limiting the impact of war.³⁸³ As proof of this, they cite Walzer’s argument that the impact of war is reduced by making it known to soldiers that they will be held accountable for their conduct irrespective of the justice of their cause. This provides incentive for soldiers on all sides to abide by the limitations of the war convention.³⁸⁴ According to Hurka, *in bello* proportionality forbids the excessive use of

³⁸⁰ Begby, Reichberg, and Syse, 337.

³⁸¹ Steinhoff then goes on to explain why he thinks this is incorrect. Steinhoff, 33.

³⁸² Coates, 209.

³⁸³ Begby, Reichberg, and Syse, 340.

³⁸⁴ Ibid.

military force. In particular, collateral harm to civilians is forbidden if the resulting civilian deaths are not proportional to the military advantage it creates.³⁸⁵

In sum, the purpose of the just war tradition is to reduce the harm of war both by preventing its incidence and, where it does occur, by minimising the death, property destruction and serious rights violations it causes. The *ad bellum* requirement contributes to this purpose by limiting the initiation of war. In contrast, the role of the *in bello* requirement in limiting the harm of war is to restrain the harmful acts that happen in war. Importantly, the *in bello* principles apply regardless of whether or not the *ad bellum* requirement has been met. After all, it is morally better that military combatants adhere to the principles of discrimination and proportionality in war than it is for them to have no such concerns. Even so, the *overall* increased permissiveness for using lethal force in war, which just war thinking gives military combatants, is of particular moral concern. I examine this moral exceptionalism, which grants military combatants additional permissions to kill in war, in more detail below.

4.3 The Morality of Killing in War

a. The moral exceptionalism of military combatancy

The just war tradition gives military combatants special permissions to kill enemy combatants in war. This “moral exceptionalism” of the military in war says that a soldier is acting on behalf of a sovereign state and is thus not a person who is solely morally responsible for his own acts of killing.³⁸⁶ Walzer was summarising the long history of thinking in the just war tradition when he said that wars were not the moral

³⁸⁵ Hurka cites Additional Protocol I to the Geneva Conventions that forbids attacks “which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.” Hurka, 36.

³⁸⁶ By “moral exceptionalism of the military” I mean to refer to the moral and legal exceptions for using lethal force that apply to military combatants fighting a war.

responsibility of soldiers. That is, the “war itself isn’t a relation between persons but between political entities and their human instruments.”³⁸⁷ As Larry May suggests, states take the primary responsibility for decisions to wage war and soldiers have a responsibility to obey the orders of their states to fight in those wars.³⁸⁸ Military exceptionalism here refers to the position that military combatants in active theatres of war are not bound by the same moral rules about killing that apply to an ordinary person in an ordinary circumstance.

For example, let us consider a scenario where a soldier on the battlefield (John) is armed with a missile launcher and is part of a heavily armed company of soldiers who have planned the ambush of a lightly armed enemy transport platoon. As planned, the enemy soldiers fall into the trap and the ambushing company attacks without warning. Being outgunned, the enemy transport platoon quickly surrenders but not before many of its soldiers are killed or wounded and most of its vehicles are destroyed. During the engagement, John fires his missile into an armoured transport vehicle, killing or wounding the soldiers inside. Such an ambush is not considered to be morally or legally problematic, suggests Miller, in the context of a war.³⁸⁹

Thomas Aquinas argues that a soldier has to learn the art of concealing his purpose lest it come to the enemy’s knowledge.³⁹⁰ He cites Augustine who states, “Provided the war be just, it is no concern of justice whether it be carried on openly or by ambushes.”³⁹¹ Although the enemy transport platoon is weaker and not prepared for a fight, the attacking force is permitted to target them because they are military combatants. This is, after all, not a sporting competition; it is warfare. Good military

³⁸⁷ Walzer, *Just and Unjust Wars: A Moral Argument with Historical Illustrations*, 36.

³⁸⁸ Larry May, "Targeted Killings and Proportionality in Law: Two Models," *Journal of International Criminal Justice* 11, no. 1 (2013): 48-49.

³⁸⁹ Seumas Miller, *Terrorism and Counter-Terrorism: Ethics and Liberal Democracy* (Oxford: Blackwell Publishing Ltd, 2009), 135.

³⁹⁰ Aquinas, "Just War and Sins against Peace," 181.

³⁹¹ *Ibid.*, 180.

operational practice seeks the decisive tactical advantage.³⁹² In normal circumstances, however, such an unprovoked attack would be a serious moral wrong. Most people would be horrified at the thought of a group of individuals planning and executing an assault on a convoy of transport vehicles using high-powered weapons. In the absence of the morally exceptional justifying reasons we grant soldiers at war, we should judge the individuals involved, including John, to be cold-blooded murderers. In other words, the normal context is morally distinct from the exceptional context we find in war.

Fritz Allhoff provides a brief philosophical description of the ethics of exceptionalism, by which he means exceptions from moral and legal strictures broadly categorised as norms.³⁹³ Allhoff argues that there are four elements that an account of moral exceptionalism should provide. First, it should tell us what the exception is to; that is, the baseline morality. These are the strictures that would normally apply (in absence of the exception). We have the opportunity to see these strictures more clearly, he suggests, when we can describe the baseline morality.³⁹⁴ In the example of the military attack described above, we can change certain facts to elicit the baseline morality. It might be the case that there is no war, which means there is no *bona fide* enemy to fight. Alternatively, perhaps the attackers or defenders (or both) parties are not military combatants. Without the conditions of war, the baseline morality reverts to self-defence or defence of others.

³⁹² For example, the Australian Army's Land Warfare Doctrine states: "Success in conflict depends on achieving a concentration of force at critical locations and times. Concentration of force is the ability to apply decisive military force at the right place, at the right time and in such a way as to achieve a decisive result. In non-contiguous battlespaces, this requires small, disaggregated teams with the ability to converge rapidly, access joint fires, achieve local superiority and decisive advantage, and then redeploy or regroup when the task is complete. Importantly, concentration of non-kinetic capabilities can achieve effects in the moral and intellectual domains just as the concentration of force achieves effects in the physical domain." *Land Warfare Doctrine 1: The Fundamentals of Land Power*, (Canberra: Australian Army, Commonwealth of Australia, 2014), 21.

³⁹³ Fritz Allhoff, *Terrorism, Ticking Time-Bombs, and Torture: A Philosophical Analysis* (University of Chicago Press, 2012), 40.

³⁹⁴ *Ibid.*

Second, Allhoff suggests that an account of moral exceptionalism should tell us *what* norm the exception is to. The exception has to be granted to a proper subset of whatever the norm normally binds. What gets excepted must be something to which the moral norm would otherwise have applied, he suggests.³⁹⁵ As I established in Chapter 2, the moral norm that would normally apply is self-defence or defence of others, which says that killing another human is morally permissible if it is necessary to ward-off an immediate unjust deadly threat. Furthermore, killing in self-defence and defence of others is an exception to the moral norm that says humans have the right not to be killed. This is a moral norm that applies to all humans equally but does not apply to non-human threats (e.g. an attack from a shark, a falling tree or large rock, or an out-of-control vehicle), which is relevantly different from it needing an exception.

Third, an account of moral exceptionalism should nominate the scope or boundaries of the exceptions. Allhoff suggests there are three ways we understand the scope of an exception: temporal, spatial and group-based.³⁹⁶ Conventionally understood, war has a *temporal* dimension because it is something that begins at one point in time and ends at another. War also has a *spatial* dimension because it is something that happens on a battlefield. So, for example, we can talk about the Pacific Theatre (spatial) of World War II (temporal) where military exceptionalism is applicable.

In addition, the moral exceptionalism of killing in war includes a *group-based* dimension because it restricts applicability to military combatants. When soldiers take up arms and wear uniforms, suggests May, they distinguish themselves from other humans and so their moral and legal status changes. If the enemy state needed to give an explanation for why its soldiers were shooting at a particular individual, then May suggests all that is necessary is to point out that the individual identified themselves as

³⁹⁵ Ibid.

³⁹⁶ Ibid., 40-41.

a military combatant.³⁹⁷ This is a point I raised in Chapter 3 and to which I will return later.

Fourth, Allhoff says that there must be good reasons for the exception so that it is not arbitrary or capricious.³⁹⁸ As I explained in 1.2, a fundamental part of knowing what is right and wrong is being able to establish sufficient moral reasons for the actions we take. And it is necessary that we justify our behaviour in situations where our actions harm others. An unjustified harm is one where our reasons for causing harm do not stand up to moral scrutiny. The reason is inadequate for changing the moral status of an act from one that is unjust to one that is just (i.e. either a right or neutral action). According to Allhoff, what matters in conventional just war is that military combatants are members of the excepted group and so are responsible – either directly or in a support role – for creating a deadly threat, which is a role they can choose to not play.³⁹⁹ In comparing the moral status of military combatants to non-combatants, there is an important morally relevant difference between them; that is, complicity or agency in imminent or otherwise future harms.

Jeff McMahan argues that the theory of the just war, as manifested in the War Convention, is more like an adaptation to the circumstances of war using a *Hobbesian* vision of the right of self-defence (combined with various elements of chivalric morality).⁴⁰⁰ But the just war approach to military exceptionalism in armed conflict is distinct from, and should not be confused with, a Hobbesian political realist account. Hobbes argued that natural law was limited to the desire for self-preservation, suggests Bellamy.⁴⁰¹ Recognising that they could *not* meet their most fundamental needs in the state of nature, Hobbes suggests that individuals establish states through a contract

³⁹⁷ May, 49.

³⁹⁸ Allhoff, 42.

³⁹⁹ *Ibid.*, 51.

⁴⁰⁰ J McMahan, "Killing in War: A Reply to Walzer," *Philosophia* 34, no. 1 (2006): 51.

between the people and their rulers. The people agree to place a monopoly of power and the right to rule in the hands of a sovereign. In return, the sovereign promises to protect the political community from the twin dangers of internal anarchy and external aggression.⁴⁰² According to Hobbes, it was pointless to attempt to restrain war, because that assumed moral and legal bonds between states, which had no such bonds. In the absence of an authority able to enforce legal or moral rules, those rules had no force.⁴⁰³

Michael J. Smith argues that Hobbes's notion of the international state of nature as a state of war is a commonly accepted view among political realists.⁴⁰⁴ Political realism treats the use of lethal force as a political option available to the state that is like any other. Hence international relations theorists, such as Hedley Bull, conclude that the Hobbesian prescription for international conduct is that the state is free to pursue its goals in relation to other states without moral restrictions.⁴⁰⁵

The standard political realist view of armed conflict says that military killing in war is morally exceptional because, according to E.H. Carr, "no ethical standards are applicable to relations between states."⁴⁰⁶ Or at least that the moral rules we expect between individuals are unlike those between states. In other words, political realism adopts an "amoral" viewpoint: it is skeptical about the worth of ethics.⁴⁰⁷ Charles Beitz suggests that political realism denies the intelligibility or meaningfulness of moral discourse at the international level, instead holding that moral judgments are appropriate

⁴⁰¹ Bellamy, 69.

⁴⁰² Ibid.

⁴⁰³ Ibid., 70.

⁴⁰⁴ Michael J. Smith, *Realist Thought from Weber to Kissinger* (Baton Rouge and London: Louisiana State University Press, 1986), 13.

⁴⁰⁵ Hedley Bull, *The Anarchical Society: A Study of Order in World Politics*, 2nd ed. (Hampshire: Macmillan Press Ltd, 1995), 24.

⁴⁰⁶ E. H. Carr, *The Twenty Years' Crisis 1919-1939: An Introduction to the Study of International Relations* (Palgrave Macmillan, 1981), 140.

⁴⁰⁷ S. Brandt Ford, "Military Ethics and Strategy: National Security, Moral Values and Cultural Perspective," in *Routledge Handbook on Military Ethics*, ed. George R. Lucas Jr (London and New York: Routledge, 2015).

only within sovereign political communities.⁴⁰⁸ Although often criticised for having an unnecessarily bleak view of humanity, political realists, such as John Mearsheimer, respond that they are simply being intellectually honest about the reality of international politics and the inevitability of future conflict.⁴⁰⁹

The just war account of military exceptionalism differs to this political realist view in a number of important respects. First, the conventional just war approach maintains that, all things being equal, killing is wrong on moral grounds. So the just war approach says that other effective non-lethal options should be preferred when they are available to a state. But political realism is not restrained in this way. Beitz suggests that skepticism about international ethics means that states are not required to follow moral principles that require occasional sacrifices of self-interest.⁴¹⁰ Thus the political realist concludes that moral objections to the use of lethal force can be trumped by reasons based on self-interest. As Hobbes describes it,

in States, and Common-wealths not dependent on one another, every Common-wealth, (not every man) has an absolute Libertie, to doe what it shall judge (that is to say, what that Man, or Assemblie that representeth it, shall judge) most conducing to their benefit.⁴¹¹

This does not then mean that political realists treat killing and war lightly. They can still recommend that a state should be restrained in its use of force. But their primary concern is with the high costs and risks of war rather than with moral considerations.

Second, the just war tradition rejects the international moral skepticism of political realism. The political realist still might believe in moral principles, but the

⁴⁰⁸ But then Beitz goes on to clarify that “It would be wrong to confuse international skepticism with the view that there are no limits at all on state action in international relations; skepticism is a normative position because it judges state action according to a definite evaluative standard. It is not a form of morality, however, because its ultimate evaluative standard is one of self-interest. States are limited in what they may do by the rule ‘promote the national interest’; but, as long as they follow this rule, they are not limited by any other moral considerations.” Charles R Beitz, “Bounded Morality: Justice and the State in World Politics,” *International organization* 33, no. 03 (1979): 406-07.

⁴⁰⁹ John J. Mearsheimer, *The Tragedy of Great Power Politics* (New York: W. W. Norton & Company, 2003), 2.

⁴¹⁰ Beitz, 407.

⁴¹¹ Hobbes, 149.

application differs. The morality found in domestic society is not the basis for the normative order of international relations. As Beitz suggests, political realists might still agree that individuals in society should follow moral principles that in some cases require sacrifice, but they deny that this domestic approach to morality applies at the international level.⁴¹² The net effect of political realism on international thought, he suggests, has been to encourage skepticism about the validity of international moral theorising.⁴¹³

This is unlike the just war tradition, which gives moral considerations a prominent role at both the domestic and international levels. Political realists are sometimes ambiguous about such international moral skepticism. Hans Morgenthau, for example, says that if we were to view international politics as merely “a series of technical tasks into which ethical considerations do not enter” then we would have to consider one of our legitimate tasks the “drastic reduction or even the elimination of the population of a rival nation, of its most prominent military and political leaders.”⁴¹⁴

Third, just war rejects the overarching goal of political realism where it is primarily concerned with accumulating power for the purposes of national self-interest. Beitz suggests that the moral skepticism of political realism is a normative position because it judges state action according to a clear evaluating value: national self-interest.⁴¹⁵ That is, for the political realist, power is the overarching goal. In contrast, the just war tradition accepts that we must deal with the moral reality of war but that power, especially military capability, is one factor among a number of important considerations, including moral values such as justice and human rights.

⁴¹² Beitz, 407.

⁴¹³ Ibid.

⁴¹⁴ Hans J Morgenthau, "The Twilight of International Morality," *Ethics* (1948): 80.

⁴¹⁵ Beitz, 407.

Fourth, at least part of the political realist concern is with crusading moralism or political idealism. Tony Coady argues that political realist arguments are addressing valid concerns with “moralism” rather than morality. He suggests that “moralism” is a type of vice in practising morality that involves an inappropriate set of emotions or attitudes in acting upon moral judgements, especially when it comes to judging others.⁴¹⁶ Coady demonstrates how to address political realist criticisms that standard ethical concerns are impossible to practice at the international level without giving up an important role for international morality. In defending the place of morality in foreign affairs, he begins by initially agreeing with the demand that morality be realistic, pay close attention to consequences and circumstances, and be conscious of the difference that the responsible use of power and authority makes to moral judgement.⁴¹⁷ But Coady argues that political realists are wrong to completely reject a concern with international morality on the basis that some form of national egoism is the only viable alternative to the concerns they have.⁴¹⁸ Coady argues that it is far from clear that the pursuit of national interest naturally leads to the other political realist goal of international stability. He also points out that the concept of national interest must be broader than merely material interests but that this then undermines its theoretical utility.⁴¹⁹ In short, the just war, as an approach to justifying the moral exceptionalism of killing in war, is distinguishable from political realism, which attempts to remove moral judgment from discussions about armed conflict on the basis that it is unnecessary and counterproductive, if not impossible. These moral exceptions to standard morality permitted by the just war tradition are contingent on the war context, however. If this is true, then what do we mean by the concept “war”?

⁴¹⁶ C.A.J. Coady, "The Moral Reality in Realism," *Journal of Applied Philosophy* 22, no. 2 (2005): 124.

⁴¹⁷ Coady, 56.

⁴¹⁸ Coady, 134.

⁴¹⁹ Coady, 57.

b. Conventional war concept

The conventional just war approach to understanding armed conflict says that designating a context as “war” significantly alters the way in which we should understand and apply the general moral principles for justified killing. Laurie Blank and Amos Guiora, for example, argue that the roles, objectives and means for the military in a conventional war are clear. Enemy combatants are identifiable by their association with the enemy military force. The military objective is to defeat the enemy force by killing them or forcing them to surrender. And the means used for this task are the military’s weapons.⁴²⁰ Consequently, Blank and Guiora conclude that the rules of engagement in the conventional war context are uncontroversial and simple to interpret: soldiers kill soldiers but protect innocent civilians and others *hors de combat*.⁴²¹ This means that the moral exceptionalism of war is tied to the features of war existing. What are these features of conventional war? First of all, war is *antagonistic*, which means that it involves a state of enmity between two (or more) political communities. John Locke describes the state of war this way,

a State of Enmity and Destruction; And therefore declaring by Word or Action, not a passionate and hasty, but a sedate settled Design, upon another Mans life, puts him in a State of War with him against whom he has declared such an Intention, and so has exposed his Life to the others Power to be taken away by him, or any one that joyns with him in his Defence, and espouses his Quarrel: it being reasonable and just I should have a Right to destroy that which threatens me with Destruction.⁴²²

According to Brian Orend, the source of the enmity between political communities is disputes about governance and who gets to exercise power in a given territory.⁴²³ That is,

who gets power, who gets wealth and resources, whose ideals prevail, who is a member and who is not, which laws get made, what gets taught in schools, where the border rests, how

⁴²⁰ Laurie Blank and Amos Guiora, "Teaching an Old Dog New Tricks: Operationalizing the Law of Armed Conflict in New Warfare," *Harvard National Security Journal* 1 (2010): 58.

⁴²¹ *Ibid.*

⁴²² Locke, 278.

⁴²³ Orend, 4.

much tax is levied, and so on. War is the ultimate means for deciding these issues if a peaceful process or resolution cannot be found.⁴²⁴

Second, conventional war involves *violent* armed conflict between two (or more) political communities. Each side is seeking to deliberately harm its opponents and destroy the enemy military force. Orend points out that the presence of mutual disdain between political communities is not a sufficient feature of war by itself. Actual armed conflict must occur between two political communities for it to count as war.⁴²⁵ According to Thomas Rid, a necessary feature of war is that it is physically violent. War involves violence, bloodshed and killing and, according to Rid, this separates it from other types of political, economic and military competition.⁴²⁶ Coady likewise describes war as an “act of violence to compel our enemy to do our will.”⁴²⁷

Third, conventional war is *political*. This feature of war means that armed conflict seeks to achieve a political purpose. The absence of a political purpose makes warfare merely senseless slaughter. Carl von Clausewitz famously stated that, “war is the continuation of policy by other means.”⁴²⁸ Clausewitz’s understanding of war is helpful because it makes clear the distinction between the political ends of warfare and its violent means. The conventional understanding of war presupposes that intentionally harmful, physically destructive acts are purposeful. According to Albert Pierce, this means that the violence, hatred and enmity of war on the battlefield should serve the interests of the state as defined by its political objectives.⁴²⁹ Furthermore, and in contrast to political realism, the political purpose is open to moral scrutiny. Suzanne Uniacke argues, for example, that in making the decision whether or not to initiate war,

⁴²⁴ Ibid.

⁴²⁵ Ibid.

⁴²⁶ Thomas Rid, *Cyber War Will Not Take Place* (Oxford: Oxford University Press, 2013), 12.

⁴²⁷ Coady, 5.

⁴²⁸ Carl von Clausewitz, *On War*, trans. Michael Howard and Peter Paret, Indexed ed. (Princeton, NJ: Princeton University Press, 1984; repr., 1989), 87.

⁴²⁹ Albert C. Pierce, “War, Strategy and Ethics,” in *Ethics and the Future of Conflict: Lessons from the 1990s*, ed. Anthony F. Lang, Albert C. Pierce, and Joel H. Rosenthal (Upper Saddle River, New Jersey: Pearson/Prentice Hall, 2004), 12.

a political authority acts on behalf of others for whom it is morally responsible, thereby committing them to a common political purpose that implies significant costs and risks for them as agents as well as potential victims.⁴³⁰

Fourth, conventional war involves a *comprehensive* use of military force. That is, war involves deliberate and repeated acts of serious armed conflict. According to Orend, war should be understood as an actual, intentional and widespread armed conflict between political communities.⁴³¹ He says that there is no real war until the fighters intend to engage in armed conflict and until they do so with a heavy quantum of force.⁴³² Yoram Dinstein argues that only a “comprehensive” use of force by states amounts to war,

War is a hostile interaction between two or more States, either in a technical or in a material sense. War in the technical sense is a formal status produced by a declaration of war. War in the material sense is generated by actual use of armed force, which is comprehensive on the part of at least one Belligerent Party.⁴³³

Dinstein suggests that military force is comprehensive if it is employed in one of the following ways: 1) *spatially*, across sizeable tracts of land or far-flung corners of the ocean; 2) *temporally*, over a protracted period of time; 3) *quantitatively*, entailing massive military operations or a high-level of firepower; or 4) *qualitatively*, inflicting extensive human casualties and destruction to property.⁴³⁴

Dinstein also makes the point that the use of military force might be limited in its political goals and yet still be comprehensive.⁴³⁵ For example, he suggests that rather than striving for total victory, the goal might be confined to the defeat of only some segments of the opposing military apparatus, the conquest of certain portions of the

⁴³⁰ Uniacke, "Self-Defence, Just War, and a Reasonable Prospect of Success," 73.

⁴³¹ Orend, 2.

⁴³² *Ibid.*, 3.

⁴³³ Yoram Dinstein, *War, Aggression and Self-Defence* (Cambridge: Cambridge University Press, 2001), 15.

⁴³⁴ *Ibid.*, 12.

⁴³⁵ *Ibid.*

opponent's territory (and no others) or the coercion of the enemy government to alter a given policy.⁴³⁶ He adds, however, that sometimes it is not easy to tell a limited war (in the material sense) apart from a grave incident "short of war." According to Dinstein, the difference between the two is relative: more force, employed over a longer period of time, within a larger theatre of operations, is required in a war setting as compared to a situation short-of-war.⁴³⁷

In short, conventional war is antagonistic, violent, political and comprehensive. War is *antagonistic* because it entails a state of enmity between two (or more) political communities. It is *violent* because each side employs military force to deliberately harm the enemy. It is *political* because the armed conflict is seeking to achieve a political purpose. And it is *comprehensive* because it entails a heavy quantum of military force. These features must be present before military combatants have access to the moral exceptions that apply to them in war.

c. Individualists: Denying military exceptionalism

To recap, the conventional view of just war thinking holds that militaries operate under "special" moral rules in war. It treats military combatants according to a moral standard different from the everyday standard. Soldiers are morally permitted to kill enemy soldiers, and vice versa, because both parties hold the status of military combatants. This moral exceptionalism of military combatancy in war has, however, been critiqued by "individualists" who argue that there is no such thing. They disagree with the notion that a military's use of lethal force in war is morally exceptional in the way that conventional just war presumes. McMahan, in particular, argues that the establishment of political relations among a group of people does not confer on them an

⁴³⁶ Ibid.

⁴³⁷ Ibid., 12-13.

exceptional right to harm or kill others, when the harming or killing would be impermissible in the absence of that political relationship.⁴³⁸ He asks,

How could it be that merely by acting collectively for political goals, people can shed the moral constraints that bind them when they act merely as individuals, so that it then becomes permissible for them to kill innocent people as a means of achieving their political goals?⁴³⁹

McMahan concludes that the political nature of a group's goals is morally irrelevant to the justification of killing. Political goals, he argues, may also be paradigmatically evil.⁴⁴⁰ It is morally impossible, he suggests, that the collective pursuit of such a goal could be self-justifying, or that it could automatically carry immunity to punishment. What matters to McMahan in the justification of violence is not whether a goal is political but whether it is just; for example, whether it involves the prevention or correction of a wrong.⁴⁴¹ If neither political organization nor political goals can generate permissions to attack or to kill others, then McMahan argues that individuals cannot enjoy a special permission or privilege to engage in collective violence in war.⁴⁴² The same forms of action would be criminal if the collectives through whom the individuals acted were not states, or if their aims were not political. He concludes that if there is no reason to suppose that political collectives are fundamentally different (morally) from other forms of collective, then the same account of the morality of collective action should apply to both.⁴⁴³

McMahan argues that the principles governing collective violence in war should be the same as those governing collective action in domestic contexts.⁴⁴⁴ If this is right, McMahan argues, then we can go in one of two directions. First, we can hold individual action in war to the same standards to which we hold *individual* action on

⁴³⁸ McMahan, "Collectivist Defenses of the Moral Equality of Combatants," 53.

⁴³⁹ Ibid.

⁴⁴⁰ McMahan uses, as an example to illustrate this point, the goal of eliminating a people in order to create an ethnically "pure" society. Ibid.

⁴⁴¹ Ibid.

⁴⁴² Ibid.

⁴⁴³ Ibid.

behalf of collectives in domestic contexts, insisting on the logic of complicity.⁴⁴⁵

Second, we can treat collective violence in domestic contexts the way it is conventionally treated in war, claiming that even in domestic society individuals acting together as a collective acquire special permissions and exemptions from liability.⁴⁴⁶ He believes that no one accepts the second view. Therefore, he argues that we should accept the first view which is to deny the conventional just war view that assigns special permissions and exemptions to military combatants in war.⁴⁴⁷

In sum, conventional just war thinking relies on a form of moral exceptionalism in warfighting. This says that the context as “war” alters the moral justifications that apply to military combatants when using lethal force. But this conventional understanding of warfare is being theoretically challenged by the individualist account of just war theory. This says that a legitimate political community does not confer on soldiers a morally exceptional right to harm or kill others, when the harming or killing would be impermissible in the absence of that political relationship.

4.4 The Challenges of Non-Conventional Conflict

a. Non-conventional threats

Conventional just war thinking is also facing a set of practical challenges. One problem for the conventional just war approach is the challenges posed by non-conventional threats. States are finding themselves involved in conflicts with non-conventional actors, such as international terrorists, in a way that blurs conventionally-understood moral categories. In particular, asymmetric armed conflict complicates the

⁴⁴⁴ Ibid.

⁴⁴⁵ According to McMahan, collective violence in the context of domestic society that is unauthorized by the state is normally subject to the law of complicity, whereby individuals may become liable to punishment for crimes of violence through certain forms of collective association, even in the absence of any personal engagement in acts of violence. *Killing in War*, 82.

⁴⁴⁶ "Collectivist Defenses of the Moral Equality of Combatants," 53.

conventional understanding of war. According to Christopher Kutz, recent developments in modern violent conflict has witnessed the increasing use of “asymmetrical” tactics, such as guerrilla raids, hiding among either one’s own or one’s enemies’ populations, infiltration of enemy lines, sabotage and joint operations with collaborating civilians.⁴⁴⁸ Such conflicts, Kutz suggests, generally involve collaborations between intelligence units of one nation and military units of another, or foreign units of one nation and military units of another, or foreign volunteers linked by ideological or religious affiliations.⁴⁴⁹ Rod Thornton suggests that asymmetric tactics allow a weaker actor to target vulnerabilities of a much stronger opponent using methods that are unexpected, including actions outside the conventional norms of warfare.⁴⁵⁰

Non-conventional threats have the effect of blurring the lines between combatants and non-combatants. Blank and Guiora suggest that the essence of modern warfare is that states are now engaged with non-state actors in a way that blurs conventionally understood categories. They conclude that the problem with these new types of armed conflicts is that military forces face a lack of clarity regarding both the purpose of operational missions and identification of the enemy.⁴⁵¹ According to David McCraw, contemporary terrorism is a major focus for Defence Policy revisionists who believe that the current era is dominated by unconventional rather than conventional warfare.⁴⁵² Fritz Allhoff suggests that armed conflicts involving terrorists are being fought in urban environments rather than conventional battlefields. And terrorists are (usually) not state

⁴⁴⁷ Ibid.

⁴⁴⁸ Christopher Kutz, "The Difference Uniforms Make: Collective Violence in Criminal Law and War," *Philosophy & Public Affairs* 33, no. 2 (2005): 154-55.

⁴⁴⁹ Ibid., 155.

⁴⁵⁰ Rod Thornton, *Asymmetric Warfare: Threat and Response in the 21st Century* (Cambridge, UK: Polity Press, 2007), 1-2.

⁴⁵¹ Blank and Guiora, 46-47.

⁴⁵² David McCraw, "The Defence Debate in Australia and New Zealand," *Defence Studies* 7, no. 1 (2007): 107.

actors and so their command structure is often unclear and decentralised.⁴⁵³ According to Allhoff, the distinction is further blurred because non-combatants often provide material support for terrorist combatants through positioning, sustenance, communication, and so on.⁴⁵⁴

Another aspect of non-conventional threats is the move towards the criminalising of armed conflict. Michael Gross notes that the tendency to view non-conventional conflict as a criminal activity creates a problem, because adversaries are more likely to conclude that their enemies are despicable villains rather than honorable foes.⁴⁵⁵ According to Gross, this signifies a sea of change in the conventional way of thinking about war, since an important norm of conventional war asserts the moral innocence of combatants on any side. Although they threaten bodily harm, soldiers are not criminals but agents of their state. Asymmetric warfare challenges this assumption.⁴⁵⁶ Gross suggests that a particular concern is that some states are responding to asymmetric threats by resorting to low-tech, primitive and prohibited forms of warfare (such as torture, assassination and blackmail) when international law had been largely successful in banning them.⁴⁵⁷

In short, the rise of non-conventional threats has made the important distinction between combatants and non-combatants more difficult to determine. This is a challenge to conventional just war thinking because it relies on this distinction for the purposes of discriminating who is a legitimate target. States are now more likely to conclude that non-state adversaries, using asymmetric methods, are criminals with no rights, leading to the increasing use of targeted killing and morally prohibitive practices such as torture, rendition and murder.

⁴⁵³ Allhoff, 36.

⁴⁵⁴ Ibid.

⁴⁵⁵ Gross, 12.

⁴⁵⁶ Ibid.

b. Emerging technologies

A second set of challenges for the conventional just war approach are the emerging technologies that are transforming the norms of armed conflict. One example is the development of military drone technology and their use in targeted killing. Outside the conventional battlefield, the use of military drones has created more opportunities to employ targeted killing against terrorist groups.⁴⁵⁸ Patrick Lin and Shannon Ford point out that drone technology provides extensive reconnaissance and surveillance capabilities. We suggest that arming drones then gives the military the capability to both identify and then attack particular terrorists.⁴⁵⁹

According to Kenneth Anderson, this type of targeted killing involves a premeditated attack on specific individuals rather than seeking to target military combatants more generally.⁴⁶⁰ Mark Maxwell suggests that the crucial distinction is the difference between targeting for reasons of an individual's conduct versus targeting on the basis of an individual's status as the member of a group. A standard military attack is concerned with the status of the target as a member of the enemy military force. In contrast, targeted killing is a judgement about the individual's conduct; that it is sufficiently threatening and/or harmful to provide sufficient justification to act with lethal force.⁴⁶¹ Since targeted killing is a practice that often involves the determination of an identified person to be killed (rather than a mass of armed and obvious

⁴⁵⁷ Ibid., 2.

⁴⁵⁸ See: O'Connell; Bradley Jay Strawser, "More Heat Than Light: The Vexing Complexities of the Drone Debate," Raza, S. Abbas, <http://www.3quarksdaily.com/3quarksdaily/2013/02/the-quarterly-dag-3qd-peace-and-justice-symposium-drones.html>; Bradley J. Strawser, *Killing by Remote Control: The Ethics of an Unmanned Military* (New York: Oxford University Press, 2013); C. Finkelstein, J.D. Ohlin, and A. Altman, *Targeted Killings: Law and Morality in an Asymmetrical World* (Oxford: Oxford University Press, 2012).

⁴⁵⁹ Patrick Lin and S. Brandt Ford, "I, Spy Robot: The Ethics of Robots in National Intelligence Activities," in *Ethics and the Future of Spying: Technology, National Security and Intelligence Collection*, ed. J.C. Galliot and Warren Reed (London and New York: Routledge, 2016), 14.

⁴⁶⁰ Kenneth Anderson, "Efficiency in *Bello* and *Ad Bellum*: Making the Use of Force Too Easy?," in *Targeted Killings: Law and Morality in an Asymmetrical World*, ed. C. Finkelstein, J.D. Ohlin, and A. Altman (Oxford: Oxford University Press, 2012), 379.

combatants), Anderson suggests that it has brought with it an increased involvement of intelligence agencies in operations.⁴⁶²

Another example of a transformative technology is the development of cyberwarfare. The internet's emergence and global expansion have become central to developing an understanding of national security (and insecurity). The rapid development of computer technology has been important, but it is also the emergence of the complex global system of interconnected networks – linking billions of computers around the world – that makes technological developments in cyber an important security issue. The modern world's dependence on digital or information-based assets, and the vulnerabilities of critical national cyber-infrastructure, mean that a non-kinetic attack (e.g. cyber-weapons that damage computer systems) could do serious harm.⁴⁶³ This is why the U.S., for example, takes the cyber-threat seriously in declaring that, as part of its cyberpolicy, it reserves the right to retaliate with kinetic means to a non-kinetic attack. Or as one U.S. Department of Defense official said, "If you shut down our power grid, maybe we will put a missile down one of your smokestacks."⁴⁶⁴

In his article on cyberwar,⁴⁶⁵ Thomas Mahnken highlights the unique attributes of what he describes as the "cyber instrument of warfare." Mahnken suggests that, unlike other military capability, the effects of cyber-weapons can be both instant and global. He also suggests that because cyber-weapons are a new military instrument they are

⁴⁶¹ Mark Maxwell, "Rebutting the Civilian Presumption: Playing Whack-a-Mole without a Mallet?," *ibid.*, 37.

⁴⁶² Kenneth Anderson, "Efficiency in *Bello* and *Ad Bellum*: Making the Use of Force Too Easy?," *ibid.*, 379.

⁴⁶³ Lin and Ford, 14.

⁴⁶⁴ Siobhan Gorman and Julian E. Barnes, "Cyber Combat: Act of War," *The Wall Street Journal*, <http://online.wsj.com/articles/SB10001424052702304563104576355623135782718>; George R. Lucas Jr, "Jus in Silico: Moral Restrictions on the Use of Cyberwarfare," in *Routledge Handbook of Ethics and War: Just War Theory in the 21st Century*, ed. Fritz Allhoff, Nicholas G. Evans, and Adam Henschke (Taylor & Francis, 2013).

⁴⁶⁵ Mahnken distinguishes between "cyber war" which for him is "the independent use of the cyber instrument of warfare" from "cyber warfare" which he says is "the use of the cyber instrument as a dimension of a larger military conflict." Thomas G Mahnken, "Cyber War and Cyber Warfare," in

surrounded by a great deal of uncertainty. Thomas Rid, however, has argued that most discussions of cyberwar are exaggerated because there is no known act of “cyber” war. An important part of his argument is that the most widespread use of state-sponsored cyber capabilities is for the purpose of espionage, which, he argues is neither crime nor war.⁴⁶⁶ Rid makes the point that attacks from cyber-weapons are not physically violent and, in many cases, will not even result in permanent damage. He argues that “most cyber attacks are not violent and cannot sensibly be understood as a form of violent action” and “those cyber attacks that actually do have the potential of force, actual or realised, are bound to be violent only indirectly.”⁴⁶⁷ Rid then goes on to explain this point in more detail and suggests that,

violence administered through weaponised code is limited in several ways: it is less physical, because it is always indirect. It is less emotional, because it is less personal and intimate. The symbolic uses of force through cyberspace are limited. And, as a result, code-triggered violence is less instrumental than more conventional uses of force. Yet, despite these limits, the psychological effects of cyberattacks, their utility in undermining trust, can still be highly effective.⁴⁶⁸

Rid’s purpose in addressing the issue of cyberwar is to downplay some of the more alarmist discussions surrounding it. He puts it into the category of political cyber offenses, whose purpose is subverting, spying, or sabotaging. According to Rid, all such political cyber offenses, criminal or not, are neither common crime nor common war.⁴⁶⁹

But it is unclear which actions in cyberspace might escalate a conflict. This increases the likelihood of miscalculation and potentially leads to more serious forms of conflict. It might prove that many of these cyber-threats are not that serious, such as defacing a website. But the ever increasing reliance on cyber systems means that cyber-

America’s Cyber Future: Security and Prosperity in the Information Age, ed. Kristin Lord and Travis Sharp (Washington, DC: DNAS, 2011), 58.

⁴⁶⁶ Rid, 12.

⁴⁶⁷ Ibid.

⁴⁶⁸ Ibid., 34.

⁴⁶⁹ Ibid., 10.

attacks on software have the potential to damage critical infrastructure and threaten the lives of people to the extent that demands a military response.

A third example of a transformative technology is the use of social media by terrorist groups to further their goals. Social media is being used to instigate violent acts in order to create fear within a target population. For example, Charlie Winter and Haroro Ingram describe the two men who opened fire outside of a Muhammad cartoon contest in Garland, Texas, in May 2015 as being “in contact with low-level jihadis on Twitter” but having “little going for them in terms of organisational ISIS connections.”⁴⁷⁰ They were not trained by ISIS nor directed to carry out an attack by its command. Rather, suggest Winter and Haroro, they were merely inspired by its propaganda.⁴⁷¹ Winter and Haroro also examine the impact of the incident on 12 June 2016 when Omar Mateen walked into Pulse nightclub in Orlando, Florida and shot 49 of its patrons and staff. According to Winter and Ingram,

When rumors of his ideological inclination first went public, observers stopped talking about Mateen as if he was an “ordinary” mass shooter and effectively put the full force of ISIS behind him. He stopped being a mere man with a gun and was transformed, via the media and politicians, into a fully-fledged ISIS operative, a human manifestation of the group’s international menace.⁴⁷²

There are clearly some important differences between these two incidents. But the overall goal remains the same for groups such as ISIS. Social media is an important means for proliferating a message that aims to instigate random violence with the intention that the target population becomes fearful about future attacks.

Thomas Nissen argues that social media provides actors with “standoff” capability for delivery of effect or “remote warfare.”⁴⁷³ Social network media, he

⁴⁷⁰ Charlie Winter and Haroro J. Ingram, "How Isis Weaponized the Media after Orlando," <http://www.theatlantic.com/international/archive/2016/06/isis-orlando-shooting/487574/>.

⁴⁷¹ Ibid.

⁴⁷² Ibid.

⁴⁷³ Thomas E. Nissen, "The Weaponization of Social Media," (Copenhagen, Denmark: Royal Danish Defense College, 2015), 97.

suggests, are weapon-systems in their own right, providing actors with new intelligence, targeting, influence, operations and command and control capabilities.⁴⁷⁴ Nissen notes a number of ethical concerns with the use of social media in this way. For instance, he asks, what are the ethical implications of conducting “military” activities against threats on social media? Using social media for warlike activities is counter to their “social” or “civilian” purposes. Trying to deny audiences the ability to speak freely on social network media sites and platforms can be ethically problematic, especially for Western liberal democracies where the notion of keeping the moral high ground and defending freedom of speech are deeply rooted values. It might also make them “dual-purpose” objects and thereby lawful military targets.⁴⁷⁵ Nissen points out that when we refer to social media as weaponised, we “securitize” the issue, which might unnecessarily undermine human rights. Such labels frame the activity as being conducted in a state of emergency and render all responses to be a security, intelligence or defence issue.⁴⁷⁶ The ethical problem being described by Nissen here is one of *militarising* the use of social media. Militarisation is where something designed for civilian use is adapted for a military function or purpose. This is appropriate in some circumstances, particularly in warfighting. But it can develop into a problem when it leads to an overarching ideology of militarism. Andrew Bacevich defines this problematic type of militarism in terms of the following three elements:

the prevalence of military sentiments or ideals among a people; the political condition characterised by the predominance of the military class in government or administration; the tendency to regard military efficiency as the paramount interest of the state⁴⁷⁷

⁴⁷⁴ Ibid., 103.

⁴⁷⁵ Ibid., 112.

⁴⁷⁶ Ibid.

⁴⁷⁷ Andrew J. Bacevich, *The New American Militarism: How Americans Are Seduced by War* (Oxford, UK: Oxford University Press, 2013), 239.

And there are a host of other emerging technologies that will pose significant challenges in the future, such as artificial intelligence, human enhancement, autonomous weapons, and so on and so forth.

In short, the conventional just war approach is being challenged by emerging technologies and their novel uses. In some cases, it has a difficult time clarifying key ethical distinctions. Just war thinking holds to a moral framework around war but these new technologies challenge the concept of war. Hence, they challenge the exceptional moral framework that justifies killing in war.

c. The military's peacetime role

A third set of challenges are the non-conventional uses of the military to serve a wide-range of institutional roles and purposes. Simply put, military capabilities are not only used in wars, thus the peacetime (or non-war) role played by military capabilities should be better acknowledged. These types of military operations encompass a wide-range of tasks including peacekeeping, supporting civil authorities, counter-terrorism, disaster relief, enforcement of sanctions, and so on.⁴⁷⁸ Many of these activities do not require the military to use lethal force. But in some cases, because they are working in an environment of dangerous conflict, the military are prepared to use lethal force. In particular, the last twenty years or so has witnessed increasing use of the military for purposes other than fighting conventional wars. This is due, in part, to the emerging norm in the 1990s favouring military intervention to protect civilians whose lives are seriously threatened.⁴⁷⁹

⁴⁷⁸ According to Alan Stephenson, "terms such as Gun-Boat Diplomacy, Low-Intensity Conflict (LIC), Small Scale Contingencies (SSC) and Military Operations Other Than War (MOOTW) attempt to capture the nebulous region between peace and war where civilian authorities retain significant control of the military power used to achieve political purpose." Alan J. Stephenson, "Shades of Gray: Gradual Escalation and Coercive Diplomacy," (DTIC Document, 2002).

⁴⁷⁹ Ned Dobos, *Insurrection and Intervention: The Two Faces of Sovereignty* (Cambridge University Press, 2011), 21; Alan J Kuperman, "A Model Humanitarian Intervention? Reassessing Nato's Libya

The international response to Libya, for example, demonstrates how the politics of humanitarian intervention has shifted to the point where it is harder to do nothing in the face of atrocities.⁴⁸⁰ According to Thomas Weiss, changes in the character of warfare and the impact this has had on contemporary humanitarian action has led to an increased requirement for military intervention to protect human beings living and working in the midst of armed conflicts.⁴⁸¹ Weiss suggests that armed humanitarian intervention is increasingly necessary because of the treacherous and unfamiliar terrain of the “new wars.” But that those new war contexts have led to problems in pursuing humanitarian strategies and using humanitarian tactics developed for conventional warfare.⁴⁸² Weiss says that aid agencies are now more likely than in the past to call for the use of military force.⁴⁸³ As the challenges in delivering aid to war victims and protecting them have changed, Weiss suggests that some civilian humanitarians have come to support military force for human protection purposes.⁴⁸⁴

Another reason for the increasing use of the military outside of war is the recognition, by some, that the military can perform a variety of political functions in peacetime. This is the use of military capabilities to impact the decision-making of a target without resorting to (or intending to use) actual violence. Barry Blechman and Stephen Kaplan, for example, argue that most uses of the armed forces have a political dimension; that is, they “influence the perceptions and behaviours of political leaders in

Campaign," *International Security* 38, no. 1 (2013); A.J. Bellamy, *The Responsibility to Protect: A Defense* (Oxford University Press, 2014); Thomas G Weiss, *Humanitarian Intervention* (Polity, 2012); Altman and Wellman; Seumas Miller, "Collective Responsibility and Armed Humanitarian Intervention," in *Righteous Violence: The Ethics and Politics of Military Intervention*, ed. Michael P. O'Keefe and C. A. J. Coady (Melbourne: Melbourne University Publishing, 2005); Martha Finnemore, "Constructing Norms of Humanitarian Intervention," in *The Culture of National Security: Norms and Identity in World Politics*, ed. P.J. Katzenstein (New York: Columbia University Press, 1996); Wheeler; Brown.

⁴⁸⁰ Simon Chesterman, "'Leading from Behind': The Responsibility to Protect, the Obama Doctrine, and Humanitarian Intervention after Libya," *Ethics & International Affairs* 25, no. 03 (2011): 279.

⁴⁸¹ Weiss, 69.

⁴⁸² According to Weiss, the new wars are “internal armed conflicts waged primarily by nonstate actors who subsist on illicit and parasitic economic behavior, use small arms and other low-technology hardware, and prey upon civilians, including aid workers and journalists.” *Ibid.*, 80.

⁴⁸³ *Ibid.*, 88.

⁴⁸⁴ *Ibid.*, 69-70.

foreign countries to some degree.”⁴⁸⁵ They hold that a political use of the armed forces occurs when physical actions are taken by one or more components of the uniformed military services as part of a deliberate attempt by the state’s authorities to influence, or to be prepared to influence, specific behaviour of individuals in another nation without engaging in a continuing contest of violence.⁴⁸⁶ For example,

The recruitment of military personnel and the procurement of weapons signal not only that a state has a capability for warfare, but also that it has the will to allocate a portion of its resources to this end, demonstrating a resolve to defend what it defines as its interests in the international arena. The greater the resources allocated to the armed forces, the more clearly this resolve is likely to be perceived.⁴⁸⁷

The point here is that the military is not only a last resort measure in war. It can also serve strategic policy objectives in times of peace.

A third reason for the increasing use of military capabilities outside of war is the heightened attention to the threat from international terrorism. Michael Gross suggests that, since the 11 September 2001 attacks, there is a growing perspective that asymmetric conflict includes the war on international terrorism.⁴⁸⁸ According to Gross, terrorism is sometimes part of the repertoire of armed force that guerrilla organisations use to press their political aims in asymmetric war.⁴⁸⁹ But he suggests that international terrorists do not represent any particular political constituency or territory. And such armed conflicts do not have a nationalist agenda nor are their operations confined to a geographical area.⁴⁹⁰ Gross argues then that a problematic feature of international terrorism is that armed conflict is “unremitting and long-term and without obvious signposts of success, whether interim treaties, cease-fires, or territorial

⁴⁸⁵ Barry M. Blechman and Stephen S. Kaplan, *Force without War: U.S. Armed Forces as a Political Instrument* (Washington, DC: The Brookings Institution, 1978).

⁴⁸⁶ *Ibid.*, 12.

⁴⁸⁷ *Ibid.*, 5.

⁴⁸⁸ Gross, 18.

⁴⁸⁹ *Ibid.*, 179.

⁴⁹⁰ *Ibid.*, 19.

accommodations.”⁴⁹¹ And that fighting a war against international terrorism does not allow a reasonable political solution or compromise.⁴⁹²

d. Changing wars and the military paradigm

These non-conventional challenges undermine the conventional just war approach for justifying the use of lethal force. The military are expected to use their unique capabilities to apply deadly force in situations of conflict outside (what we conventionally understand as) war, where the moral grounds for their destructive actions are less clear. As I explained in 4.3, it is morally permissible in war for soldiers to do certain types of harms that we do not allow in any other context. Soldiers fighting a war can attack and kill enemy combatants without warning (e.g. in an ambush or a missile strike). But in cases where soldiers are not at war (or at least there is some doubt that it is war) then how should we morally evaluate the military use of lethal force? Should we extend the boundaries of “war” to include less conventional conflicts? Is it a matter of developing a more sophisticated set of justifications based on killing in self-defence? Does policing offer a better paradigm for judging uses of lethal force “short-of-war”? Or is it something else?

In order to illustrate the problem, it might help to consider the specific example of using lethal force to kill Osama bin Laden. Tom Junod suggests that many people (certainly Americans but perhaps others too) would agree that this use of lethal force was justified.⁴⁹³ But the group he led – Al Qaeda – is neither a state nor does it represent a legitimate political community. George Aldrich describes the problem in the following way,

⁴⁹¹ Ibid.

⁴⁹² Ibid.

⁴⁹³ Tom Junod, "The Lethal Presidency of Barack Obama," *Esquire*, 9 July 2012.

Al Qaeda is evidently a clandestine organization consisting of elements in many countries and apparently composed of people of various nationalities; it is dedicated to advancing certain political and religious objectives by means of terrorist acts directed against the United States and other, largely Western, nations. As such, Al Qaeda does not in any respect resemble a state, is not a subject of international law, and lacks international legal personality. It is not a party to the Geneva Conventions, and it could not be a party to them or to any international agreement. Its methods brand it as a criminal organization under national laws and as an international outlaw. Its members are properly subject to trial and punishment under national criminal laws for any crimes that they commit⁴⁹⁴

If this is correct, then attacks perpetrated by Al Qaeda cannot be properly described as war and its leaders cannot, in this sense, be treated as military combatants. They should be judged, instead, in the way that we would normally judge the actions of murderous criminals. This particular group of murderous criminals, however, operates outside the reach of the jurisdiction of the state (or states) whose job it is to protect innocent victims from the harmful actions of these aggressors. Conventional police enforcement is inadequate for such a task since these murderous aggressors can plot with impunity in some cases. Plausibly, a state that has an obligation to prevent the mass murder of its jurisdictional inhabitants, but whose instruments for policing are rendered ineffective, could turn to its military capabilities.

But an important part of the problem, as I see it, is that if we choose to use military capabilities for a function that is something akin to a policing role, then we can end up transporting the “warrior mindset” about using lethal force along with the military personnel, equipment and training. If the state is using its military capabilities to fulfill a policing role, however, then presumably the rules of lethal force should be unlike the ones we permit in war; they should be much more restrictive. Perhaps they should not be quite as restrictive as those of the police working within a well-ordered society, but they should certainly be more restrictive than we are willing to allow in war. So in situations of conflict short-of-war, where they are expected to use lethal

⁴⁹⁴ George H. Aldrich, "The Taliban, Al Qaeda, and the Determination of Illegal Combatants," *The American Journal of International Law* 96, no. 4 (2002): 893.

force, the military should adjust to the fact that they are not fighting a war and to be more restrained in their use of lethal force.

In sum, modern conflict is making the conventional approach to ethics in conflict more problematic. The basic paradigm of killing in self-defence (and defence of others) is open to general arguments of morality and is not context-limited. In contrast, the exceptional moral justifications provided in the conventional just war approach are context-specific, meaning that they only apply to military combatants fighting a war. This depends on establishing a distinction between combatants and civilians. But this distinction is failing to provide the necessary framework to ground the ethical judgements required in a number of emerging forms of non-conventional conflict. And it is becoming increasingly clear that the conventional approach is inadequate for grounding the exceptional permissions necessary for morally justifying state-sanctioned uses of lethal force in non-standard cases.

4.5 Moral Frameworks

a. Default-to-policing approaches

This final section outlines four basic types of responses typically proposed to solve the problem of non-standard cases. As I described it in Chapter 1, this problem says that when the police or military use lethal force outside of a law enforcement or warfighting context respectively, then the moral justifications for their morally exceptional use of lethal force become problematic. The first type of response is to make policing the default option. In other words, where there is doubt about to which paradigm an instance of lethal force belongs, then we should always conclude that it fits within the policing paradigm. One could argue, for example, that when the conditions

for war are not met, and the state is faced with an ambiguous conflict scenario, then we should assume that the context is best described as law enforcement.

This default-to-policing approach is a commonly accepted view with international lawyers, for example. Robert McLaughlin, in his analysis of use of force paradigms applicable under United Nations Security Council Chapter VII mandates, argues that the default legal approach should be the “law enforcement” paradigm, with its focus on human rights, criminal law and limiting the use of lethal force to self-defence situations.⁴⁹⁵ In a similar fashion, Nils Melzer concludes his legal analysis of targeted killing with the view that, “all State-sponsored targeted killings, except those directed against legitimate military objectives during the conduct of hostilities, are governed by the paradigm of law enforcement, regardless of contextual or territorial considerations.”⁴⁹⁶ His concern is that the practice of targeted killing is a problematic move away from established normative standards for the protection of human life towards an increasingly arbitrary legal order.⁴⁹⁷ David Rodin goes further than this and makes the more radical claim that the state does not have a right of self-defence and that the moral justification for the institutional use of lethal force should be derived from the law enforcement paradigm. He subsequently suggests that this approach then requires the establishment of a minimal universal state to be effective.⁴⁹⁸

A key assumption of a default-to-policing approach is that justifications for state-sanctioned intentional killing must belong to one of the two standard paradigms. According to Claire Finkelstein, either it is justified killing of co-belligerents, as set out by the traditions and laws of war, or it is a form of law-enforcement, whose norms are established by the parameters of the general principles of morality relating to the

⁴⁹⁵ Rob McLaughlin, “The Legal Regime Applicable to Use of Lethal Force When Operating under a United Nations Security Council Chapter VII Mandate Authorising ‘All Necessary Means’,” *Journal of Conflict and Security Law* 12, no. 3 (2007): 417.

⁴⁹⁶ Nils Melzer, *Targeted Killing in International Law* (Oxford: Oxford University Press, 2008), 424.

justifications and excuses of everyday morality.⁴⁹⁹ An attraction of a default-to-policing approach is that it is comparatively straightforward. The logic of “if-not-warfare-then-policing” seemingly removes, with little effort, any ambiguity for the state-sanctioned agents to take action in situations of conflict. If it cannot be shown to be one, then it must be the other. So it gives decision-makers a clear heuristic for dealing with complex issues. It also gives the impression of being the safest option for dealing with the problem of non-standard cases. That is, the safest option in terms of choosing an approach that maximises cautiousness and, as Alexander Guerrero suggests, demonstrates reluctance to use lethal force in conditions of uncertainty.⁵⁰⁰ After all, policing demands more restraint when considering the use of lethal force than does the military in war.

It does not follow, however, that a situation failing to meet the conditions of warfare *always* therefore meets the necessary conditions of law enforcement. If it is true that the moral justification for a state-sanctioned agent’s use of lethal force is in some way derived from the existence of specific conditions existing, then the absence of these conditions in one context is no proof of their presence in the other. In other words, the conditions necessary for morally justifying lethal force must exist in and of themselves rather than assuming they must exist when another set of conditions, either in whole or in part, are absent. Furthermore, a default-to-policing approach does not attempt to explain *how* state institutions relate to both conditions of conflict and moral justifications. As I explain in Chapter 5, the necessary conditions of the law enforcement context play an important role in justifying the moral exceptions that apply

⁴⁹⁷ Ibid., 435.

⁴⁹⁸ Rodin, 163.

⁴⁹⁹ Claire Finkelstein, "Targeted Killing as Preemptive Action," in *Targeted Killings: Law and Morality in an Asymmetrical World*, ed. C. Finkelstein, J.D. Ohlin, and A. Altman (Oxford: Oxford University Press, 2012), 161.

⁵⁰⁰ Alexander A Guerrero, "Don't Know, Don't Kill: Moral Ignorance, Culpability, and Caution," *Philosophical studies* 136, no. 1 (2007).

to the police use of lethal force. The complete or partial absence of these necessary conditions means that the police are more likely to unjustly use lethal force.

b. Extending the boundaries of war

A second type of approach for solving the problem of non-standard cases is to extend the boundaries of war. An extending war boundaries approach posits that conflict is a normal element of human social interaction and so the moral exceptionalism that conventionally only applies in war can, in fact, be applied more broadly. It might be argued that the exceptional moral permissions derived from the just war tradition can be extended and applied outside of the conventional warfighting context.⁵⁰¹ But we potentially create a moral problem when we allow the boundaries of war to extend too far. When, as Rosa Brooks describes it, everything becomes war and the military becomes everything.⁵⁰² We should resist the notion that violent conflict is a normal element of human social interaction and too easily permit the uniquely destructive activities that should only happen in war. This is because it *contradicts* the conventional view of civil society which considers “*bellum omnium contra omnes*” (or “war of all against all”) as something that must be restrained. Hobbes calls this problem the “state of nature,” which he describes in the following way:

Hereby it is manifest, that during the time men live without a common Power to keep them all in awe, they are in that condition which is called Warre; and such a warre, as is of *every man, against every man*. For Warre, consisteth not in Battell onely, or the act of fighting; but in a tract of time, wherein the Will to contend by Battell is sufficiently known.⁵⁰³

⁵⁰¹ As I explained above, the just war tradition gives military combatants exceptional moral permissions for killing enemy combatants in war. The moral exceptionalism of just war thinking is grounded in the essentially political nature of war. As Michael Walzer argues, war is a relation between political entities (and their human instruments) rather than one between persons. Walzer, *Just and Unjust Wars: A Moral Argument with Historical Illustrations*, 36.

⁵⁰² Brooks.

⁵⁰³ Hobbes, 88.

In this state of nature, says Bellamy, individuals can never be sure of their security and are forced into a war of all against all.⁵⁰⁴ Tom Sorell describes how in the social contract theories of Hobbes, Locke and others, the state of nature is the human condition before there was a state order, and the condition that human beings would be returned to if an existing state were to dissolve.⁵⁰⁵ He describes the state of nature as a state of generalised insecurity in which the concept of morality has no footing.⁵⁰⁶ In this state, each person has the right of nature, suggests Sorell, taking whatever seems a help to his own self-preservation and prosperity.⁵⁰⁷ In order to avoid this situation, Bellamy explains that individuals agree to the establishment of states in order to meet their most fundamental needs. That is, the people agree to a social contract wherein they place a monopoly of power and the right to rule in the hands of a sovereign. In return, the sovereign promises to protect the political community from the twin dangers of internal anarchy and external aggression.⁵⁰⁸

Yet recent scholarship has sought to apply the principles of war to an increasingly wide variety of practices, contexts and institutions. John Stone, for example, seeks to demonstrate the ways in which cyber-attacks can be construed as acts of war.⁵⁰⁹ Randall Dipert also applies the conventional principles of the just war tradition to cyberwar. He concludes that existing international law and principles of just war theory do not apply to cyberwar in a straightforward way.⁵¹⁰ Michael Quinlan uses just war thinking to morally evaluate intelligence practice. He argues just as we cannot morally engage in

⁵⁰⁴ Bellamy, 69.

⁵⁰⁵ Sorell, 25.

⁵⁰⁶ *Ibid.*, 26.

⁵⁰⁷ "Hobbes, Locke and the State of Nature," in *Studies on Locke: Sources, Contemporaries, and Legacy* (Springer, 2008), 27.

⁵⁰⁸ Bellamy, 69.

⁵⁰⁹ John Stone, "Cyber War Will Take Place!," *Journal of Strategic Studies* 36, no. 1 (2013).

⁵¹⁰ Randall R. Dipert, "The Ethics of Cyberwarfare," *Journal of Military Ethics* 9, no. 4 (2010): 384.

any war we like and fight it any way we like, so we cannot engage in any intelligence activity and conduct it in any way we like.⁵¹¹

There is even an influential literature that seeks to apply the principles of war to business practice.⁵¹² Mark McNeilly, for instance, uses Sun Tzu's *The Art of War* to formulate six strategic principles that apply to the world of business.⁵¹³ In similar fashion, Andrew Holmes adapts Carl von Clausewitz's *On War* to business practice as "part and parcel of man's social existence."⁵¹⁴ There is nothing wrong with seeking to develop such interdisciplinary insights. But there is a risk that we can miss the point of the morally exceptional nature of the destructiveness that we apply to military combatants in warfare. A patently absurd example of this is William C. Bradford's argument that academic "scholars, and the law schools that employ them, are—at least in theory—targetable so long as attacks are proportional, distinguish non-combatants from combatants, employ non-prohibited weapons and contribute to the defeat of Islamism."⁵¹⁵

My point here is that war needs boundaries because in war we permit substantially more harm than we do in normal life. That is, we treat war as something that allows moral exceptions to destruction and killing. David Luban argues that the military paradigm offers much freer rein than normal life. He suggests that in war, but not in law, it is permissible to use lethal force on enemy troops regardless of their degree of

⁵¹¹ Michael Quinlan, "Just Intelligence: Prolegomena to an Ethical Theory," *Intelligence and National Security* 22, no. 1 (2007).

⁵¹² In these cases, the authors are seeking to apply principles of conflict to competitive activity rather than develop an understanding of the ethics of war as such.

⁵¹³ To be fair, McNeilly does make clear that "businesspeople should not follow the philosophy of the destruction created by total war." Mark R. McNeilly, *Sun Tzu and the Art of Business: Six Strategic Principles for Managers* (New York: Oxford University Press, 1996), 5, 8.

⁵¹⁴ Andrew Holmes, *Carl Von Clausewitz's on War: A Modern-Day Interpretation of a Strategy Classic* (Oxford, UK: Infinite Ideas Ltd, 2010).

⁵¹⁵ Cited in Matt Ford, "The West Point Professor Who Contemplated a Coup," *The Atlantic*, <http://www.theatlantic.com/politics/archive/2015/08/west-point-william-bradford/403009/>.

personal involvement with the adversary.⁵¹⁶ Luban suggests that one can attack an enemy without concern over whether he has done anything wrong. He further suggests that, in war, “collateral damage” (i.e. foreseen but unintended killing of non-combatants) is morally permissible and the requirements of evidence are much weaker.⁵¹⁷ Stephen Neff identifies, in his history of war and the law of nations, a set of normative features that make war different to the rest of social life. He suggests that war is a violent conflict between collectives rather than between individuals, which distinguishes it from interpersonal violence.⁵¹⁸ And he argues that wartime is distinguishable from peacetime.⁵¹⁹

Military combatants should *only* do the harm that is justifiable because it is necessary to secure victory. But this still permits much more destruction and killing than normal life. The harmful means employed by military combatants in war is unlike, say, a police officer in a well-ordered society. As explained by Geoffrey Corn et al:

For the soldier, the logic is self-evident: the employment of combat power against an enemy—whether an individual soldier firing her rifle, a tank gunner firing a highly-explosive anti-tank round, or an Apache pilot letting loose a salvo of rockets—is intended to completely disable the enemy in the most efficient manner in order to eliminate all risk that the opponent remains capable of continued participation in the fight.⁵²⁰

And it hardly needs to be said that we should be shocked if a private corporation routinely used lethal force against its business competitors. In contrast, military combatants take a completely different approach to killing. Soldiers on the battlefield are actively looking to destroy the enemy’s military capability, which includes killing the opposing forces’ troops as routine business.

⁵¹⁶ David Luban, "The War on Terrorism and the End of Human Rights," *Philosophy and Public Policy Quarterly* 22 (2002): 9.

⁵¹⁷ *Ibid.*

⁵¹⁸ Neff, 15.

⁵¹⁹ *Ibid.*

⁵²⁰ Geoffrey S. Corn et al., "Belligerent Targeting and the Invalidity of a Least Harmful Means Rule," *International Law Studies* 89 (2013): 537.

Extending the boundaries of war ignores the real progression made by international society in restricting the use of armed force between states. This approach risks changing the laws of war in ways that undermine important benefits of the current international order. Jeremy Waldron, for example, in his discussion of targeting killing, warns that great caution must be brought to any attempt to change the laws of war.⁵²¹ Changing or revising the laws of war, he argues, means letting go of one strand of proven normativity (in an otherwise normative-free zone) in which a great deal has been invested.⁵²² In short, we should always keep at the front of our minds the underlying principle of restraining violence promoted by the just war tradition.

c. The individualist approach

A third potential avenue for solving the problem of non-standard cases is to argue that there is nothing morally special about the use of lethal force in war (or law enforcement). War is typically thought of as another exception to our usual moral prohibitions on the use of force. But over the last two decades, the state-sanctioned, collectivist approach in just war theory has been challenged by what Helen Frowe calls “reductive individualism.”⁵²³ This individualist account (also commonly referred to as the revisionist account) of morally justified killing holds that the only available moral justification for using lethal force is killing in self-defence or defence of others. As I stated above (in 4.3), McMahan is a major proponent of this approach. He denies that a military’s use of lethal force is morally exceptional in the way that conventional just war thinking presumes. He denies that the establishment of political relations among a group of people confers on them an exceptional right to harm or kill others and

⁵²¹ Jeremy Waldron, "Justifying Targeted Killing with a Neutral Principle?," in *Targeted Killings: Law and Morality in an Asymmetrical World*, ed. C. Finkelstein, J.D. Ohlin, and A. Altman (Oxford: Oxford University Press, 2012), 127-28.

⁵²² Ibid.

⁵²³ Frowe, 2.

concludes that the political nature of a group is morally irrelevant to the moral justification of killing.⁵²⁴ Individualists hold that it is a mistake to think of war as morally distinctive. Instead, individualists, such as Frowe, say that military combatants should be governed by rules that are ultimately reducible to the moral rules of ordinary life.⁵²⁵ That is, the moral rules that govern harming between individuals are the same moral rules that also govern harming in war. War does not provide an additional set of exceptions to the prohibition against killing for the military's use of lethal force. Rather, she suggests that the individualist approach tells us that the military in war are morally justified by the same exception as killing in self-defence and defence of others.⁵²⁶ This individualist account of armed conflict concludes that the problem of non-standard cases is irrelevant because there is nothing morally special about war. If neither a policing paradigm nor the military paradigm plays a decisive role in determining moral rules for the police and military, then non-standard cases are simply *not* morally problematic.

But individualism underestimates the role of state-sanctioned institutions for determining moral rules. As I demonstrate in the next two chapters, the institutional roles of "police officer" and "soldier" differ from civilian life in a number of morally significant ways. I also make clear that the reductive individualist overestimates the applicability of the killing in self-defence paradigm. The self-defence paradigm can demand less restraint and risk-taking in decisions to use lethal force than demanded by either the military or policing paradigms. Furthermore, as Uniacke argues, the moral principles of just war thinking are grounded in important assumptions about the nature of political authority and responsibility that do not apply to killing in self-defence.⁵²⁷ The authorities who make decisions on waging war, for example, have a much broader

⁵²⁴ McMahan, "Collectivist Defenses of the Moral Equality of Combatants," 53.

⁵²⁵ Frowe, 2.

⁵²⁶ Ibid.

range of political considerations. And military combatants fight at the direction of a state's leaders and act on their behalf.

d. Hybrid approaches

A final approach is to conclude that when it comes to using lethal force, we need a well-reasoned "hybrid" ethical framework that draws on the appropriate moral principles of both the military and the policing paradigms. This approach holds that we do not move immediately from one paradigmatic context to the other. In reality, we should accept that there is an in-between area. David Luban warns against what he calls a "hybrid war-law model," however, because of his concern that states will misuse such an approach by picking-and-choosing the rules that suit them. For example, he suggests that "the U.S. has simply chosen the bits of the law model and the bits of the war model that are most convenient for American interests, and ignored the rest."⁵²⁸ But the misuse of an *ad hoc* hybrid war-law model by the U.S. does not rule out the development of a well-reasoned morally principled hybrid ethical framework *per se*.

A number of authors have suggested some version of a hybrid model. Bradley Strawser, for example, proposes tying combatant status to degrees of liability in order to construct a conflict-by-conflict rubric. This way, he suggests, we can track differing levels of liability for a given set of unjust enemies.⁵²⁹ Geoffrey Corn asserts that the changing nature of warfare necessitates recognition of a hybrid category of armed conflict for the purposes of triggering the foundational principles of the law of war. He argues that this category, which he refers to as "transnational armed conflict," is based on the *de facto* existence of armed conflict, regardless of the geographic scope of the

⁵²⁷ Uniacke, "Self-Defence, Just War, and a Reasonable Prospect of Success," 63.

⁵²⁸ Luban, "The War on Terrorism and the End of Human Rights," 12.

⁵²⁹ Strawser, "Walking the Tightrope of Just War," 540-41.

conflict.⁵³⁰ Jens David Ohlin explores the idea that a functional concept of military membership might be used in place of formal membership of a military institution.⁵³¹ He suggests that one might describe the functional version of membership as a hybrid concept that straddles the distinction between status and conduct, arguing that such an approach merges the best of both worlds.⁵³² While A. John Radsan and Richard Murphy argue that any new hybrid model must recognise that fighting terrorism can be as much war as it is law enforcement, and suggest that it can be based on principles of due process, international humanitarian law or from other relevant sources.⁵³³ This is the approach I examine more fully in Chapter 6, where I argue that the emerging discussion of *jus ad vim* has provided an opportunity to move away from an overly simplistic binary approach to armed conflict while still remaining within the just war tradition.

4.6 Conclusion

In conclusion, there is a substantial moral gulf between military combatants killing in war and an average person killing in self-defence or defence of others. Importantly, military combatants have exceptional moral permissions to kill enemy combatants in war. The just war account of killing derives this moral exceptionalism from the attempt to balance military necessity with humanitarianism. But just war individualists, such as McMahan, have recently challenged this conclusion and argued that killing in war should *not* be treated as morally distinct from the standard self-defence and defence of others accounts for justified killing. Further undermining the

⁵³⁰ Geoffrey S. Corn, "Making the Case for Conflict Bifurcation in Afghanistan: Transnational Armed Conflict, Al Qaida and the Limits of the Associated Militia Concept," *International Law Studies* 85 (2009).

⁵³¹ According to Ohlin, "Formal membership is built around formal indicia such as membership lists, the wearing of uniforms, and *de jure* requirements of domestic law, while the functional concept of membership can be determined by the individual's role and function within the organisation. For the functional definition of membership, it is particularly relevant whether the individual received and carried out orders from the organisation's hierarchy." Jens David Ohlin, "Targeting Co-Belligerents," in *Targeted Killings: Law and Morality in an Asymmetrical World*, ed. C. Finkelstein, J.D. Ohlin, and A. Altman (Oxford: Oxford University Press, 2012), 74.

⁵³² *Ibid.*, 86-87.

conventional just war approach to the military's exceptional use of lethal force are the changing trends in modern armed conflict. There are number of standard strategies typically proposed to address the problem of non-standard cases. These tend to give precedence to one or the other state-sanctioned paradigm (or deny there is a such a thing). Therefore, I will now clarify the moral grounds and boundaries for the policing and military paradigms in turn. And then I propose that what is leftover requires the development of a "hybrid" element to the moral framework for using lethal force. This draws on the appropriate elements of both military and policing paradigms in a morally principled way.

⁵³³ A. John Radsan and Richard Murphy, "Measure Twice, Shoot Once: Higher Care for Cia-Targeted Killing," *University of Illinois Law Review* (2011): 1238.

CHAPTER FIVE: POLICE USE OF LETHAL FORCE

5.1 Introduction

The previous chapter demonstrated the way in which the conventional just war approach to justifying the military's use of lethal force in war is morally distinct from either killing in self-defence or defence of others. Military force in war is morally exceptional: it gives military combatants special moral permissions to kill enemy combatants in war, and posits that a soldier acting on behalf of a sovereign state is not solely morally responsible for his own acts of killing. But this conventional notion of the military killing in war has been undermined by recent developments in the theory and practice of armed conflict. In particular, the military lack the necessary conditions to be sufficiently morally justified in cases that fall short of war.

Now, in Chapter 5, I consider an alternative state-sanctioned paradigm of moral justification by examining the police use of force. I argue that police officers also hold exceptional moral permissions to use lethal force. This is, I argue, because police have a state-sanctioned institutional teleology to preserve public safety. Police are like the military in that their moral permissions to use lethal force differ from the average person. But they are unlike the military in that *they are obliged to go to greater lengths to avoid killing altogether*. The police use of lethal force is much more restrictive (less morally permissive) than the military's use of lethal force in wartime and, in some cases, the police use of force is even less morally permissive than self-defence or defence of others.

In the first section, I argue that police use of lethal force is *not* morally justified by the same considerations as the average person.⁵³⁴ The police are *not only* morally

⁵³⁴ According to Rob Reiner, "'Police' refers to a particular kind of social institution, while 'policing' implies a set of processes with specific social functions. 'Police' are not found in every society, and

permitted to use lethal force against an immediate unjust deadly threat (i.e. *only* in self-defence or defence of others). This is because police have state-imposed duties that go beyond what morality requires of the average person. I then examine three approaches to justifying special permissions for the police to use lethal force. These are: 1) the consequentialist approach; 2) the social contract approach; and 3) the institutional approach. I argue for an institutional approach that says the police should have exceptional permissions to use lethal force based on their state-sanctioned role as police officers. This role derives its ethical grounding from the moral purpose of the policing institution.

Then, in the second section, I explore the moral purpose of the policing institution. I argue that a moral purpose of policing is to preserve public safety, which includes using the lethal force necessary to protect jurisdictional inhabitants from serious criminal harm. I outline what it means for police to preserve public safety. An important implication is that the police responsibility to preserve public safety displaces “immediacy” within the threat condition. I also outline the role played by the minimum force principle on the police use of lethal force.

Next, the third section gives a description of the policing paradigm for the justified use of lethal force. I outline the key state-imposed police duties, which are to: 1) confront criminal threats to public safety; 2) accept greater risks; and 3) exercise more restraint in threatening situations. As a result of these state-imposed duties, the police have exceptional moral justifications to use lethal force (i.e. moral permissions that are distinct from self-defence or defence of others justifications). This means that the police are morally permitted to: 1) initiate conflict likely to turn violent; 2) use

police organizations and personnel can have a variety of shifting forms. ‘Policing,’ however, is arguably a necessity in any social order, which may be carried out by a number of different processes and institutional arrangements.” Robert Reiner, *The Politics of the Police* (Oxford, UK: Oxford University Press, 2010).

lethal force to prevent the of escape dangerous criminals; and 3) use lethal force against a criminal conspirator who intends to cause serious harm. I also examine the limits of extra-jurisdictional policing and provide a moral argument for maintaining the institutional distinction between the police and the military. The policing paradigm can only be stretched so far before it then becomes military force. I examine the limitations imposed by police jurisdiction and some of the key issues with extra-jurisdictional policing. Then I explore the limitations for the policing paradigm in using lethal force during a state of emergency. Finally, I outline a moral argument for maintaining a police-military distinction.

5.2 Lethal Force and Policing

a. Police and the immediate threat condition

Do police officers receive an authority to use force by being part of a policing institution? And when should the police use lethal force? We might believe that the police have precisely the same set of moral responsibilities in using force that everybody has; that being a police officer makes no difference morally-speaking. This means that police do not have any additional duties or exceptional permissions to use lethal force outside of the standard self-defence or defence of others paradigms. From this point of view, any difference we might see in how the police use lethal force, when compared with the average person, results from the inherent danger of policing. Police are more likely to confront potentially deadly threats than the average person because this is an important part of their role. In comparison, the average person might choose to avoid dangerous situations. What looks to be a moral distinction in the police use of lethal force is simply a function of the police requirement to be in more life-threatening situations.

For example, consider again the shooting of Lovelle Mixon (as outlined in 1.2). Mixon killed two Oakland police officers during a routine traffic stop. He was subsequently killed by police in a shootout at a nearby apartment.⁵³⁵ Now we might argue that the police were justified in shooting Mixon simply because they were defending lives that were in danger from an unjust immediate deadly threat. When the police located Mixon hiding in an apartment, he was armed with a military assault rifle. The police entry team who broke into the apartment were fired upon by Mixon. In this case, it seems clear that the police officers confronting Mixon used lethal force to protect their own lives and the lives of their fellow police officers. In other words, the suspect was justifiably killed because he was an immediate unjust deadly threat to police officers who were performing their law enforcement duty.

There are, however, problems with the conclusion that the police use of lethal force is *only* morally justified in self-defence or defence of others. The implication of this perspective is that there cannot be *any* other circumstances where the police can be justified in using lethal force. For instance, the police can never be justified in shooting a fleeing felon or someone in the act of committing a crime if the suspect is not, at that moment, an immediate unjust deadly threat. But we can describe plausible cases where a suspect does *not* meet the condition of being an immediate unjust deadly threat and yet the police are still morally obliged to use lethal force.

For example, let us imagine a situation where Olivia is carrying a bomb in a backpack which is rigged to explode when her GPS recognises she has reached a particular set of coordinates, in this case it is the busy town square of the city of Waltham. Let us also assume the police have very good intelligence detailing the bombing operation after capturing the remorseful planner of the operation. The police know the identity of the bomber, the intended target and the fact the bomb will detonate

⁵³⁵ Stewart.

when Olivia reaches the location (but only when it reaches that particular location). They also know that the only way to trigger the bomb is through the GPS device that is part of the bomb and that Olivia is otherwise unarmed. Furthermore, they have also established that Olivia is travelling to the city on motorbike and is a day or more away from her target, and so have set up a number of checkpoints to apprehend her. It is at one of these checkpoints, on a rural back road, that a lone police officer – Peter – recognises the bomber. Consequently, he draws his handgun and orders Olivia to dismount the motorbike, put her hands on her head, and lie face down on the ground. But instead of following Peter’s directions, Olivia attempts to flee on the motorbike (with her backpack). Peter has reason to believe that she is unlikely to be stopped again and so he shoots her in the back and kills her.

Now it is clear that a bomber in the presence of police and civilians who is about to detonate a bomb that will kill both police and civilians can justifiably be shot dead by police. If Olivia was within close proximity to her destination, then shooting her is morally justified on the basis of self-defence and the defence of the lives of other. This is because, as Seumas Miller suggests, “the threat is immediate, known with a high degree of certainty to be actual, and that there is no method of successful intervention other than that of shooting dead the bomber.”⁵³⁶ But a problem arises with a self-defence justification, argues Miller, when the threat is not immediate (and/or when known with lower degrees of certainty).⁵³⁷ In the case I have just described above, Olivia is still at least a day or more away from reaching the location of her target. The threat she poses is not immediate in the sense that a significant amount of time will elapse while she travels to the location of her target and she does not pose an immediate threat to Peter or any nearby bystanders.

⁵³⁶ Miller, *Terrorism and Counter-Terrorism: Ethics and Liberal Democracy*, 99.

⁵³⁷ Ibid.

According to Gabriella Blum and Philip Heymann, the standard self-defence paradigm in a law enforcement context concludes that killing an individual is allowed only in the very limited circumstances of self-defence (where the person poses an immediate deadly threat to the defender) or defence of others (where the person poses an immediate deadly threat to the lives of others).⁵³⁸ But in our case, we know that Olivia is harmless to the police officer.⁵³⁹ So Peter is not defending himself from an immediate threat. Furthermore, the bomber is also not an immediate threat to others when confronted by Peter. Olivia only becomes an immediate deadly threat when she reaches (or is close to enough to reach) her intended target. So according to the standard self-defence paradigm, Peter should not shoot the bomber. But it would be negligent of Peter in his role of police officer to let Olivia escape and allow the risk that she reaches her intended target in Walterville.

But in response to this imaginary case, it might perhaps be argued that the problem raised here is a definitional one. The threat posed by Olivia does not meet the immediacy condition for the standard self-defence justification, strictly-speaking, but perhaps we can get around it by describing the threat she poses as imminent. According to Onder Bakircioglu, “imminent” means the attack must be so close that the defender cannot wait any longer. In contrast, immediacy means that the threat will occur “immediately” or “at once.”⁵⁴⁰ The notion of imminence says that a specific threat is going to occur but it allows for the passage of time. So although Olivia does not pose an immediate threat to Peter (or to nearby bystanders), she is an imminent threat to the people of Walterville because she is in the process of travelling towards them, and she is likely to reach her target if she is not intercepted. The threat is imminent in the sense

⁵³⁸ Gabriella Blum and Philip Heymann, "Law and Policy of Targeted Killing," *Harvard National Security Journal* 1 (2010): 146.

⁵³⁹ The main risk to the police officer is that he inadvertently triggers the bomb by shooting the suspect.

⁵⁴⁰ Onder Bakircioglu, "The Contours of the Right to Self-Defence: Is the Requirement of Imminence Merely a Translator for the Concept of Necessity?," *The Journal of Criminal Law* 72 (2008): 156.

that we can specify a deadly weapon (the bomb), an intentional actor (Olivia), and a target (Walterville's centre square).

But a second scenario demonstrates why the police use of lethal force still remains distinct from the standard self-defence paradigm. In 1983, a London police officer (from the Diplomatic Protection Group) shot and wounded a would-be assassin, attempting to escape, following an attack on the Israeli Ambassador in London.⁵⁴¹ The assassin had fired one shot striking the ambassador in the head. At this point his gun jammed. The assassin was then pursued by a police officer who, after shouting a warning, fired one shot wounding the assassin, who was then arrested. At the ensuing trial of the would-be assassin it was suggested that the police officer had used unreasonable force in shooting the defendant to make the arrest. Although the judge noted, "it would be unlawful for a police officer to shoot a suspect to prevent him escaping" he also concluded that, "the law is not so stupid as to forbid a police officer *in such circumstances* to resort to the ultimate remedy of shooting a gunman."⁵⁴² So, according to this judge, in some circumstances it is justified for a police officer to shoot a dangerous criminal who is *not* an imminent threat. In this case, the criminal was a dangerous would-be assassin attempting to flee the scene of his attack and escape arrest.

Therefore, police are *not* bound by the same *immediate threat condition* that is required by the standard self-defence and defence of others paradigms. As I explained in Chapters 2 and 3, immediacy is one of the necessary requirements for morally justifying killing in self-defence or defence of others. The purpose of the immediacy requirement is to balance the defender's right not to be killed with the requirement to take reasonable measures to avoid the deadly confrontation. This is because we expect police to use lethal force in more situations than just those where they confront an

⁵⁴¹ Peter Squires and Peter Kennison, *Shooting to Kill? Policing, Firearms and Armed Response* (Chichester, West Sussex: John Wiley & Sons Ltd, 2010), 85.

unjust immediate deadly threat. If this is true, then either we are demanding that police act wrongly when they use lethal force against a non-immediate threat, or we need an alternative explanation for why they are morally justified. Given that – as I have previously argued – it is morally incoherent to demand that police officers act wrongly in performing their standard duties *qua* police, there is a pressing need to seek a moral justification for why it is that police are morally justified in using lethal force outside the self-defence or defence of others paradigms.

b. A Social Contract approach

In addition to self-defence and defence of others, there are three schools of thought for morally justifying why the police should have exceptional permissions to use lethal force. A *social contract approach* to morally justifying the police use of lethal force concludes that the state invests police officers with additional responsibilities for using lethal force as part of the division of labour within the state. The state imbues the police with extra powers and accountability to reduce the need for jurisdictional inhabitants to use violence. John Kleinig suggests that the social contract justification for the police use of lethal force starts with the presumption that there exists a natural right to use defensive force that permits killing in self-defence or in defence of the lives of others. He then points out that the social contract approach says rational individuals should consent to give up some individual defensive rights and allow the police to have additional powers to use lethal force because this is a better way of protecting individual rights and preventing violence in their society.⁵⁴³

According to Jeffrey Reiman, the social contract is the solution to the problem of the state of nature which is the insecurity caused when “everyone’s freedom to use force

⁵⁴² My emphasis. Ibid.

⁵⁴³ John Kleinig, *The Ethics of Policing* (Cambridge: Cambridge University Press, 1996), 111.

at his own discretion undermines everyone else's freedom to work and live as he wishes."⁵⁴⁴ So he suggests that it becomes rational for people to renounce their freedom to use force at their own discretion and hand this right over to a public institution – the police – that can use force on behalf of the community.⁵⁴⁵ This responsibility given to the police, suggests Reiman, is an additional power granted them by the social contract which is “loaned” to them by the inhabitants of their jurisdiction. He argues that this explains why police officers should be accountable for their use of lethal force to the wider public who own the special powers they exercise.⁵⁴⁶ Reiman argues that it is appropriate for the police to have specialist weapons and the benefit of doubt in using them, which are not allowed the public, because police “have the positive duty of placing themselves in dangerous situations that the private citizen is entitled to avoid. Special risks justify special protections.”⁵⁴⁷

But Kleinig argues that Reiman falls back on consequentialist reasoning to answer the difficult aspects for the police use of lethal force. He suggests that Reiman's focus is not on the actual consent of the “contracting parties” but rather on that to which rational individuals would consent, which is whatever maximises their freedom.⁵⁴⁸ The question of whether the use of lethal force is justified when an immediate threat to life is not present (e.g. firing on fleeing felons or protecting property) should be resolved, according to Reiman, by determining whether allowing police to use lethal force in these cases is more likely to enhance or to threaten the freedom of the citizenry as a whole. He suggests that for such a policy to increase security, it would have to increase the likelihood of apprehending actual criminals or deterring potential ones without

⁵⁴⁴ Reiman, 239.

⁵⁴⁵ Ibid.

⁵⁴⁶ Ibid., 241.

⁵⁴⁷ Ibid., 242.

⁵⁴⁸ Kleinig, 110.

substantially increasing the danger to innocent parties.⁵⁴⁹ This leads Kleinig to conclude that the difference between a consequentialist account and Reiman's social contract argument is minimal, since a utilitarian justification focuses on the maximisation of welfare as something that it would be rational to pursue.⁵⁵⁰

Another concern with Reiman's account is that it does not attempt to explain what happens to the immediacy condition in his account of justified police killing. As I indicated above, the purpose of the immediacy condition is to balance a defender's right not to be killed with the requirement to take reasonable measures to avoid the deadly confrontation. But Reiman's account simply focuses on "grave danger" as the justification for the police use of lethal force without distinguishing between immediate and non-immediate cases.⁵⁵¹ Reiman's focus on giving the police the "benefit of doubt" is also unclear.⁵⁵² A key criticism of the police use of lethal force is the argument that the police are rarely, if ever, punished for wrongful or mistaken killings. As Simon Bronitt and Miriam Gani point out, "instituting legal action against the police presents enormous difficulties for private citizens."⁵⁵³ Furthermore, they suggest that "in practice, police officers possess a wide margin of discretion in determining when and how much force is used against suspects."⁵⁵⁴ But Reiman does not specify where we should draw the line on the benefit of doubt we give police.

⁵⁴⁹ Reiman, 242.

⁵⁵⁰ According to Kleinig, other versions of the social contract argument, which emphasise *actual* rather than merely *hypothetical* consent, can be more easily distinguished from utilitarian arguments. But unless the consent is shown to be reasonable, he believes it is difficult to see how it provides a *justification* as distinct from an *authorisation*. Kleinig, 110.

⁵⁵¹ Reiman, 242.

⁵⁵² *Ibid.*

⁵⁵³ Simon Bronitt and Miriam Gani, "Regulating Reasonable Force: Policing in the Shadows of the Law," in *Shooting to Kill: Socio-Legal Perspectives on the Use of Lethal Force*, ed. S. Bronitt, M. Gani, and S. Hufnagel (Oxford and Portland, Oregon: Hart Publishing, 2012), 143.

⁵⁵⁴ *Ibid.*, 147.

c. A Consequentialist approach

The third type of potential moral justification for the police use of lethal force is a broadly *consequentialist* argument. According to Kleinig, here it is argued that society is overall better served when the police, as the guardians of social order, have the power to use deadly force. He suggests this is an argument the police themselves sometimes make because they believe their authority will be ineffective if they do not have this power.⁵⁵⁵ If people know that the police cannot resort to lethal force outside the strict parameters established by confronting an immediate unjust deadly threat, so this argument goes, then they will flout the law and are more likely to challenge the police in dangerous situations. Consider again the situation faced by police officers in the Detroit riots (as described in 1.4). The Detroit police were restrained in their use of lethal force and did not shoot unless attacked themselves. Unfortunately, some rioters interpreted this policy as an opportunity to engage in criminal behaviour at will. This criminal behaviour included looting, destroying property and attacking people. So the consequentialist approach says that we should give the police permission to use lethal force. This way, people are deterred from criminal behaviour and society avoids a fundamental breakdown in law and order.

But Kleinig suggests that there is an implicit limitation in this type of consequentialist reasoning. He argues that “the general welfare will not be promoted if the police use of deadly force is permitted in circumstances in which innocent parties are placed at greater risk than would be the case were their powers more circumscribed.”⁵⁵⁶ And there are other problems with this view. Peter Neyroud and Alan Beckley point out that modern police services have developed an impressive array of other options to choose from before they resort to lethal force. Only once these have

⁵⁵⁵ Kleinig, 110.

failed or are clearly inappropriate, they argue, can police justify the use of weapons.⁵⁵⁷

Robert Reiner argues that good policing is not just about using force: it is also characterised by effectively “handling trouble without resort to coercion, usually by skilful verbal tactics.”⁵⁵⁸ Furthermore, this type of consequentialist reasoning can have perverse outcomes where it demands that the police *refrain* from intervening to save an innocent life, by using lethal force, because it is better for society overall.

d. An Institutional approach

A fourth way to morally justify the police use of lethal force is an *institutional* approach. This says that the institutional purpose (or teleology) of the police morally grounds additional moral responsibilities for using lethal force. Miller’s teleology of social institutions approach to the ethics of policing, for instance, is concerned with the ends (*telos*) or purpose of a social institution.⁵⁵⁹ Miller argues that, as with other social institutions, the *telos* of the police is to realise a collective good. The good in question, he suggests, involves the protection of the moral rights (including human rights) for all of the inhabitants of a jurisdiction.⁵⁶⁰ This, suggests Miller, is a *normative* account of policing; it is an account of what policing *ought* to be about. Moreover, he says it is a normative theory of the *institution* of the police; that is, a theory of the proper ends and distinctive means of the institution of the police.⁵⁶¹

The institutional approach posits that there is an important relationship between the teleology of a social institution and the roles taken on by moral agents within that

⁵⁵⁶ Ibid.

⁵⁵⁷ Peter Neyroud and Alan Beckley, *Policing, Ethics and Human Rights* (Devon: Willan Publishing, 2001), 139.

⁵⁵⁸ Reiner, 8.

⁵⁵⁹ *The Moral Foundations of Social Institutions: A Philosophical Study* (Cambridge: Cambridge University Press, 2010), 245-76; Seumas Miller and John Blackler, *Ethical Issues in Policing* (Aldershot, UK: Ashgate, 2005), 61-82; Miller, *Terrorism and Counter-Terrorism: Ethics and Liberal Democracy*, 99-103; *Social Action: A Teleological Account* (Cambridge: Cambridge University Press, 2001).

⁵⁶⁰ *The Moral Foundations of Social Institutions: A Philosophical Study*, 245.

institution. This relationship is important because the institutional teleology has moral implications for its agents. The role that an agent has within a given social institution can alter his moral responsibilities; what is referred to as “role morality.” Tony Coady describes how within morality itself there are general moral principles, rules, and so on and then special moral requirements dictated by significant social roles. These sometimes conflict, he suggests, such as when the lawyer’s obligation to provide her client with the best defence and to preserve confidentiality are at odds with the demands of impartial justice.⁵⁶² The institutional approach tells us that for moral agents to act ethically they need to understand and commit themselves to their role within the institution, its moral purpose and the social good it provides.

Seumas Miller and John Blackler, for example, argue that the most important purpose of police work is the protection of moral rights, which is constrained by the law. This end, they suggest, permits the police to use methods that are harmful (e.g. coercion and deception) and normally considered morally wrong.⁵⁶³ According to Miller and Blackler, other examples of state-sanctioned institutions that must use harmful means to achieve moral ends include the military and intelligence agencies. They point out that soldiers deliberately kill, and intelligence operatives deliberately lie.⁵⁶⁴ Miller and Blackler suggest that in ordinary circumstances we should consider killing and lying to be immoral. But they suggest that military and intelligence institutions are justified in employing these types of harmful methods as part of their role in national defence.⁵⁶⁵

⁵⁶¹ Ibid., 246.

⁵⁶² C. A. J. Coady, "The Problem of Dirty Hands," in *Stanford Encyclopedia of Philosophy* (2014), 17.

⁵⁶³ Miller and Blackler assume three properties of moral rights. First, moral rights generate concomitant duties on others. Second, human rights (but not necessarily institutional moral rights) are justifiably enforceable. Third, bearers of human rights do not necessarily have to assert a given human right in order for the right to be violated. Miller and Blackler, 61.

⁵⁶⁴ Ibid., 26.

⁵⁶⁵ Ibid.

The benefit of using an institutional approach is that it addresses fundamental problems with the social contract and consequentialist approaches outlined above. Miller and Blackler argue that the social contract approach fails to adequately account for human rights because one cannot agree to simply hand over one's right to life or contract oneself into slavery. The social activities of promise-making, contracts and consenting, they argue, rely on a framework of inalienable human rights, especially the rights to life and autonomy.⁵⁶⁶ Likewise, Miller and Blackler suggest that the consequentialist approach fails because human rights ought not to be overridden for the sake of other benefits to the community, such as social order. They argue that the decision to use lethal force and drastically infringe a human right can only be justified by recourse to other human rights considerations.⁵⁶⁷ As I demonstrated in Chapter 2, this means the human right not to be killed should not be pushed aside by factors such as social utility or economic benefit.

In contrast, an institutional account provides a more promising way to ground the moral justification for using harmful methods, such as lethal force, because it does not undermine human rights in the way described above. It remains necessary for the police to justify the use lethal force in terms of the ends of policing, which Miller claims is the protection of the moral rights (including human rights) for all of the inhabitants of a jurisdiction.⁵⁶⁸ This is also why Miller argues that police efforts to protect moral rights ought to be constrained by the law.⁵⁶⁹ According to Miller, police engaged in the protection of moral rights ought to be constrained by the law in the sense that: a) the procedures for generating these laws are more or less universally accepted by the community (e.g. a democratically elected legislature); and b) the content of the

⁵⁶⁶ Ibid., 64.

⁵⁶⁷ Ibid.

⁵⁶⁸ Miller, *The Moral Foundations of Social Institutions: A Philosophical Study*, 245.

⁵⁶⁹ Miller insists that police work ought to be guided by moral considerations and not simply by legal considerations. This, he believes, helps his view avoid the problem besetting other theories of policing

laws are at least in large part accepted by the community (e.g. they embody general policies with majority electoral support or reflect the community's moral beliefs).⁵⁷⁰ Miller argues that legal constraints on police officers provide an additional (and necessary) condition for the moral legitimacy of police work. The moral purpose of having such constraints, he suggests, is to prevent police officers pursuing only their subjective view of what counts as an enforceable moral right.⁵⁷¹ What counts as an enforceable moral right is an objective matter and, according to Miller, this is a decision for the community to make by way of its laws and its democratically elected government. He suggests that his view presumes that in a properly constituted democracy, the law embodies the will of the community.⁵⁷²

The shooting of Jean Charles de Menezes will help illustrate the way in which the police can make the wrong decision about using lethal force when they lose sight of some of the basic principles of policing that should derive from its moral purpose as a state-sanctioned institution. On 22 July 2005, Jean Charles de Menezes was shot and killed by British Metropolitan Police officers on board an underground train at Stockwell station, in the wrong belief he was a suicide bomber. The shooting was part of a police surveillance operation (Op Theseus), which was the police response to the 7 July 2005 suicide bombings in London and the failed attempt to detonate bombs the previous day.⁵⁷³ In this case, a series of police failings led to the wrongful killing of an innocent person. According to Peter Squires and Peter Kennison, the police were following a more militaristic policy of "shoot to eliminate," which had been inadequately scrutinised. They claim that this meant the police went into the operation

(especially those cast in terms of law enforcement, protection of the state, or even peace keeping) of authoritarian states that enact laws violating human rights. *Ibid.*, 247.

⁵⁷⁰ Miller describes his moral constraint on policing is broadly contractarian because it relies on the consent of citizens. *Ibid.*, 248.

⁵⁷¹ *Ibid.*, 249.

⁵⁷² *Ibid.*

with a mindset where they were primed to shoot de Menezes rather than attempt to arrest him.⁵⁷⁴ Squires and Kennison also claim that the information provided to the police on the scene was faulty. This included an incorrect intelligence briefing and uncertainty in identifying de Menezes by the surveillance team.⁵⁷⁵ There were many mistakes contributing to de Menezes' death, but the main point made by Squires and Kennison is that "for an agency to make so many is an indication that it had already lost touch with the fundamental policing priorities: to preserve life, minimise risks and promote public safety."⁵⁷⁶ The police in this case had lost sight of their institutional purpose, which was to preserve public safety.

In sum, an institutional approach to morally justifying the police use of lethal force provides the most promising way of understanding their exceptional duties and permissions. The social contract and consequentialist justifications for the police use of lethal force both fail because neither adequately accounts for human rights. In contrast, an institutional approach seeks to justify the police use of lethal force in terms consistent with human rights; it gives such rights priority. It also tells us that exceptional justifications for the police use of lethal force are morally grounded in the teleology of the policing institution. In order to act ethically, institutional agents need to understand and commit themselves to their role within the institution, its moral purpose and the social good it provides.

⁵⁷³ "Stockwell One: Investigation into the Shooting of Jean Charles De Menezes at Stockwell Underground Station on 22 July 2005," (London: Independent Police Complaints Commission (IPCC), 2007).

⁵⁷⁴ Squires and Kennison, 37.

⁵⁷⁵ Ibid., 40.

⁵⁷⁶ Ibid., 51.

5.3 Preserving Public Safety

a. The teleology of policing

Having examined how the police use of lethal force is morally grounded, I now discuss the way in which the state monopolises the use of force within a given jurisdiction. This invests police officers, as its representatives, with state-imposed duties and exceptional permissions to use lethal force. A police service derives its moral and legal authority to use force from the state (or similar political community) and, for this reason, we give police a monopoly in using force within their jurisdiction. This conventional understanding of the state's monopoly on coercive force is described by Max Weber in the following way:

A state is that human community which (successfully) lays claim to the *monopoly of legitimate physical force within a certain territory*, this 'territory' being another of the defining characteristics of the state. For the specific feature of the present is that the right to use physical violence is attributed to any and all other associations or individuals only to the extent that the state for its part permits this to happen. The state is held to be the sole source of the 'right' to use violence.⁵⁷⁷

This presumes that a state effectively controls and manages conflict within the physical territory over which it has sovereignty. Police institutions do much of the coercive side of this state function within the jurisdiction given to them by a state. Police jurisdiction here refers to the physical domain where police officers are legally authorised by the state to employ special powers of law enforcement, including arrest, search, seizure and so on. In other words, a police jurisdiction is the domain over which the police have the legal authority to enforce the law on behalf of the state. Consequently, the concept of "jurisdiction" is fundamentally important for fully understanding the police role and the limits on police authority.

⁵⁷⁷ My emphasis. Smith, 24; Max Weber, "The Profession and Vocation of Politics," in *Weber: Political Writings*, ed. P. Lassman and R. Speirs (Cambridge: Cambridge University Press, 1994), 310-11; "Part One: Conceptual Exposition," in *Economy and Society*, ed. G. Roth and C. Wittich (Berkeley and Los Angeles: University of California Press, 1978), 56-58.

In this role, a professional police service provides a number of important benefits to society. One way that a professional police service benefits society, for instance, is by dealing with the day-to-day conflicts that occur between the inhabitants living within a particular jurisdiction. Without a good police service to justly manage conflict, persons with a grievance might well conclude that it is better to take justice into their own hands. In a situation where people are forced to pursue their own ideas of justice, we are likely to see increased levels of violence and disorder, which is broadly detrimental to the functioning of society and everybody within it. So for the general benefit of peacefully managing conflict, it is an important responsibility of the police to resolve incidents that might potentially involve physical violence.

A police monopoly on the use of force means that police have responsibilities in relation to coercion that other jurisdictional inhabitants do not have. An example is the right to one's property and what should be done in a dispute. In a society with an effective police service, we expect jurisdictional inhabitants to refer the matter to the police if they believe something of theirs has been stolen. We do not allow the property owner to take back the property by force as might be the case in a society that does not have a police service. Instead, we give the police exceptional powers to use those harmful methods necessary to perform their duties. These harmful methods include arrest, physical violence, deception and intrusion.

The police monopoly on the use of force leads some authors to conclude that the purpose of the police is to *use force*. A leading proponent of this view, Egon Bittner, argues that the purpose of the police is to protect the state by enforcing the law. The heart of the police role, he believes, is the need to address all sorts of human problems where the solution requires, or might possibly require, the use of force.⁵⁷⁸ Roger

⁵⁷⁸ E. Bittner, "The Functions of the Police in Modern Society," *Washington, DC: National Institute of Mental Health* (1970): 44.

Dunham and Geoffrey Alpert agree with Bittner that the police represent and implement the government's right to use coercion and force to guarantee certain behaviours from its citizens. They believe that the ultimate right to use force is what makes police unique and what allows the police to function successfully.⁵⁷⁹ Carl Klockars similarly argues that police are best understood to be "institutions or individuals given the general right to use coercive force by the state within the state's domestic territory."⁵⁸⁰ Rather than defining policing in terms of its ends, he believes that a properly objective definition of the police must be based on the means that have been common to all police at all times. He suggests the means in question is the police right to use coercive force.⁵⁸¹ P.A.J. Waddington argues that policing is the exercise of the authority of state over the civil population. He suggests that this authority is based on the monopoly of legitimate coercion. Police command people to do something and, if they do not comply, then the police force them into compliance.⁵⁸²

In short, the police are understood to have monopoly on the use of force within their jurisdiction. This leads some authors to conclude that the purpose of the police is to use force.

b. More than law enforcement

But it is a mistake to conclude that the use of force defines the *ends* of the police. For one thing, a policing institution that is primarily focused on using force is more likely to be misused as a coercive instrument of the state. The concern here is that the police are used to serve the interests of the government-in-power at the expense of the interests of the broader community they are meant to serve. As Robert Reiner suggests,

⁵⁷⁹ Roger G. Dunham and Geoffrey P. Alpert, *Critical Issues in Policing: Contemporary Readings*, 7th ed. (Longrove, Illinois: Waveland Press Inc., 2015), 3.

⁵⁸⁰ Carl B. Klockars, *The Idea of Police* (Sage Publications, 1985), 12.

⁵⁸¹ *Ibid.*, 9.

⁵⁸² P.A.J. Waddington, *Policing Citizens: Authority and Rights* (New York: Routledge, 1999), 30.

“policing may be inescapably political, but it need not be politicized.” By this, he means that policing should preserve “the minimal conditions of civilized and stable social existence from which all groups benefit, albeit differently.”⁵⁸³ Reiner agrees that the police are the domestic specialists in the exercise of legitimate force, when it is necessary to regulate and protect the social order.⁵⁸⁴ But he highlights the tensions in modern policing between a focus on law enforcement and the more proactive community policing philosophy. Overall, he believes modern police have moved away from Sir Robert Peel’s original conception of policing, which emphasised preventive patrol by uniformed constables as fundamental.⁵⁸⁵

Seumas Miller, John Blackler and Andrew Alexander also point out that force is not the only (or even preferred) option available to the police. Unlike persuasion or rational argument, they suggest that force itself is a morally undesirable thing.⁵⁸⁶ The police use a variety of methods in preference to force in their day-to-day work. These measures include negotiation, rational argument and appeal to societal values before they use force or threaten to use force. In addition, the focus on the use of force does not help us differentiate the police teleology from other institutions empowered by the state to use lethal force, such as the military. Kleinig also disagrees with the enforcement model of policing, which he describes as the classical liberal view of the police role. He argues that the classical liberal view of the police role is to be enforcers who ensure that those who violated the rights of others answered for their wrongdoing.⁵⁸⁷ But the current liberal view of policing, Kleinig argues, is now much broader. He suggests the changing views of what counts as a human right has altered

⁵⁸³ Reiner, 33.

⁵⁸⁴ "Policing in a Postmodern Society," in *Policing: Key Readings*, ed. Tim Newburn (Uffculme: Willan Publishing, 2005), 675.

⁵⁸⁵ *Ibid.*, 681.

⁵⁸⁶ Seumas Miller, John Blackler, and Andrew Alexandra, *Police Ethics*, 2nd ed. (Allen&Unwin, 2006), 47.

⁵⁸⁷ John Kleinig, *Ethics and Criminal Justice: An Introduction* (New York: Cambridge University Press, 2008), 51.

perspectives on the proper province of government in its executive function.⁵⁸⁸ Peter Neyroud and Alan Beckley also argue that securing and reconciling human rights – balancing the rights of individuals and communities – provides a way forward for public policing that begins to address some of the questioning of its purposes and functions.⁵⁸⁹ Bittner’s approach is weakened by his exclusive focus on means (coercive force) without really considering the ends of policing. But a good normative theory of policing should include both the moral ends and the moral means of policing. This is because the police need an end that gives them an objective point of moral reference.

If we agree it is not enough for police to be mere enforcers of the law (or coercive instrument of state authority), then we should clarify what institutional role it serves. Part of the moral purpose of the police is that policing exists to realise a common good. As I indicated above, Miller argues that this common good is best described as protecting the moral rights of each and all of the members of some jurisdiction. Police, he suggests, jointly contribute to the aggregated rights protection of members of the community because they have a joint right to such protection.⁵⁹⁰ Although police institutions have other important purposes that might not directly involve the protection of moral rights, according to Miller, these turn out to be purposes derived from the more fundamental purpose of *protecting moral rights*. By making the protection of moral rights their objective reference point, he suggests that the police should be able to use their constabulary independence and discretionary power most appropriately.⁵⁹¹ But Kleinig suggests that government is no longer seen merely as the protector of individual life, liberty and property: it is now also an agency of government that can fulfil various social service functions, including crisis management and order maintenance.⁵⁹² So in

⁵⁸⁸ Ibid., 52.

⁵⁸⁹ Neyroud and Beckley, 4.

⁵⁹⁰ *The Moral Foundations of Social Institutions: A Philosophical Study*, 245.

⁵⁹¹ Ibid., 248.

⁵⁹² Kleinig, *Ethics and Criminal Justice: An Introduction*, 54.

contrast with Miller's protecting moral rights account, Kleinig argues for a *social peacekeeping account* of policing. This means the role of the police is to ensure or restore peaceful order.⁵⁹³ Kleinig argues that the purpose of policing is not merely restricted to enforcing (i.e. making sure that others do not interfere with an individual's life, liberty and property). His peacekeeping perspective shifts the focus of the police from coercive force to authority.⁵⁹⁴ That is, Kleinig says the police are "given authority to direct, organise, control, respond to, and investigate situations so that social peace may be maintained or restored." He then argues this includes the authority to resolve situations disruptive of social peace by using force, but only when other strategies fail or are inappropriate.⁵⁹⁵

Kleinig's subordination of coercive force to the end of a peaceably ordered social environment is a welcome move because it means the police role becomes less about pacification and more about building social cohesion, trust and cooperation. But, according to Miller, it still leaves open the question of *whose* peaceable order. His concern is that the social peacekeeping account of policing does not rule out the potential for a repressive police state to enact laws that violate human rights.⁵⁹⁶ For this reason, Miller suggests that police work ought to be guided by moral considerations and not simply by legal ones.⁵⁹⁷ Miller claims that Kleinig's focus on peacekeeping leaves the way open for authoritarian policing in the name of social pacification. He argues that the constraint provided by some form of objective morality is required.⁵⁹⁸

In short, we have three distinct institutional accounts claiming to describe the teleology of the police. The use of force account claims that the purpose of the police is to use force. A second account says that the police should protect the moral rights of its

⁵⁹³ *The Ethics of Policing*, 28.

⁵⁹⁴ *Ibid.*, 29.

⁵⁹⁵ *Ethics and Criminal Justice: An Introduction*, 57.

⁵⁹⁶ Miller, *The Moral Foundations of Social Institutions: A Philosophical Study*, 247-48.

jurisdictional inhabitants. Whereas, the peacekeeping account claims that the end of the police is to ensure or restore peaceful order.

c. Public safety

Despite some disagreement, Miller's protecting moral rights account and Kleinig's peacekeeping account both put emphasis on enhancing the moral agency of police officers in order to preserve public safety. Miller wants police to use their constabulary independence and discretionary power more appropriately by making the protection of moral rights their objective reference point.⁵⁹⁹ Likewise, Kleinig wants police officers to become better moral agents. He suggests that "having regard to the values we associate with peace, a climate of trust in which our human selves may flourish in community with others" provides the basis through which "both police and community might be brought together in a joint and mutually supportive enterprise."⁶⁰⁰ The protection of "social peace" and "moral rights" both express a concern with the state's obligation to preserve public safety. As I outlined in 1.5, an important obligation of states is to respond to threats facing jurisdictional inhabitants and minimise the need for private rescue. Hobbes refers to this as "the procuration of the safety of the people," which means protecting jurisdictional inhabitants from actions that directly endanger human life. Although a state's duty to preserve public safety certainly entails "bare preservation," according to Hobbes, it also includes "other contentments of life, which every man by lawful Industry, without danger, or hurt to the Commonwealth, shall acquire to himself."⁶⁰¹ Within a state's jurisdiction, the police are the institution sanctioned to perform this role.

⁵⁹⁷ Ibid., 247.

⁵⁹⁸ Ibid., 248.

⁵⁹⁹ Ibid.

⁶⁰⁰ Kleinig, *The Ethics of Policing*, 29.

⁶⁰¹ Hobbes, 231.

If we believe that police have a monopoly on the use of force within the state, then we should expect police officers to be armed (or maintain the institutional capacity to be armed). We should also expect police to be trained in the effective use of those arms. But here there is an important distinction between police and the military. If it is true that police are primarily concerned with *preserving public safety*, then they are also required to adhere to the minimum force principle. This says that police should use the least amount of force necessary to perform their duties. Importantly, police should have a particular concern with avoiding uses of force that endanger the safety of the public. Kleinig points out, for instance, that most police departments adopt some form of a “continuum of force” policy that matches situations with considerations of proportionality.⁶⁰² P.A.J. Waddington and Martin Wright suggest that the amount of force used in a given situation is judged as disproportionate when it is sufficiently excessive in comparison to the resistance offered by a subject of police compliance.⁶⁰³ And Miller and Blackler suggest that police officers are required to communicate clear warnings, expose themselves to more risk and demonstrate adherence to the escalation of force model.⁶⁰⁴ If we conclude that police should adhere to a principle of minimum use of force then, at most, we should want police officers to carry small arms (other than specialised units), use them sparingly, prefer the use of non-lethal weapons or even no force at all.⁶⁰⁵

Furthermore, the police use of force is tied to the notion of what is considered “reasonable” in the situation. Squires and Kennison, for example, suggest that “reasonableness” has been historically important when a case of police use of lethal

⁶⁰² John Kleinig, "Legitimate and Illegitimate Uses of Police Force," *Criminal justice ethics*, no. 2 (2014): 91.

⁶⁰³ P.A.J. Waddington and Martin Wright, "Police Use of Force, Firearms and Riot-Control," in *Handbook of Policing*, ed. Tim Newburn (Uffculme: Willan Publishing, 2008), 487.

⁶⁰⁴ Miller and Blackler, 80; Kleinig, "Legitimate and Illegitimate Uses of Police Force," 91.

⁶⁰⁵ Non-lethal weapons do not completely replace the need to use lethal force because they create their own set of problems for the proportionate police use of force. For example, Kleinig points out that police

force has gone to court.⁶⁰⁶ Bronitt and Gani argue that the law (as reflected in judicial decisions, statutes and administrative directions) promotes police restraint in the use of force. In practice, however, they argue that police officers possess a wide margin of discretion in determining when and how much force is used against suspects.⁶⁰⁷

According to Bronitt and Gani, reasonable force requires,

consideration of the objective reasonableness of the subjective belief held as to the necessity of the intervention in question, and of whether the degree of force used was such that an objective hypothetical person would consider proportionate to those circumstances.⁶⁰⁸

Again, the reasonableness of a police officer's use of lethal force should be judged according to, first, an assessment of what police action is necessary to preserve public safety. According to Bronitt and Gani, a police officer's decision to use lethal force is morally justified only where it is "necessary to protect life or to prevent serious injury."⁶⁰⁹ And, second, a police officer's lethal action should be proportionate, which means that it adheres to the minimum force principle.

In sum, the moral purpose of policing is to preserve public safety, which includes using the lethal force necessary to protect jurisdictional inhabitants from serious criminal harm. If we agree that police have a monopoly on the use of force within the state, then we should expect police officers to be armed (or maintain the institutional capacity to be armed). But here there is an important distinction between police and the military: police are also required to adhere to the minimum force principle. This says that police should use the least amount of force necessary to perform their duties.

are now more likely to use (or threaten to use tasers) to ensure conformity rather than engaging in the harder work of persuasion. "Legitimate and Illegitimate Uses of Police Force," 91.

⁶⁰⁶ Squires and Kennison, 84.

⁶⁰⁷ Bronitt and Gani, 147.

⁶⁰⁸ Ibid., 158.

⁶⁰⁹ Ibid., 163.

5.4 The Policing Paradigm

a. Police duties

Since the police institution has a state-sanctioned teleology to preserve public safety, police officers take on a number of duties in using lethal force that do not apply to civilians. I refer to these as special duties or role obligations. And it is these special duties that give police exceptional moral permissions for using lethal force that only apply to them. We know that such police obligations exist because we can describe cases where a police officer should be sanctioned for failing to perform his duty but the average person should not. For example, we generally do not expect a bystander who observes a theft in a store to be punished for failing to confront the thief (even if we might disapprove of the bystander's inaction and expect her to at least report the crime). But in a situation where the bystander is a police officer, we expect the police to intervene and enforce the law against theft. All things being equal, a police officer who did nothing about the theft is acting wrongly and deserves to be sanctioned.

The first duty of police officers, that is important for their use of lethal force, is to *confront serious criminal threats to public safety*. David Bayley and David Weisburd suggest that in most countries it is the police who bear primary responsibility for maintaining public safety.⁶¹⁰ The notion that it is a police responsibility to maintain public safety is also reflected in the UN's Basic Principles on the Use of Force and Firearms by Law Enforcement Officials.⁶¹¹ Of particular concern to the police are *criminal activities* that are a serious threat to public safety. A serious threat to public safety is something that endangers the lives of persons residing within a given

⁶¹⁰ David H Bayley and David Weisburd, "Cops and Spooks: The Role of Police in Counterterrorism," in *To Protect and to Serve: Policing in an Age of Terrorism*, ed. David Weisburd, et al. (New York: Springer, 2009), 81.

jurisdiction. It is a fundamental police duty to protect the public from such serious criminal harm. This means the police are obliged to confront a person (or group of persons) who are doing serious criminal harm (or likely to do serious harm) to persons within their jurisdiction. Although it is not a police duty to determine their criminal guilt, a police officer does have an obligation to prevent a suspect from doing serious criminal harm to members of the public. Preserving public safety means saving innocent lives. Furthermore, in cases where a serious criminal harm cannot be prevented, we still expect police to reduce the amount of damage to the victims.

But since the police role is designed for prevention rather than punishment, arresting a suspect is always to be preferred to killing. The police aim to confront a threat to public safety in order to arrest the perpetrator. Confronting the threat to public safety in this way has a dual purpose. It both prevents future harm and it brings the suspect before a court of law to determine her culpability for any crimes committed, where she is punished if found guilty. It is better to have a designated police service to forcefully confront criminal harm than it does other types of groups. On the one hand, we do not want this role to be performed by civilians when it suits their personal interests. That path may very well lead to unaccountable lynch mobs with widely varying subjective standards of justice. On the other hand, we also do not want to put this responsibility in the hands of the military or other state institutions who have different institutional ends. The police provide a necessary service for society by confronting criminal threats to public safety in a way that is neither personally interested nor wholly coercive.

A second duty of the police is to *accept greater risks to their personal safety* than the average person. I argued in Chapter 3 that in a situation where a defender's life is

⁶¹¹ "Basic Principles on the Use of Force and Firearms by Law Enforcement Officials", (Adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana,

threatened by an unjust attacker, that a third-party is morally obligated to forcefully intervene if it is necessary to rescue the defender. But I also argued that if the forceful intervention is likely to be very costly or very risky to the life of the third party, then the obligation is weakened. This is not the same for police. A police officer's duty to forcefully intervene is stronger than the average person's. This is because jurisdictional inhabitants have given up some of their rights of self-defence so that the police can do their role more effectively. It would be wrong for jurisdictional inhabitants to give up legitimate rights of self-defence if police officers were not in some way duty-bound to forcefully intervene in threatening situations.

This duty to accept greater risks does not cancel a police officer's right to defend himself, however. Miller and Blackler argue that a police officer is still morally entitled to kill another person if that person is trying to kill, maim or otherwise threaten the life of the officer.⁶¹² But police should be more willing to expose themselves to risky situations. Where we normally expect the average person to move away from danger, sometimes it is the police officer's duty to head towards it. For example, imagine a scenario where an angry drunk man is making loud threats to harm people in a public place. He has not made a move to attack another person but he is yelling abuse and threatening to attack anyone who goes near him. In such a situation, the right thing to do for a bystander is call the police and stay out of harm's way. In contrast, the police are duty-bound to confront the angry man because he is posing a threat to public safety.

A third duty of the police is to *exercise restraint*. By exercising restraint, I mean that the police should demonstrate greater reluctance to use lethal force than the average person, especially when personally threatened. According to Principle 5 of the UN's Basic Principles on the Use of Force and Firearms by Law Enforcement Officials:

Cuba: United Nations, 1990).

⁶¹² Miller and Blackler, 80.

Whenever the lawful use of force and firearms is unavoidable, law enforcement officials shall: (a) Exercise restraint in such use and act in proportion to the seriousness of the offence and the legitimate objective to be achieved; (b) Minimize damage and injury, and respect and preserve human life; (c) Ensure that assistance and medical aid are rendered to any injured or affected persons at the earliest possible moment; (d) Ensure that relatives or close friends of the injured or affected person are notified at the earliest possible moment.⁶¹³

The police use of lethal force should be restrained in this way because the additional powers vested in the police put them in a position of public trust. The political community bestows upon police officers the special responsibility to use lethal force on their behalf.

Furthermore, the police should be held accountable for any uses of lethal force. This means that police use of lethal force should always be scrutinised by a fair process that impartially applies the appropriate principles of justification. According to Bronitt, this requires a clear understanding of the principles for good police decision-making and certainty over the legal powers of police to use force.⁶¹⁴ Accountability does *not* mean treating police as political scapegoats whenever there is a lethal force incident, however. We should not expect police to do the difficult work of confronting dangerous criminals only to then disown them whenever there is a shooting incident. Police officers are not expendable instruments of state to be thrown under the bus whenever there is a politically sensitive incident to address.

In short, the police have a set of obligations conferred upon them by the state which directs them to intervene to protect life and prevent serious harmful crime within their jurisdiction. Consequently, we can describe the police as having a state-sanctioned institutional role-derived obligation to forcefully intervene when human life is threatened or when a serious harmful crime requires stopping. As I have argued earlier in this chapter, when I suggest that the police have a “special” obligation I mean that

⁶¹³ "Basic Principles on the Use of Force and Firearms by Law Enforcement Officials".

⁶¹⁴ Simon Bronitt, "Rethinking Police Use of Force: Linking Law Reform with Policy and Practice," *Crim Law Journal* 36 (2012): 74.

they have an obligation where a non-police officer does not. And the obligation is derived from their state-sanctioned institutional role as a police officer.

b. Police permissions

Having argued that the police have a number of role duties that are important for their use of lethal force, I now outline how these obligations impact the moral permissibility of police action. These are the special permissions to use lethal force when it is necessary to address a serious threat to public safety. Without such exceptional permissions, it would be unreasonable for police officers to carry out the state-imposed duties outlined above. First, the police are morally permitted to initiate violent conflict. That is, a police officer is permitted to confront a suspect or offender even when it is likely to turn violent. Since police officers are duty-bound to confront threats to public safety, they must be permitted to use lethal force in some situations when they could reasonably retreat. It follows that if a police officer has a duty to confront threats to public safety, including potentially violent ones, then it is permissible for him to do so. This is unlike the standard morality of self-defence or defence of others where the average person is obliged to take reasonable measures to avoid a deadly confrontation. As I suggested in 2.5, reasonable measures are not costly or risky to the defender, and they include escape from the situation and/or seeking police intervention. So the average person is expected to retreat (or help others retreat) from a potentially deadly confrontation when escape is a reasonable option.

In contrast, Bronitt and Gani argue that the police are permitted to confront and arrest a person they have grounds to suspect of a serious crime. This also permits them to use force when a suspect is not compliant.⁶¹⁵ In Australian law, for example, section

⁶¹⁵ In addition to authorising use of force to make an arrest, Bronitt and Gani point out that legislation typically confers on police special powers to use force in a range of situations. These include powers to:

230 of the Law Enforcement (Powers and Responsibilities) Act 2002 (NSW) sets out the general powers of police to use force lawfully, and section 231 specifies the powers of police to use force in the context of making an arrest. Both provisions allow police to “use such force as is reasonably necessary” to exercise the relevant function, to make the arrest or prevent the escape of the person after arrest.⁶¹⁶ So the police are obliged to confront serious threats to public safety and this permits them, in some cases, to use proportionate force.

Second, the police are morally permitted to use lethal force to prevent the escape of a dangerous criminal. This includes both armed suspects and unarmed fleeing felons who pose a serious threat to public safety. Miller argues that in the case of an *armed suspect* a police officer is morally permitted to kill another person if that person is rightly and reasonably suspected of the crimes of serious rights violations, is attempting to avoid arrest, is armed and using those arms to avoid arrest, and if the only way to prevent the suspected offender from escaping is to kill him.⁶¹⁷ Miller also argues that a police officer is morally permitted to kill a *fleeing felon* if that person (whether armed or unarmed) is rightly and reasonably suspected of the crimes of killing, maiming, or otherwise threatening the self-hood of some third person(s), is attempting to avoid arrest, and if the only way to prevent the suspected offender escaping is to kill him.⁶¹⁸ So where a convicted felon escapes custody, the police are permitted to use lethal force to prevent escape. In both cases, the police have a duty to preserve public safety. If it is not possible for the police to apprehend a dangerous criminal who poses a serious threat to public safety, then it is permissible for them to use lethal force to prevent his escape. A police officer who failed to prevent the escape of such a dangerous criminal, because

enter onto property/premises to prevent crime and disorder; protect property; execute warrants and other court orders; conduct forensic testing (including the forcible taking of blood or tissue samples); prevent suicide; and suppress riots and disorder. Bronitt and Gani, 157.

⁶¹⁶ Ibid.

⁶¹⁷ Miller and Blackler, 81.

she refused to use lethal force, might be liable for the harm the criminal then goes on to do.

Third, police are permitted to use lethal force against a criminal conspirator who intends to cause serious harm to public safety. A criminal conspirator is a person who is knowingly engaged in (and necessary to the successful carrying out of) a criminal enterprise. For example, let us return to our imaginary case (in 5.2) where Olivia has planned a bombing attack on the innocent people of Walterville. She draws up plans for the bombing, she acquires the necessary components, she makes the bomb, she plants the bomb, and finally she triggers the bomb. The police have a duty to prevent such an attack on innocent civilians, which includes killing the Olivia if this is necessary. And we saw that the police *might not* have to wait until Olivia is on the verge of triggering the bomb to be justified in shooting her. The police would be justified in using lethal force against such a conspirator at any stage of her plan if arresting the bomber was not possible or the risk to police personnel (or innocent bystanders) was unreasonably high.

This use of lethal force also includes cases where one person does not pose a direct threat to public safety by themselves but rather constitutes an integral element of a joint action that, with others, poses a serious threat to public safety. For example, think of not just one bomber alone but a group of four people who plan to execute a bombing together. They initially meet together and agree to go through with the bombing. Their plan is for one person to acquire the necessary components, the second person then makes the bomb, the third person plants the bomb and the fourth person triggers the bomb. A police officer is permitted to use lethal force against any one of the conspirators if this action is necessary to prevent the bomb being detonated and killing or seriously injuring members of the public. Again, arrest must either be impossible or unreasonably risky to the police involved (or other innocent bystanders).

⁶¹⁸ Ibid., 80.

Furthermore, the conspirator must be knowingly complicit in the goal of the conspiracy and play a necessary role in its success or otherwise.

In short, the police are morally permitted to use lethal force against a person who is not himself (or persons who are not themselves) immediately an unjust deadly threat. It is not justified for the average person to kill another person who might be an unjust deadly threat in the future, even in cases where the attack is likely. In contrast, the police are permitted to confront these types of potential threats, which include necessary uses of lethal force. Since the police have this special responsibility to preserve public safety within their jurisdiction, they are duty-bound to intervene when they suspect that a person is a serious threat to public safety. The preferred police intervention is always arrest of the suspect. But in cases where the suspect of a serious crime either resists arrest or flees, the police might be obliged to use lethal force when it is the only reasonable option for preventing the escape of the suspect and he is: a) a serious threat to public safety because he has committed a serious crime such as murder, maiming, or other crimes against the selfhood of persons; and/or b) is armed and has demonstrated the willingness to do serious harm to members of the public.

c. Limits

The moral justification for the use of lethal force within the policing paradigm has its limits, however; it can only be stretched so far. There are at least three ways in which the police use of lethal force – as an additional set of moral duties and permissions – should be limited. First, the policing paradigm for using lethal force is limited by police jurisdiction. As described earlier (in 4.3), a principled morality of exceptions has a spatial aspect. The police derive the necessary powers to perform the policing role from the state, which has the authority to exercise legal jurisdiction over criminal acts within a (mostly) geographic area. In other words, the policing paradigm

exists in tandem with policing jurisdiction. The police are duty-bound to preserve public safety within their jurisdiction, and this is the source of their additional moral permissions (and restraints) when it comes to using lethal force. Hence the police use of lethal force is only morally justified when applied by police officers operating within a legally-defined police jurisdiction. When police officers are outside their jurisdiction they are no longer duty-bound to preserve public safety *qua* police. Instead, they revert to the standard moral justifications based on killing in self-defence and defence of others.

But there is a problem when the police have a duty to preserve public safety from a serious criminal threat but cannot use standard policing methods to reach the perpetrators. This is the issue of extra-jurisdictional policing; that is, the fulfillment of policing obligations outside the police jurisdiction. This problem is illustrated by the Entebbe case (described in 1.4). Here a group of pro-Palestinian terrorists hijacked an aircraft travelling from Tel Aviv to Paris and flew it to Entebbe Airport in Uganda. The terrorists threatened to kill their Israeli hostages unless their demands were met. A problem in this type of case is the inadequacy of using normal policing methods and capabilities for dealing with the conspirators involved.

For instance, Mark Maxwell suggests that it might be that a criminal conspirator is immune to arrest for much of the time that he is preparing for an attack, perhaps because he is operating in an area of the world where policing is weak or non-existent.⁶¹⁹ Bronitt et al also point out that international terrorism, in particular, creates a context in which legal systems have struggled to determine the legitimate boundaries on the use of force to prevent violent acts.⁶²⁰

⁶¹⁹ Maxwell, 37.

⁶²⁰ Bronitt, Gani, and Hufnagel, xiii.

One option for the police is cooperation and/or agreements with other police jurisdictions. In the Entebbe case, the issue would have been effectively addressed if the Ugandan authorities had arrested the terrorist group when they landed in Uganda and then returned the hostages to their home countries. But they did not do this. A second option is creating international policing jurisdictions. This includes either the establishment of an international policing agency (e.g. INTERPOL) or specifying an international jurisdiction for a national policing agency (e.g. FBI). Again, however, the Entebbe Operation, which was high risk and involved the use of strategic airlift and special operations forces, was beyond standard policing capabilities. A third option is the use of military force in lieu of police capabilities, which is how the Entebbe situation was eventually resolved.

A second limit for the policing paradigm is the use of lethal force during a state of emergency, where law enforcement is no longer effective. According to Larry May, a state of emergency refers to the situation where a government temporarily changes the conditions of its political and social institutions in response to a particularly serious large-scale emergency, such as a natural disaster, war or rioting. And due process constraints on government officials, such as *habeas corpus*, are temporarily suspended.⁶²¹ Again, a principled approach to moral exceptionalism has a temporal aspect. The type of emergency that concerns us here is one that has such a serious impact on society that the existing police capabilities are not sufficient to enforce the law and preserve public safety. In such cases, it might be necessary to call in the military to assist police in dealing with the emergency. Here the military act to enhance the capabilities of the police. The goal is political stabilisation and a return to effective law enforcement. But the risk here is the warrior mindset of the military and the increased likelihood that soldiers will act with less restraint than police officers. For

⁶²¹ May.

example, in the McCann case (in 1.4), the problem here was that although the SAS soldiers involved had some training in arrest procedures and the goal was to apprehend the suspects, their military training took over and they ended up shooting the people they had under observation.

The main reason to permit the use of lethal force in a state of emergency, either by police or the military, is the threat posed to innocent lives. When a mob is violent or in an uncontrollable frenzy, suggests Jyoti Belur, it might be necessary to resort to the use of lethal force. But then, he suggests, it must be used in a controlled, precisely targeted and methodical manner.⁶²² But what about a situation where mass rioting leads to the widespread destruction of property but does not threaten lives? In the Detroit Riots (described in 1.4), many people took advantage of the disorder to engage in looting. Consequently, General Simmons, with the approval of Governor Romney, ordered the National Guard to use such force as was required to enforce the laws of Michigan. Guardsmen were instructed to return fire if fired upon and to halt looting by shooting “if necessary.” By the evening 24 July, the police, the Guard, and the State Police were all shooting at looters.⁶²³

Shooting rioters who are intent on criminal activities, such as looting and vandalism, and who are not posing an immediate deadly threat, seems like an overly harsh and heavy-handed response. Shooting a looter who is not an immediate threat to the police officers is not an act of self-defence. Yet the way that the Detroit riots unfolded suggests that the police needed to use effective force to prevent the overall situation deteriorating into something that was life threatening to the residents of Detroit. Perhaps we could say that looting, while not a threatening activity in itself, contributed significantly to conditions that were life-threatening. In this case, the police

⁶²² Jyoti Belur, *Permission to Shoot?: Police Use of Deadly Force in Democracies* (Springer, 2010), 4.

⁶²³ Fine, 194.

had a duty to take the proportionate actions necessary to protect the lives of Detroit's inhabitants by restoring order. These necessary actions included using the weapons available to them. But whether or not lethal force was used, the police officers (or soldiers) who found themselves caught up in the riot were clearly faced with a difficult choice either way.⁶²⁴

A third limit on the policing paradigm is the moral requirement to maintain the police-military distinction. For example, on 7 July 2016 the Dallas police used a bomb robot to kill a man who had shot five police officers. Their decision, along with images of police outfitted in riot gear and other heavy-duty equipment during protests against police brutality across the U.S., set off a storm of debate about the militarisation of law enforcement in the U.S. These protests illustrated the belief that police institutions should be kept clearly distinct from military institutions.⁶²⁵

Not all countries have a strong institutional distinction between the police and the military: France's paramilitary *Gendarmerie*, for example. But the English-style police model – which is used in the United Kingdom, United States, Canada and Australia – is based on Sir Robert Peel's Metropolitan Police in London. This model emphasises the importance of the ethical distinction between the police and the military. The objectives of this style of policing, suggests Jude McCulloch, are to protect life and property, prevent crime, discover crime, detect the perpetrators of offences and preserve the

⁶²⁴ Miller and Blackler make the suggestion that deterrence of criminal behavior during a state of emergency might be moral justification for the police to use lethal force against such as looting. According to Miller, a police officer who is duty-bound to enforce the law might be morally entitled (and perhaps morally obliged) to kill a person if: a) that person is rightly and reasonably suspected of a type of crime which is so widespread in an existing state of emergency as to constitute a serious threat to fundamental rights of citizens; b) deadly force is the only available deterrence in the circumstances of this particular state of emergency; c) that person is attempting to avoid arrest; d) the only way to prevent the suspected offender escaping is to kill him/her; e) perpetrators of the type of crime in question have been warned that they will be shot dead under conditions (a), (c) and (d); and f) the policy specified in conditions (a)-(e) has been adopted as a limited policy for a specific delimited period. Miller and Blackler, 81.

⁶²⁵ Hanna Kozłowska, "Why Do American Police Officers Dress Like Soldiers, and Does It Actually Keep Anyone Safe?," Quartz, <http://qz.com/728758/why-do-american-police-officers-dress-like-soldiers-and-does-it-actually-keep-anyone-safe/>.

peace. In contrast, he suggests, soldiers prepare to wage war, kill enemies and destroy their property.⁶²⁶ The clear separation is meant to prevent police from adopting a mindset in which they believe they are “fighting a war” against the same people they are supposed to protect.

It is true that the police and military have a number of things in common. Peter Kraska and Victor Kappeler, for example, point out that the police and the military are “the state’s primary use-of-force entities, the foundation of its coercive power.”⁶²⁷ And in *Above the Law*, Jerome Skolnick and James Fyfe note that both organisations wear uniforms, use specialist language and codes, are overwhelmingly male and operate within a strictly hierarchical setting. Like soldiers, they suggest, police officers are part of an institution that is organised into a hierarchy where orders from superiors can have a greater impact on their actions than the law.⁶²⁸ Despite these commonalities, however, the purpose of the police is distinct from the purpose of the military. Police are supposed to enforce the law and preserve public safety within a legal jurisdiction. But this is not the role of the military. Paul Sieghart reflects on this distinction in a 1978 article for *New Scientist*, writing that “the job of the soldier is to kill the Queen’s enemies in war-time; that of a policeman is to protect the Queen’s subjects in peacetime.” He suggests that police, like soldiers, are permitted to use lethal force in the course of their duties, but that injuring and taking life are nevertheless fundamentally in conflict with the police duty to protect life.⁶²⁹ The police should not shirk their duty to use lethal force to protect the safety of the public when it is necessary.

⁶²⁶ Jude McCulloch, *Blue Army: Paramilitary Policing in Australia* (Melbourne: Melbourne University Press, 2001), 16.

⁶²⁷ Peter B. Kraska and Victor E. Kappeler, "Militarizing American Police: The Rise and Normalization of Paramilitary Units," *Social Problems* 44, no. 1 (1997).

⁶²⁸ Jerome H. Skolnick and James J. Fyfe, *Above the Law: Police and the Excessive Use of Force* (New York: The Free Press, 1993), 138-9.

⁶²⁹ P. Sieghart, "Harmless Weapons: A Threat to Liberty?," *New Scientist* 77 (1978).

But a concern here is the militarisation of the policing role. According to Peter Kraska, police militarisation is the process whereby civilian police increasingly draw from, and pattern themselves around, the tenets of the military paradigm.⁶³⁰ He describes this as “the process of arming, organizing, planning, training for, threatening, and sometimes implementing violent conflict to militarize means adopting and applying the central elements of the military model to an organization or particular situation.”⁶³¹

There are three big moral concerns about the militarisation of the police. One concern involves the risk that the police become a repressive tool of the state. The political philosopher John Rawls held that in developing the principles of domestic justice, a state should not use an army against its own people. Instead, it should use the police to keep domestic order and a judiciary and other institutions to maintain an orderly rule of law. This is very different from the institution that is needed to defend against aggressive states, he suggests.⁶³²

A second moral concern involves the move away from standard policing methods to increasingly embrace military approaches. The military ethicist George Lucas Jr. points out that the military have a “warrior mindset,” which means soldiers instinctively think that their job is to “kill people and break things.”⁶³³ The risk here, then, is that the police take on the warrior mindset of the military and act with less restraint than they should. The police should adhere to a principle of minimum force—that is, they should use the least amount of force necessary to protect the public. Jude McCulloch, for

⁶³⁰ Peter B. Kraska, "Militarization and Policing—Its Relevance to 21st Century Police," *Policing* 1, no. 4 (2007).

⁶³¹ Ibid.

⁶³² John Rawls, *The Law of Peoples: With "the Idea of Public Reason Revisited"* (Cambridge, Massachusetts: Harvard University Press, 2001), 26.

⁶³³ George R. Lucas, "Postmodern War," *Journal of Military Ethics* 9, no. 4 (2010): 296.

example, says that police use of force should be to overcome resistance to arrest or to protect life.⁶³⁴

A third moral concern with police militarisation is the extensive harm caused by military-grade weapons and technologies. Military-grade weapons and technologies are designed to maximise the destruction of enemy combatants. Weapons with such highly destructive properties include high-powered automatic rifles, grenades, tanks, ships, fighter aircraft, high explosives, precision-guided missiles and so on. The purpose of overwhelmingly destructive weapons is to achieve a particular political effect on an enemy force. So the state using this kind of technology against its own citizens necessarily raises troubling questions for many people.

This does not mean that Dallas police were wrong to use a robotic bomb against Micah Johnson. The police clearly have a responsibility to confront a serious criminal threat to public safety. But incremental moves towards police militarisation – such as using a remote-controlled robot to detonate an explosive – do increase the risk of disproportionately harmful outcomes. If we want to maintain a police system that preserves public safety, we need to proceed with caution.

In sum, the police have access to additional moral permissions to use lethal force. But the policing paradigm should only be stretched so far before it then becomes military force. The key limits on the policing paradigm are: police jurisdiction; a state of emergency; and the police-military distinction.

5.5 Conclusion

In conclusion, police officers have special permissions to use lethal force, based on their state-imposed duties, which are derived from their institutional teleology to

⁶³⁴ McCulloch, 17.

preserve public safety. Hence, the police use of lethal force goes beyond warding off an immediate threat, in some cases, because police have a duty to preserve public safety within their jurisdiction. The institutional approach is the most promising way of understanding the exceptional permissions of police to use lethal force because it is consistent with a respect for human rights. Since the police have a state-imposed duty to preserve public safety within their jurisdiction, they are duty-bound to intervene when they suspect that a person is a serious threat to public safety. The preferred police intervention is to arrest the suspect. But in cases where the suspect of a serious crime either resists arrest or flees, the police might be obliged to use lethal force when it is the only reasonable option for preventing the escape of the suspect and he is: a) a serious threat to public safety because he has committed a serious crime such as murder, maiming or other crimes against the selfhood of persons; and/or b) armed and has demonstrated the willingness to do serious harm to members of the public.

CHAPTER SIX: THE USE OF MILITARY FORCE

6.1 Introduction

Up to this point, we have seen that the police and military use of force is treated as morally exceptional when compared to the average person. Chapter 1 demonstrated that, in non-standard cases, police and military actors might lack the necessary conditions to be sufficiently morally justified. So, in Chapters 2 and 3, I went back to first principles and examined the moral justification for killing in self-defence and defence of others. I argued that the unjust threat account of killing in self-defence is morally grounded in the necessity of warding off an immediate unjust deadly threat. And then I argued that this account of justified killing should be modified so that in cases where the threat is non-culpable (or only partially culpable) the defender is obliged to share the cost and risk in order for both parties to survive.

Next I demonstrated that defence of others morally permits a third-party to forcefully intervene and kill an immediate deadly unjust threat in order to protect an innocent human life. In addition, I argued that a third-party *should* use forceful intervention (including lethal force) to protect an innocent human life in cases where the use of force against an unjust threat is morally permissible and the intervener has a duty to rescue the defender's life. This obligation is weakened when intervention is risky and/or costly to the third-party. But if the intervener has an agent-relative responsibility for the defender's wellbeing, then the intervener should accept more risk and/or cost in order to rescue the defender.

Chapter 4 then suggested that the conventional just war approach to justifying the military's use of lethal force in war is morally distinct from either killing in self-defence or defence of others. Conventional just war thinking holds that military force in war is

morally exceptional. In virtue of the context, it gives military combatants special moral permissions to kill enemy combatants in war, and posits that a soldier acting on behalf of a sovereign state is not solely morally responsible for his own acts of killing. But this conventional notion of the military killing in war has been undermined by recent developments in the theory and practice of armed conflict. In particular, the military lack the necessary conditions to be sufficiently morally justified in cases that fall short-of-war. Thus, in Chapter 5, I examined an alternative state-sanctioned institution with special responsibilities for using force: the police. I concluded that police hold exceptional moral permissions to use lethal force because they have a state-imposed institutional teleology to preserve public safety.

Now, in this chapter, I examine where and how the state's use of military force is morally justified in standard *and* non-standard cases. I argue that the military's exceptional moral permissions for using lethal force are also derived from its institutional teleology, which is to defend the "common good." This is the basis for morally justifying the use of lethal force within the conventional military paradigm. Then I examine the problem of non-standard cases where lethal military force is used in cases that fit neither the conventional law enforcement nor warfighting contexts. The use of lethal military force short-of-war demands more restraint than is permitted by the conventional military paradigm.

As such, I argue for the addition of *jus ad vim* (or the just use of military force short-of-war) as a hybrid element to the moral framework for the state-sanctioned use of lethal force. This provides a better way of applying ethics to the use of military force when defending the common good against non-conventional threats that require the intentional anticipatory state-sanctioned use of lethal force. This is because *jus ad vim* complements the conventional military paradigm by permitting the use of military capabilities to defend the political community and protect jurisdictional inhabitants

against serious threats in non-standard cases. But, at the same time, it inhibits the move towards the more destructive levels of violence characteristic of conventional warfighting.

In the first section, I put forward my argument for an institutional account to ground the military's moral exceptionalism for using lethal force in war. I argue that the military's exceptional use of lethal force is based on its moral purpose as a social institution. This moral purpose, or institutional teleology, is to defend the common good. I start out by returning to Jeff McMahan's critique of the conventional just war account, and I argue that this is a timely reminder that soldiers should be held morally accountable for uses of lethal force. But, in contrast with McMahan's view, I hold to the conventional just war account that wartime killing *is* morally exceptional. I argue that McMahan's mistake is to underestimate social institutions as sources of moral justification. I argue for a reconsideration of an institutional perspective that is underpinned by a proper understanding of the moral purpose of the military. I conclude that the best alternative for grounding a military's exceptional moral permissions to kill in war is to be found in its institutional teleology. Next I consider differing views for the institutional teleology of the military as a social institution. I demonstrate that the modern military is more than an instrument for doing harm or fighting wars. I also examine the conventional approach that says the teleology of the military is to carry out the state's responsibility for defending the "life" of a political community from external threats. Then I examine cosmopolitan criticisms of this view, which argue that the moral purpose of the military should be to preserve a just peace and protect human rights.

In the second section, I conclude that the morally responsible state uses its military to defend the common good. In particular, I argue that a state's military should defend the common good of the political community it serves, which includes, but is not

limited to, fighting wars against external aggression. I also argue, however, that a state has important moral responsibilities to the common good outside the interests of its own narrowly defined political community. Importantly, it has a moral obligation, albeit weakened, to use military force to protect the lives of outsiders. Having grounded the military's moral exceptionalism in its institutional moral purpose to defend the common good, I then outline the exceptional duties and permissions of military combatants using lethal force in conventional armed conflict. I argue that the military take on a number of moral duties (or role obligations) in using lethal force that do not apply to civilians. I argue that military combatants have a state-imposed duty to: 1) obey lawful orders; 2) accept grave risks; and 3) identify with, and serve, a legitimate political community. As a consequence, I argue that these special duties of military combatants give them exceptional moral permissions for using lethal force in war. These include moral permissions to: 1) kill enemy combatants on sight; 2) use military-grade weapons; and 3) do serious collateral harm.

Finally, in the third section, I argue that in non-conventional cases involving armed conflict short-of-war, the military's morally exceptional use of lethal force requires the addition of a hybrid element to the justificatory moral framework. I refer to this hybrid element as *jus ad vim*. I argue that *jus ad vim* complements the conventional just war approach without the need to fall back to the policing paradigm. Moreover, it inhibits the move towards the more destructive and extensive levels of violence characteristic of war. In particular, it tightens the restraints on the use of military force short-of-war by: 1) reducing the permissibility of foreseeable collateral harm; 2) requiring higher standards of proof for targeting; 3) demanding that each operation demonstrate that other non-lethal options (such as arrest) were not available or would have been unacceptably risky; and 4) putting more onus on the moral responsibility of individual soldiers for using lethal force.

6.2 The Purposes of Military Force

a. The moral agency of soldiers

In Chapter 4, I outlined how the just war tradition promotes a principled approach to the moral exceptionalism in war. Then I described McMahan's individualist critique of this view (in 4.3). He puts emphasis on the presumption against killing and insists that objective moral justifications are necessary to overcome this presumption.⁶³⁵ McMahan's individualist argument is an important reminder that states are not empowered to authorize killing for any reason whatsoever. At the heart of the individualist critique is the goal of making political leaders more accountable for their use of military capabilities that involve lethal force. As McMahan points out, political leaders cannot cause other people's moral rights to disappear simply by commanding their armies to attack them.⁶³⁶ A sovereign requires sufficient moral reasons to justly authorise the use of lethal force, which is a notion that is consistent with the moral purpose of the just war tradition. Andrew Alexandra and Seumas Miller, for example, highlight Kant's belief that a human being is intrinsically – as opposed to instrumentally – morally valuable, and of greater value than non-human animals and inanimate objects.⁶³⁷ Furthermore, Stephen Neff argues that an important conceptual step for the just war tradition occurred when war ceased to be viewed as a routine and natural feature of international life, requiring no special explanation, and began instead to be seen as an exceptional and pathological state of affairs, calling for some kind of moral justification.⁶³⁸

⁶³⁵ According to McMahan, an act is objectively justifiable on the basis of facts that are independent of the agent's beliefs. It is not sufficient that the person believes, or is even justified in believing, that her act is justified. It is necessary that her actions are justified on the basis of objective reasons. McMahan, *Killing in War*, 43.

⁶³⁶ *Ibid.*, vii.

⁶³⁷ Andrew Alexandra and Seumas Miller, *Ethics in Practice: Moral Theory and the Professions* (Sydney: University of New South Wales Press Ltd, 2009), 41.

⁶³⁸ Neff, 14.

McMahan's individualist critique rightly concludes that soldiers are more than mere instruments of the state: they are moral agents. The notion that the only moral responsibility of soldiers is to follow the directives of their masters is immortalised in Lord Tennyson's poem *The Charge of the Light Brigade* where he says, "Theirs not to make reply, Theirs not to reason why, Theirs but to do and die." Michael Walzer describes this view plainly – that soldiers are primarily state instruments for killing – when he says,

army and navy officers, defending a long tradition, will often protest commands of their civilian superiors that would require them to violate the rules of war and turn them into mere instruments for killing. The protests are mostly unavailing – for instruments, after all, they are – but within their own sphere of decision, they often find ways to defend the rules.⁶³⁹

McMahan's individualist approach denies such an instrumentalist view and instead puts greater emphasis on the moral agency of soldiers. This is a good thing because, as Heather Roff argues, the ethical regulation of warfare is premised on the fact that the agents doing the fighting are *moral agents*, i.e. agents to whom responsibility for actions can be attributed.⁶⁴⁰ Soldiers who are better moral agents are more likely to make good judgements in difficult situations.

There are, however, a number of problems with McMahan's individualist account of just war theory. First, it underestimates the place of institutional accountability. The roles of "civilian" and "soldier" differ in a number of morally significant ways, and shifting between them is not a simple matter. Soldiers in a war fight on behalf of a political community, and have a moral responsibility to protect and preserve the life of that political community. Military combatants in war are normally accountable, in practice, to a command hierarchy (especially in modern militaries) and are judged according to the conventions of war. In contrast, civilians are not part of an institution

⁶³⁹ Walzer, *Just and Unjust Wars: A Moral Argument with Historical Illustrations*, 45.

⁶⁴⁰ Heather M. Roff, "Killing in War: Responsibility, Liability and Lethal Autonomous Robots," in *Routledge Handbook of Ethics and War: Just War Theory in the 21st Century*, ed. Fritz Allhoff, Nicholas G. Evans, and Adam Henschke (Taylor & Francis, 2013), 354.

where their actions are regulated and judged on an impartial basis. As Shannon French reminds us, this distinction allows soldiers to be held to a higher ethical standard than that required for an ordinary person within the general population of the society they serve.⁶⁴¹

A second problem with McMahan's individualist account is the gulf that it potentially creates between ideal moral theory and military practice. According to Chris Brown and Kirsten Ainley, political realists generally criticise international morality for being impractical and utopian.⁶⁴² E.H. Carr describes utopian views as ones that hold that states are subject to the same moral obligations as individuals.⁶⁴³ Political realists are likely to argue that McMahan's emphasis on individualistic moral theorising fails to acknowledge the realities of international power politics.⁶⁴⁴ The challenge for international moralists then, suggests Stanley Hoffman, is that, "a deontological ethic in which the definition of what is right is not derived from a calculation of what is possible condemns itself to irrelevance if its commands cannot be carried out in the world as it is."⁶⁴⁵ But the concern for political realists, Hoffman says, is not simply that utopianism will retreat to practically irrelevant discussions of ideal moral theory that promise harmony in a pacified world. Rather, he argues that political realists also worry about the potential harms caused by crusading forms of political idealism that have, in the past he believes, prompted the powerful states, such as the United States, to initiate military conflicts around the world.⁶⁴⁶

⁶⁴¹ French, 3.

⁶⁴² Chris Brown and Kirsten Ainley, *Understanding International Relations*, 3rd ed. (Hampshire, UK: Palgrave MacMillan, 2005), 26.

⁶⁴³ Carr, 141.

⁶⁴⁴ Tony Coady points out that political realists will generally argue along these lines; that standard morality demands the impossible of statesmen and takes insufficient account of the role played by prudence in such decision-making. Coady, 126.

⁶⁴⁵ Stanley Hoffmann, *World Disorders: Troubled Peace in the Postcold War Era* (Lanham, Maryland: Rowman & Littlefield Publishers, 1998), 152.

⁶⁴⁶ *Ibid.*, 56.

The problem with McMahan's individualist approach is that it remains vulnerable to these political realist criticisms. Walzer makes this point when he suggests that we cannot apply the individualist standard of morality without attending far more closely to the moral reality of war than McMahan is prepared to do.⁶⁴⁷ And the main thrust of Henry Shue's critique is McMahan's lack of concern with the reality of war. Shue argues that the ethics of war must deal with the extraordinary mass violence of war and so its content will depart greatly from the morality for ordinary life.⁶⁴⁸ James Pattison also focuses on this aspect of the individualist account when he argues that McMahan's emphasis on discovering "the deep morality of war" overlooks the *applied* morality of war. He suggests that an applied or non-ideal theory should consider important *contingent* features of war, including "the morality of institutions governing war (such as the UN Security Council) and the morality of norms and doctrines related to war (such as the responsibility to protect (R2P) and the norm against mercenary use)."⁶⁴⁹

A third problem with McMahan's individualist approach is that it overlooks the broader considerations that concern political decision-makers. Just war thinking attempts to come to terms with the essentially political nature of the decision to wage war. As Suzanne Uniacke argues, *jus ad bellum* criteria are grounded in important assumptions about the nature of political authority and responsibility that do not apply to personal self-defence.⁶⁵⁰ Specifically she says,

because the *jus ad bellum* 'success condition' reflects assumptions about political authority and responsibility, its application to defensive war encompasses considerably more than fending off an attack. Within the Just war tradition, the right of a legitimate authority to wage war invokes duties on the part of political leaders that mean that the aims of war (and thus also the 'right intentions' of those who declare war) extend well beyond an immediate just cause. These wider aims include the promotion of the common good and the securing of

⁶⁴⁷ Walzer, "Response to McMahan's Paper," 45.

⁶⁴⁸ Henry Shue, "Do We Need a 'Morality of War'?", in *Just and Unjust Warriors: The Moral and Legal Status of Soldiers*, ed. David Rodin and Henry Shue (New York: Oxford University Press, 2008), 91.

⁶⁴⁹ James Pattison, "The Case for the Nonideal Morality of War: Beyond Revisionism Vs. Traditionalism in Just War Theory," *Political Theory* (forthcoming): 2-3.

⁶⁵⁰ Uniacke, "Self-Defence, Just War, and a Reasonable Prospect of Success," 63.

a lasting peace, which are held to be the over-arching responsibilities of a political authority who declares war on behalf of the nation that subsequently wages war.⁶⁵¹

As I argued in detail in Chapters 2 and 3, an individual acting in self-defence (or defence of others) is morally justified when he is fending off an immediate unjust deadly threat. In contrast, the authorities who make decisions on waging war have a much broader range of considerations. Military combatants fight at the direction of their leaders who are making decisions on behalf of the state. As a result, military combatants share these broader political concerns when they make decisions about using lethal force. Furthermore, the self-defence paradigm requires the existence of an *immediate* threat likely to cause death or serious injury. According to Uniacke, this means that self-defence might be anticipatory but it cannot be premeditated, which requires planning, coordination and collective action. This, she suggests, is distinct from war which generally requires premeditation to be successful.⁶⁵²

A fourth problem with McMahan's individualist approach is that the self-defence paradigm demands less restraint in morally justifying decisions to kill than does the military paradigm in some cases. One example of the way in which morally justified killing in self-defence is less restrained than the military paradigm is the frequently cited use of an explosive in self-defence against an out-of-control car. In McMahan's imaginary case,

A person keeps his car well maintained and always drives cautiously and alertly. On one occasion, however, freak circumstances cause the car to go out of control. It has veered in the direction of a pedestrian whom it will kill unless she blows it up by using one of the explosive devices with which pedestrians in philosophical examples are typically equipped.⁶⁵³

McMahan uses this illustration to demonstrate that the pedestrian is permitted to use the explosive device to protect herself from a responsible threat. But let us imagine that the pedestrian is a soldier (John). John is part of a peacetime military convoy that is

⁶⁵¹ Ibid., 73.

transporting weapons through a busy residential area. Unfortunately, a truck veers out-of-control and heads toward him. In this particular case, he has the capability to use a missile launcher he is transporting to destroy the out-of-control truck and save himself. But could a soldier with the responsibility for transporting sophisticated and dangerous military weaponry use it to defend himself in this way? It seems unlikely.

A second example demonstrates the way in which the individualist account of morally justified killing can be less restrained than the military paradigm. A UN-mandated international military force intervened in East Timor (INTERFET) following the breakdown in law and order after the independence referendum in 1999. The troops on the ground initially faced significant provocation from militias and, on the basis of self-defence, these soldiers might have been justified in using lethal force. But the INTERFET soldiers were restrained in their uses of lethal force because of the potential political repercussions. In this case, there was the real possibility of the situation escalating into a broader armed conflict with Indonesia.

In short, there are plausible reasons for concluding that the conventional just war account is correct and that wartime killing *is* morally exceptional.

b. Military institutional action

A key element that McMahan overlooks in relation to the moral exceptionalism of combatants fighting in war is an appreciation of the military's purpose as a state-sanctioned social institution. McMahan uses Christopher Kutz's argument to attack a "collectivist approach" to morally justifying killing in war.⁶⁵⁴ According to Kutz's collectivist view, says McMahan, a combatant does not act in war as a private

⁶⁵² "Self-Defence and Just War," 67.

⁶⁵³ McMahan, "The Basis of Moral Liability to Defensive Killing," 393.

⁶⁵⁴ McMahan describes Christopher Kutz's work as "the most careful development of the collectivist approach of which I am aware." *Killing in War*, 81.

individual but as an agent of the collective of which he is a member. The morality of his action is derived from his relation to the collective and cannot be understood in isolation from it.⁶⁵⁵ Kutz's collectivist approach says that in the context of war, violence that would otherwise be morally impermissible can become permissible in a special way by virtue of its collective political character. He states that,

the fact that my nation is at war, not me, does not absolve me of responsibility towards my enemy, but it does create a normatively distinct relation between us, one structured through a set of rules specific to our interrelationship as individual members of warring nations.⁶⁵⁶

Kutz claims that "when individuals' wills are linked together in politics, this affects the normative valence of what they do individually as part of that politics, even to the point of rendering impugnable what would otherwise be criminal."⁶⁵⁷ According to Kutz, this type of collective action can allow limited scope for a political permission to do violence as a member of one group towards another.⁶⁵⁸

McMahan lists three problems with Kutz's collective approach to moral exceptionalism in war. First, McMahan argues that Kutz's collective approach leads to the conclusion that the same act can be both morally impermissible and politically permissible.⁶⁵⁹ Second, McMahan argues that Kutz's collective view does not successfully distinguish how it is that by acting collectively for political goals, people can shed the moral constraints that ordinarily bind them when they act merely as individuals.⁶⁶⁰ Third, McMahan questions why the collective approach does not conclude that political leaders, who, like military combatants, are agents of a political collective, are also released from their moral responsibility for their contribution to fighting an unjust war.⁶⁶¹ Consequently, McMahan argues that a collectivist approach is

⁶⁵⁵ "Collectivist Defenses of the Moral Equality of Combatants," 51.

⁶⁵⁶ Kutz, 173.

⁶⁵⁷ McMahan, "Collectivist Defenses of the Moral Equality of Combatants," 52; Kutz, 156.

⁶⁵⁸ 173.

⁶⁵⁹ McMahan, *Killing in War*, 81.

⁶⁶⁰ *Ibid.*, 82.

⁶⁶¹ *Ibid.*, 83.

insufficient on its own to morally justify killing in war and must appeal to epistemic limitation.⁶⁶² That is, McMahan believes that the conditions of war change nothing at all; they simply make it more difficult to ascertain relevant facts.⁶⁶³ For McMahan, the overall collectivist argument says that for people to organize themselves politically and act collectively, it is necessary for them to surrender their moral agency to higher authorities. Therefore, the collectivist concludes that there is a strong presumption for the permissibility – indeed the necessity – of obedience, he suggests.⁶⁶⁴ McMahan then argues that for the collectivist, this presumption can only be defeated when it is certain that a war in which one has been commanded to fight is unjust. But the presumption in favour of obedience stands when there is uncertainty. And there is normally some uncertainty about whether an armed conflict is just or unjust, he suggests.⁶⁶⁵

But Kutz does not equal all collectivist approaches and collectivism does not equal institutional teleological accounts. An institutionalist approach to the moral exceptionalism in war provides a more plausible alternative to the collectivism described by McMahan. McMahan reasons that a presumption in favour of obedience fails as a moral justification. This, he suggests, is because where there are conflicts between duties that derive from institutional roles and duties that have other sources, there can be no *a priori* guarantee that the institutional duties will be overriding.⁶⁶⁶ The relevant question here, according to McMahan, is whether a soldier's role-based duty to obey an order to fight in a war that is objectively unjust overrides the duties that his participation in the war would require him to violate.⁶⁶⁷ But Seumas Miller's institutional account acknowledges that basic human rights are logically prior to social institutions. And these basic human rights, he suggests, provide the collective end for

⁶⁶² "Collectivist Defenses of the Moral Equality of Combatants," 55.

⁶⁶³ McMahan, 47.

⁶⁶⁴ McMahan, "Collectivist Defenses of the Moral Equality of Combatants," 55.

⁶⁶⁵ *Ibid.*

⁶⁶⁶ *Killing in War*, 72.

social institutions such as the police and military.⁶⁶⁸ Miller argues that social institutions are necessary for human living because they produce essential collective goods. That is, fundamental goods available to the whole community such as clean drinking water and foodstuffs, electricity, education, health, safety and security. These common goods would not be adequately available without group cooperation.⁶⁶⁹ If these social institutions fail, suggests Miller, the consequence would be great harm to the society as a whole. This means there is a *collective moral responsibility* to ensure that social institutions are producing the appropriate common goods.⁶⁷⁰ Miller argues that this collective moral responsibility means that professional obligations are moral obligations because their expertise plays a key role in the success of such social institutions. And he argues that this is not adequately encompassed by an individualist approach to morality.⁶⁷¹ McMahan concedes that this form of argument “has wide application and in many of its applications it is obviously right” because “the failure to fulfill the duties of one’s institutional role can impair the functioning of the institution.”⁶⁷²

Importantly, the institutionalist approach to the moral exceptionalism in war addresses a number of the problems with collectivism. First, the institutionalist claims to morally judge collective actions in *individualist* rather than *collectivist* terms. Miller’s institutionalist theory of social action, for example, claims that joint actions consist of the individual actions of a number of agents directed to the realisation of a collective end. This is an end possessed by each of the individuals involved in the joint action, he suggests, but it is not realised by the action of any one individual. Hence, joint actions can be analysed in individualist (rather than collectivist) terms.⁶⁷³

⁶⁶⁷ Ibid.

⁶⁶⁸ Miller, *The Moral Foundations of Social Institutions: A Philosophical Study*, 57.

⁶⁶⁹ Ibid.

⁶⁷⁰ Ibid., 67.

⁶⁷¹ Ibid., 80.

⁶⁷² McMahan, *Killing in War*, 72.

⁶⁷³ Miller, *Social Action: A Teleological Account*, 24; "Intentions, Ends and Joint Action," *Philosophical Papers* 24, no. 1 (1995).

Furthermore, Miller argues that his individualist account does not reduce morality to simply a social construction. The fact that social forms have a moral dimension is at least in part explained by the fact that human beings start with moral instincts and intuitions, he suggests.⁶⁷⁴ According to Miller, social institutions are constituted and animated by human beings who are intrinsically moral agents. So while social institutions play a fundamentally important role, they are not simply a social construction.⁶⁷⁵ Hence, soldiers are not treated as mere instruments in the institutionalist account and, consequently, the moral agency of soldiers remains intact.

Second, the institutionalist account does not rely on the domestic analogy to morally justify the military's use of lethal force in war. Walzer uses the domestic analogy to build his theory of just war, which says that states possess a right of self-defence in an analogous way to individuals. Therefore, according to Walzer, international aggression is a criminal act equivalent to armed robbery or murder.⁶⁷⁶ But David Rodin argues that Walzer's domestic analogy is flawed by attacking the notion that states have a right of national-defence. The right of national-defence, he explains, says that a state is permitted to use military force to protect the lives of its citizens being threatened by an aggressor.⁶⁷⁷ But Rodin uses the example of a "bloodless invasion" to demonstrate that "defending the lives of citizens is not a necessary condition for national-defence."⁶⁷⁸ According to Rodin, the argument from bloodless invasion says that the right of national-defence still applies to acts of aggression that do not threaten the lives of the citizens of the victim state. For example, he suggests, the aggressor might make its move with such an overwhelming show of force that the victim state

⁶⁷⁴ *Social Action: A Teleological Account*, 14.

⁶⁷⁵ *Ibid.*

⁶⁷⁶ Walzer, *Just and Unjust Wars: A Moral Argument with Historical Illustrations*, 58.

⁶⁷⁷ Rodin, 132.

⁶⁷⁸ *Ibid.*, 131.

chooses not to resist and an invasion is accomplished with no loss of life.⁶⁷⁹ But the institutionalist account avoids this problem because it does *not* treat collectives as moral agents. Again, it relies on the notion of joint action, which involves “two or more agents performing individual action in the service of a shared end.”⁶⁸⁰ The individual lives of the victim state’s citizens do not need to be directly threatened in order to justify the use of military force against an aggressor state.

Third, the institutionalist account encourages soldiers to reflect on the moral purpose of the military as a social institution without undermining its efficient functioning. McMahan points out that institutions such as the military need to function efficiently so that people act in coordinated ways in the service of morally important ends. Military institutions have to be able to react quickly in moments of crisis and so those lower down in the chain of command must obey orders immediately and without hesitating.⁶⁸¹ But McMahan argues that a soldier’s duty to maintain the efficient functioning of the military is generated only within military institutions that are just. There can be no moral requirement to fulfill the functions of the soldier’s institutional role, he suggests, when they are required to violate other significant moral duties.⁶⁸² In particular, McMahan argues that soldiers should not obey a military institution that does not itself serve moral purposes and especially not if it serves immoral purposes. For example, the Nazi military was incapable of imposing moral duties on those who occupied roles within it, he suggests.⁶⁸³ This is correct. But the institutionalist account addresses this problem by focusing on the moral ends of the military as a social institution. Significant institutional deviation from the proper teleology of the military is grounds for military disobedience (which I discuss in more detail below in 6.3).

⁶⁷⁹ Ibid., 132.

⁶⁸⁰ Miller, *Social Action: A Teleological Account*, 5.

⁶⁸¹ McMahan, *Killing in War*, 71.

⁶⁸² Ibid., 73.

⁶⁸³ Ibid.

In short, the individualist account of just war theory does not defeat the institutionalist account.

c. The teleology of military institutions

Having demonstrated that an institutionalist approach to collective action is a plausible alternative to either the individualist or collectivist accounts, I now examine some ways to understand the teleology of the military as a social institution. When I refer to the teleology of the military, I simply mean the institutional purpose or ends for which it exists. One approach to understanding the institutional purpose of the military is to argue that it is the instrument of government for doing harm. That is, the purpose of the military is, as onetime U.S. presidential hopeful Mike Huckabee described it, to “kill people and break things.”⁶⁸⁴ This might be termed the *doing harm* approach to understanding the purpose of the military. Rupert Smith, a former NATO General, argues that military force does not have an absolute utility, other than its basic purposes of killing and destroying. When military force is employed, he suggests, it has only two immediate effects: it kills people and destroys things.⁶⁸⁵

But a purpose that *only* focuses on killing and destroying confuses the unique means of the military with its institutional purpose. For example, Smith goes on to argue that the *true* measure for the utility of military force is whether or not the death and destruction it causes serves to achieve an intended political effect. He argues that lack of coherence in purpose (or between purpose and force) is a major reason for the failure of using force.⁶⁸⁶ According to Smith, every military force is constructed with a

⁶⁸⁴ Janell Ross, "Mike Huckabee Says the Military's Job Is to 'Kill People and Break Things.' Well, Not Quite.," *The Washington Post*, <https://www.washingtonpost.com/news/the-fix/wp/2015/08/07/huckabee-says-the-militarys-job-is-to-kill-people-and-break-things-well-not-quite/>.

⁶⁸⁵ Rupert Smith, *The Utility of Force: The Art of War in the Modern World* (Penguin Books Limited, 2006), 18.

⁶⁸⁶ According to Smith, “In order to apply military force with utility requires: a) an understanding of the context in which one is acting; b) a clear definition of the result to be achieved; c) an identification of the

political purpose, which is normally outlined in security policy, defence strategy and military doctrine. In conjunction with certain amounts of troops and materiel of specific qualifications, he suggests that this shared political purpose creates a coherent military force.⁶⁸⁷ Smith holds that we need a military force as a basic element of our lives for two generic overarching purposes: defence and security. In other words, he suggests we need a professional military institution to defend our homes and ourselves, and to secure our interests.⁶⁸⁸

But it is muddled thinking to argue that the *telos* of the military is both to destroy *and* to create a political effect. Even in war, the military's destructive capabilities should always be subservient to its political purpose. For example, the Allies' overarching political goal at the Battle of Buna in Papua New Guinea (described in 1.2) was to defend their political communities (and their citizens) from Japan's military aggression. In order to achieve this political objective, it was necessary for the Allied forces to destroy Japan's military and kill its soldiers in battle. The unique destructive means employed by the Allied military forces included military tanks, automatic rifles, grenade launchers and so on. In this case, the Allied military's purpose was to achieve a particular political effect and its capability to "kill people and break things" was a means unique to the military. If the Allied forces could have achieved their political goal without killing Japan's soldiers (e.g. perhaps through a negotiated agreement with Japan's political leaders), then we would *not* conclude that the military had failed to achieve its purpose. As long as the political goal is achieved, the just war criterion of last resort says that it is better when the military does not kill and destroy. Additionally, such an outcome is also better from the strategic perspective because warfare uses up valuable resources and creates unpredictable effects. But the same is *not* true if the

point or target to which the force is being applied; and d) an understanding of the nature of the force being applied." Ibid., 6.

⁶⁸⁷ Ibid., 19.

Allies were successful in destroying Japan's military and killing its soldiers but then failed to achieve the political goal. The military's capability to kill and destroy is not a purpose in itself. It is rather a necessary means to a political end. So it is *not* true to say that the purpose of the military is doing harm.

Another approach to describing the teleology of the military might be described as the *warfighting* approach. This is the view that the purpose of the military is to deter, fight and win wars. Andrew Bacevich, for example, says that military forces exist to win wars.⁶⁸⁹ His goal is to focus military institutions explicitly on national defence and jettison the concept of national security as a justification for using military force.⁶⁹⁰ Samuel Huntington argues that the military professional should be isolated from politics in order to focus on warfighting. That is, he suggests that military policy should be designed to defeat efforts to weaken or destroy the nation by armed forces operating from outside its territorial confines.⁶⁹¹ Eliot Cohen describes this approach as the "normal" theory of civil-military relations, which entails civilian deference to military expertise in warfighting.⁶⁹² But, as seen in Chapter 4 (in 4.4), the military serves other important purposes besides fighting wars. The military are frequently required to engage in operations that encompass a wide-range of tasks, including peacekeeping, supporting civil authorities, counter-terrorism, protection of humanitarian operations, enforcement of sanctions and so on and so forth. The military institution also plays key peacetime roles. For example, Defence Attaches are often part of diplomatic staffs where they are sent to all parts of the world to play an important role in statecraft. In

⁶⁸⁸ *Ibid.*, 9.

⁶⁸⁹ Andrew J. Bacevich, "The Us Military Does Everything – except Win Wars," *The Spectator*, <http://www.spectator.co.uk/2014/10/the-us-military-should-be-winning-wars-not-fighting-ebola/>.

⁶⁹⁰ *The New American Militarism: How Americans Are Seduced by War*, 213.

⁶⁹¹ Samuel P. Huntington, *The Soldier and the State: The Theory and Politics of Civil-Military Relations* (Belknap Press, 1981), 1.

⁶⁹² E.A. Cohen, *Supreme Command: Soldiers, Statesmen, and Leadership in Wartime* (Free Press, 2002), 4.

such positions, their purpose is international military engagement rather than being involved in warfare.

Furthermore, a focus on warfighting can be problematic for civilian decision-makers if it leads them to adopt a more militaristic mindset. A readiness for armed conflict can be difficult to distinguish from an ingrained preference to choose fighting over other more restrained options. Consider, for example, the way in which Japan became increasingly militarily aggressive as the military elite gradually took political control in the period leading up to its involvement in World War II. According to Richard Storry, the dominant theme of the 1930s in Japan was growing militarism; the ever-increasing assertiveness and power of the military.⁶⁹³ After Japan's democracy had collapsed, Jack Snyder suggests that its policy was dominated by military cartels, whose disdain for restraint led to "open-ended expansion in pursuit of the chimerical goal of autarky"⁶⁹⁴ and "Japanese militarists consciously and systematically skewed their analysis to support their preference for aggression."⁶⁹⁵

It might be argued, however, that the main purpose of the military is to fight wars and simply "make do" for everything else. For example, Christopher Dandeker and James Gow note that many armed forces hold the view that it makes sense to focus primarily on high-intensity warfighting and then "train down" to cater for the needs of operations in which a more restrained use of force is appropriate.⁶⁹⁶ But there are a number of problems with such a "make do" approach. First, the military's training is more likely to be of the wrong type. Adam Henschke and Nicholas Evans demonstrate that the methods for training soldiers in warfighting are not always suitable for non-

⁶⁹³ Richard Storry, *Japan and the Decline of the West in Asia, 1894-1943* (New York: St Martin's Press, 1979), 140.

⁶⁹⁴ J. Snyder, *Myths of Empire: Domestic Politics and International Ambition* (Cornell University Press, 2013), 112.

⁶⁹⁵ *Ibid.*, 127.

⁶⁹⁶ Christopher Dandeker and James Gow, "Military Culture and Strategic Peacekeeping," *Small Wars & Insurgencies* 10, no. 2 (1999): 58.

conventional military tasks such as peacekeeping, international policing and disaster relief.⁶⁹⁷ Henschke and Evans suggest that warfighting training requires the military to develop skills in killing enemy combatants and destroying the tools and infrastructure necessary for the enemy combatants to pursue their acts of aggression. In comparison, peacekeeping training requires the military to focus on developing skills in capacity-building, political stabilisation and conflict resolution.⁶⁹⁸

Second, it is not simply a problem of the training that soldiers receive but also equipping them for the task. Committing to a particular institutional purpose has major cost implications, and equipping for effective warfighting is expensive. Moreover, submarines and cruise missiles cannot be used for peacekeeping or disaster relief. These decisions have serious implications for a military's major capital assets (i.e. tanks, ships, submarines, fighter jets and so on). Acquisition of major capital assets is an especially slow process and, in some cases, requires decisions decades in advance. Once such military capabilities are lost, they take a long time to get back.

A third problem with the "make do" argument is that it can end up wasting significant national resources. Permanent professional military forces are expensive to maintain. Being unclear about the military's strategic and moral purposes undermines national fiscal discipline. Finally, a "make do" approach to the military increases the likelihood of using military force injudiciously. Recent history demonstrates the way in which the poorly conceived uses of military force have created a range of serious problems, including loss of international power and prestige, ongoing domestic criticism and erosion of public trust, the undermining of military morale and so on and so forth.

⁶⁹⁷ Adam Henschke and Nicholas G. Evans, "Winning Well by Fighting Well: Probability of Success and the Relations between War's Ends and Warfighter's Roles," *International Journal of Applied Philosophy* 26, no. 2 (2013): 158.

⁶⁹⁸ *Ibid.*, 157.

A third approach for understanding the teleology of the military is the view that it carries out the state's responsibility for defending the "common life" of a political community from external aggression. This is the conventional just war view, and so I refer to it here as the *conventional* approach. The conventional approach is based on Walzer's theory of interstate aggression. State aggression, Walzer says, threatens international society directly and, unlike domestic crime, there is no independent law enforcement to police it. Instead, the member states of international society must rely on themselves and on one another.⁶⁹⁹ The rights of the member states must be vindicated, concludes Walzer, because it is only by virtue of those rights that there is a society at all. Someone must be held responsible for breaking the peace of the society of states.⁷⁰⁰ Walzer approvingly cites the strategist Liddell Hart, who says "The object in war is a better state of peace."⁷⁰¹ That is, according to Walzer, when a political community resorts to armed military force it should do so in order to become less vulnerable to territorial threats, safer for jurisdictional inhabitants and more politically independent in its self-determinations.⁷⁰²

But Walzerians have a difficult time explaining how a political community has a right to defend its "common life" against aggression in a manner that justifies the use of military power. As I explained above, David Rodin has recently undermined the conventional approach by attacking the commonly accepted notion that states have a right of national-defence.⁷⁰³ Furthermore, Walzer's conventional approach is criticised for being underpinned by a communitarian view of international ethics. Joshua Cohen argues that Walzer's view is communitarian because he is saying that membership in communities is an important good and that the primary subjects of values are particular

⁶⁹⁹ Walzer, *Just and Unjust Wars: A Moral Argument with Historical Illustrations*, 61.

⁷⁰⁰ *Ibid.*, 59.

⁷⁰¹ B.H. Liddell Hart, *Strategy* (New York, N.Y.: Meridian, 1991), 338.

⁷⁰² Walzer, *Just and Unjust Wars: A Moral Argument with Historical Illustrations*, 121.

⁷⁰³ Rodin, 132.

historical communities.⁷⁰⁴ In other words, communitarianism relies on the notion that the state is the primary form of political community and its physical borders are the legitimate boundaries of justice and moral obligation. But advocates of a more cosmopolitanism approach to international ethics have criticised the communitarianism of Walzer's view. Charles Beitz argues that this approach to international ethics involves a philosophically unacceptable and empirically misleading conception of the state. He suggests that it is philosophically unacceptable because it holds that the state's moral character is unaffected by domestic injustice. And he believes it is empirically misleading because it treats the state as an enclosed sphere in which processes of change proceed with little outside influence.⁷⁰⁵ From this cosmopolitan perspective, the disproportionate concern of states to protect their own citizens, to the exclusion of the security needs of outsiders, is unjust and unnecessary.

Such criticisms have led a number of authors to reconceptualise the teleology of the military in more cosmopolitan terms. I refer to this fourth approach for understanding the moral purpose of the military as the *peacekeeping* approach. This suggests that the purpose of the military is to preserve a just peace and protect human rights. May, for example, suggests that the use of military force is sometimes necessary to "restore human rights protection and peace in a region of the world."⁷⁰⁶ And Brown says that striving for a just peace might be a more useful end for justifying war since it assumes that people have a right to live together in communities founded upon peace and justice. He says that if peace and justice are the norm, then acts that violently

⁷⁰⁴ Joshua Cohen, "Spheres of Justice by Michael Walzer," *The Journal of Philosophy* 83, no. 8 (1986): 457.

⁷⁰⁵ Beitz, 416.

⁷⁰⁶ May states that "In general, I wish to indicate why there is a problem about war over the centuries, namely, that war is strongly condemned but also seen as allowed, or at least excusable, in some few cases. Indeed, in those few cases, such as when a State uses military force in self-defense or defense of others, these wars are not only justified but may even be required." Larry May, *Aggression and Crimes against Peace* (Cambridge University Press, 2008), 5-6.

disrupt them must be addressed. Therefore, Brown concludes that the use of military power is morally justified when it seeks to preserve peace and justice.⁷⁰⁷

Mary Kaldor's suggestion then is that peacekeeping should be reconceptualised as cosmopolitan law enforcement. She argues that armed conflict is now a mixture of war, crime and human rights violations, and so this means that the agents of cosmopolitan law enforcement have to be a mixture of soldiers and police.⁷⁰⁸ An example of this peacekeeping approach is demonstrated by the way in which New Zealand has treated the development of its military. According to David McCraw, the New Zealand Government restructured the military to facilitate peacekeeping rather than conventional warfighting. This, he suggests, led to the combat arm of the Air Force being abolished and the Navy's combat capability limited, while emphasis was put on re-equipping the Army.⁷⁰⁹

The peacekeeping approach to the use of military force has a greater concern with the humanitarian rights of people outside the jurisdiction of a given political community. That is, it puts more of an emphasis on armed humanitarian intervention than does the conventional approach. Deen Chatterjee and Don Scheid suggest that, with the end of the Cold War, humanitarian-motivated military interventions have increased in number as intrastate conflicts have become more frequent and interest in the idea of human rights has become more extensive.⁷¹⁰ According to Chatterjee and Scheid, armed humanitarian intervention refers to the coercive action of one party – usually a state, coalition of states or the United Nations – in the political affairs of another party for a humanitarian purpose. They suggest that this type of military force is primarily motivated by a concern to “rescue and protect people in a foreign territory

⁷⁰⁷ Brown, 104.

⁷⁰⁸ Mary Kaldor, *New and Old Wars: Organised Violence in a Global Era* (Cambridge, UK: Polity Press, 2012), 12.

⁷⁰⁹ McCraw, 98.

from gross violations of their basic human rights” rather than for national self-defence or “out of any interest in political domination, territorial acquisition, or the like.”⁷¹¹ Lorraine Elliott and Graeme Cheeseman suggest that the cosmopolitan argument for armed humanitarian intervention rests on the claim that “individuals are bound together in humanity as a single moral community which, in constituting a ‘community of fate,’ provides the basis for relations of obligation among them.”⁷¹² This view gives particular emphasis to the inherent worth of being human. In other words, according to Onora O’Neill, “all human beings have equal moral standing.”⁷¹³ In contrast, she argues that a communitarian view is less likely to favour armed humanitarian intervention because moral duties are owed “only or mainly to others in the same community, which they define in terms of descent, culture or common citizenship.”⁷¹⁴

Brown acknowledges the contribution of prominent cosmopolitan theorists, such as Charles Beitz, in widening the systematic moral debate to include a cosmopolitan dimension. But then he argues that Beitz makes the mistake of largely dismissing non-cosmopolitan perspectives in advance, only allowing them to make the occasional observation about practicality.⁷¹⁵ Walzer also responds to his cosmopolitan critics by arguing that the political community with its government (i.e. the state) is still the critical arena of political life. And he suggests that we should not attempt to transcend this reality with cosmopolitan perspectives.⁷¹⁶ Walzer’s first reason for not attempting to transcend the important role played by the state is prudential. He says that,

⁷¹⁰ Deen Chatterjee and Don Scheid, *Ethics and Foreign Intervention* (Cambridge, UK: Cambridge University Press, 2003), 4.

⁷¹¹ *Ibid.*, 1.

⁷¹² Lorraine Elliott and Graeme Cheeseman, "Cosmopolitan Theory, Militaries and the Deployment of Force," *International Relations* (Canberra: The Australian National University, 2002), 7.

⁷¹³ Onora O’Neill, *Bounds of Justice* (Cambridge, UK: Cambridge University Press, 2000), 190.

⁷¹⁴ *Ibid.*, 187.

⁷¹⁵ Chris Brown, "The House That Chuck Built: Twenty-Five Years of Reading Charles Beitz'," *Review of International Studies* 31 (2005): 379.

⁷¹⁶ Michael Walzer, "The Moral Standing of States: A Response to Four Critics," *Philosophy & Public Affairs* 9, no. 3 (1980): 227.

if the outcome of political processes in particular communal arenas is often brutal, then it ought to be assumed that outcomes in the global arena will often be brutal too. And this will be a far more effective and therefore a far more dangerous brutality, for there will be no place left for political refuge and no examples left of political alternatives.⁷¹⁷

Walzer's second reason is concerned with the importance of political life in a community. He argues that "politics" depend upon shared history, communal sentiment, accepted conventions and some extended version of Aristotle's "friendship." According to Walzer, communal life and liberty require the existence of "relatively self-enclosed arenas of political development" that should be protected. He believes that interfering with or destroying such communities causes individual members to lose something valuable to which they have a right (unless it rescues them from massacre, enslavement or expulsion).⁷¹⁸ This loss, suggests Walzer, is their participation in the "development" that can only go on within the enclosure. Against foreigners, he believes that individuals have a right to a state of their own whereas against state officials, they have a right to political and civil liberty.⁷¹⁹

It would be wrong to conclude that political communities themselves are somehow intrinsically bad for the rights of individuals. Participation in community is crucial to the development of virtue in many instances. It is through the experience of social relationships within a political community, for instance, that we learn about important moral values such as altruism. Thomas Nagel argues that politics addresses itself to people both as occupants of the impersonal standpoint *and* as occupants of particular roles within an impersonally acceptable system. This is not capitulation to human badness or weakness, he suggests, but rather a necessary acknowledgement of human complexity.⁷²⁰ Furthermore, the mostly likely means for delivering armed humanitarian intervention is from the political communities with a monopoly on the use

⁷¹⁷ Ibid., 228.

⁷¹⁸ Ibid.

⁷¹⁹ Ibid.

⁷²⁰ Nagel, *Equality and Partiality*, 30.

of military force – national militaries, coalitions of states or the United Nations Security Council (UNSC) – who are driven by mostly communitarian concerns. States will maintain their monopoly on the effective use of military force for some time yet. The monopolisation of military force by states is a morally and legally deeply ingrained characteristic of the international system. And the military capability of states remains unrivalled, especially by the more powerful states.

In sum, it is insufficient to describe the military's purpose as doing harm or fighting wars. Walzer's conception of the military concludes that it carries out a state's responsibility for defending the "common life" of a political community from external aggression. But his cosmopolitan critics extend the focus of the military's role beyond the state to focus on protecting human rights more broadly.

6.3 The Military Paradigm

a. The morally responsible state

What are we then to conclude about the teleology of the military? We should conclude that the morally responsible state uses military force to defend the "common good." Amitai Etzioni describes the common good (or the public interest) as those goods that we share and serve all of us, such as a healthy environment or national security.⁷²¹ Etzioni makes the point that no society can flourish without some shared formulation of the common good. He suggests that this is because it provides criteria upon which to draw when the interests and values of differing groups within a society diverge, and it also provides a rationale for individuals to make sacrifices.⁷²² Thomas Aquinas suggests that the business of soldiering is directed to the protection (*tuitionem*) of the entire common good (whereas other matters in the state are directed to the profit

⁷²¹ Amitai Etzioni, *The Common Good* (Cambridge, UK: Polity Press, 2004), 1.

of individuals).⁷²³ Aquinas argues that it is a sovereign's "business to watch over the common weal of the city, kingdom or province subject to them" and so they should "rescue the poor: and deliver the needy out of the hand of the sinner."⁷²⁴ In order to defend the common good, Aquinas suggests that it is sometimes necessary to resist evil using military force and bring the enemy to the prosperity of peace.⁷²⁵ David Luban puts this in more specific terms when he argues that military force is just when it is fought in defence of socially basic human rights (subject to proportionality) or in self-defence against an unjust armed attack.⁷²⁶

The common good in question here is the peaceful functioning of a legitimate political community. In the modern world, this means the state. As I explained in Chapter 1, the state has a duty to protect its jurisdictional inhabitants and citizens from threats, and this is the moral foundation for state-sanctioned acts of force. This means the state is responsible for maintaining peaceful relations between its jurisdictional inhabitants and for its peaceful relations with other states. Military force is necessary to ensure that the peaceful functioning of states (i.e. legitimate political communities) is not vulnerable to armed threats or other forms of political violence. The notion that the purpose of the military is to defend the common good *in this way* then consists of three key elements. A state military's primary obligation in defending the common good is protection of the political community it serves from external state aggression. For military actors, this certainly includes fighting wars against the type of external state aggression described by Walzer. Responding to serious military attacks is the *first element*.

⁷²² Ibid., 2.

⁷²³ Aquinas, "Just War and Sins against Peace," 187.

⁷²⁴ Ibid., 177.

⁷²⁵ Ibid., 178.

⁷²⁶ Luban, "Just War and Human Rights," 175.

The *second element* is the military force that is sometimes required to defend the political community from a wide-range of threats and in a variety of situations short of war. I suggested (in 4.4) that the last twenty years or so have witnessed increasing use of the military for purposes other than fighting conventional wars. This increasing use of military capabilities outside of war is partly attributable to the heightened attention to the threat from international terrorism. But it is also partly due to the recognition that the military can perform a variety of political functions in peacetime. The point here was that military force is *not only* a last resort measure used to fight wars. Military force might also be morally justified short-of-war in order to defend socially basic human rights or in self-defence against an unjust attack.

The *third element* is based upon the notion that a state has moral responsibilities to the common good outside defending its own political community. In particular, a state has some moral obligation to use military force to protect the lives of vulnerable outsiders. Again, in Chapter 4, I argued that this is, in part, a result of the norm of humanitarian intervention, which emerged in the 1990s. For example, Kofi Annan highlighted the tragedy of East Timor in 1999 as demonstrating the need for timely intervention by the international community when death and suffering are being inflicted upon a people and the state nominally in charge is unable or unwilling to stop it.⁷²⁷ Tom Frame describes the way in which the Australian-led armed humanitarian intervention in East Timor reinforced the value of foreign military protection when it successfully rescued the East Timorese people from suffering and intimidation. This intervention, he suggests, “provided a model for restoring the political, legal and social conditions in which human rights are respected and security and order can be re-

⁷²⁷ Kofi Annan, "Toward a New Definition of Sovereignty," in *The Ethics of War: Classic and Contemporary Readings*, ed. Gregory Reichberg, Henrik Syse, and Endre Begby (Oxford, UK: Blackwell Publishing, 2006), 685.

established.”⁷²⁸ Elliott and Cheeseman suggest that military forces deployed for cosmopolitan purposes are expected to perform a range of tasks outside their traditional role and which make the rules of engagement more complex. These tasks might include protection of safety zones and humanitarian workers, managing the movement of refugees and displaced persons, disarming militias, helping to restore civil society, providing humanitarian assistance or being the security guarantors for the process of civil reconciliation and reconstruction.⁷²⁹

A difficulty in justly using military force to defend the common good, as described above, is finding an appropriate balance between a state’s moral obligations to insiders and outsiders. But the communitarian concerns of states, and their militaries, are not inevitably incompatible with humanitarian action. Andrew Linklater argues that the tension between the obligations of citizenship and the obligations of humanity is an exemplar for the conflict between particularist and universalist approaches to moral thought.⁷³⁰ Universalism does not entail the demise of the inner circles of obligations within the state, but he suggests that it does imply that the “inner sanctum” must be available for the scrutiny of outsiders if it has any impact at all upon their equal right to promote their own ends.⁷³¹ According to Elliot and Cheeseman, the point of cosmopolitanism is that persons are the ultimate unit of moral concern for everyone, and so there is no intrinsic significance to be ascribed to states or to co-nationals. But they agree that cosmopolitan ideas do not then assume that “local attachments and particular loyalties” are replaceable or morally unimportant.⁷³²

⁷²⁸ Tom Frame, *Living by the Sword? The Ethics of Armed Intervention* (Sydney: University of New South Wales Press, 2004), 19.

⁷²⁹ L. M. Elliott and G. Cheeseman, *Forces for Good: Cosmopolitan Militaries in the Twenty-First Century* (Manchester, UK: Manchester University Press, 2004), 4.

⁷³⁰ Andrew Linklater, "The Problem of Community in International Relations," *Alternatives: Global, Local, Political* 15, no. 2 (1990): 140.

⁷³¹ *Ibid.*, 142.

⁷³² Elliott and Cheeseman, 19.

Any attempt to balance a state's moral obligations to both insiders and outsiders also faces a number of practical problems. Finite resources – including time, money and awareness – cannot hope to meet the limitless humanitarian needs in the world. The cosmopolitan impulse to help outsiders can easily lead to a despairing or cynical view when confronted with the sheer scale of humanitarian need in the world. Although a state has a much greater capacity to help outsiders than any individual, attempts to seriously take obligations to outsiders necessitates some selectivity. Any lack of consistency in humanitarian interventions is open to the charge that they are arbitrary and based upon a political whim.

But acting in some cases is better than acting in no cases at all. At least some victims are saved and some criminals are punished. Pierre Hassner also suggests that it potentially deters others by showing that the norm of non-intervention does not guarantee their impunity.⁷³³ Another problem is that attempting to balance differing moral obligations can create confusion when the motivations and values underlying action are unclear or even contradictory. Brown acknowledges that mixed motives can undermine humanitarian efforts, particularly when they are “accompanied by ethnocentric, racist assumptions.”⁷³⁴ Such moral uncertainty makes decisive action difficult and can be a cause of fragmentation and disagreement. But then Brown argues that it is unreasonable to expect that for an action to count as humanitarian, the motives must be completely “pure.”⁷³⁵ Instead, Brown suggests that,

One of the effects – intended or not – of emphasizing the alleged desirability of non-arbitrary rules is to legitimize a black-and-white account of the moral universe under which actions are either wholly altruistic or wholly selfish – and since states are never wholly altruistic this move is usually the prelude to a denial that altruism can be a factor at all in the conduct of international affairs. Contrary to this absolutism, there is no reason to think that when states

⁷³³ Pierre Hassner, "Violence and Ethics: Beyond the Reason of State Paradigm," in *Ethics and International Affairs: Extent and Limits*, ed. J. Coicaud and D. Warner (Tokyo: United Nations University Press, 2001), 91.

⁷³⁴ Chris Brown, "Humanitarian Intervention and International Political Theory," in *Human Rights and Military Intervention*, ed. A. Moseley and R. Norman (Aldershot: Ashgate Publishing Limited, 2002), 155.

⁷³⁵ *Ibid.*, 154.

act to right a wrong they may not also be motivated by self-interest. Motivation is a complex process and about the only thing that can be said with certainty about it is that there is never simply one single reason why anyone does anything⁷³⁶

In short, the morally responsible state uses its military to defend the common good. That is, the peaceful functioning of a legitimate political community. Military force is necessary to ensure that the peaceful functioning of states (i.e. legitimate political communities) is not vulnerable to armed threats or other forms of political violence.

b. Military combatant's duties

In order to carry out the state's moral responsibility to defend the common good, the military have a number of special moral duties (or role obligations) for using lethal force that do not apply to civilians. These special moral duties are especially clear in warfighting when applied to military combatants on the battlefield. First, military combatants have a moral duty to obey lawful orders. To be effective in battle, the military relies on soldiers habitually responding to orders quickly. Yitzhak Benbaji suggests that for a military system to be morally optimal, states must be able to expect their soldiers to obey commands.⁷³⁷ He suggests that military combatants are *not* acting in their capacity as individuals. Instead, they carry out the actions of the state that they serve.⁷³⁸ According to Ross Bellamy, the Lieber code – published by the U.S. Government in 1863 – emphasised the importance of following orders. He suggests that the pivotal concept in the Lieber code was military necessity, which it defined as

⁷³⁶ "In Defense of Inconsistency," in *Ethics and Foreign Intervention*, ed. J. Coicaud and D. Warner (Cambridge, UK: Cambridge University Press, 2003), 46.

⁷³⁷ Yitzhak Benbaji, "The Moral Power of Soldiers to Undertake the Duty of Obedience*," *Ethics* 122, no. 1 (2011): 59.

⁷³⁸ *Ibid.*, 69.

“those measures which are indispensable for securing the ends of the war, and which are lawful according to the modern law and usages of war.”⁷³⁹

The important exception is when a military order is clearly illegal. Gary Solis says that a manifestly illegal order should *not* be obeyed.⁷⁴⁰ The subordinate, he suggests, should refuse to obey an illegal order and report the incident.⁷⁴¹ In cases where there is any doubt about the wrongfulness of the order, however, Solis suggests it should be presumed to be lawful and the duty to obey holds.⁷⁴² For example, a soldier at the Battle of Buna might have been ordered to shoot Japanese prisoners by his superior officer. In this case, the soldier should disobey the command. But other than disobeying an unlawful order, are there other grounds to refuse military orders?⁷⁴³ Soldiers might refuse to serve a military whose institutional and professional purpose has been substantially corrupted. As Jessica Wolfendale points out, refusal of services on professional grounds is based on a commitment to the moral values of one’s profession. Yet in the literature on refusal of service in the military, this distinction has largely been ignored, she suggests.⁷⁴⁴

George Lucas examines the various views for an alleged duty of dissent as a professional obligation upon all military personnel to withhold their professional service whenever providing such service would implicate them in the commission of unjust or illegal acts. He responds by arguing that this unfairly imposes a duty to dissent on “the most junior, least experienced, and potentially most vulnerable members of a profession

⁷³⁹ Bellamy, 95.

⁷⁴⁰ Gary D. Solis, *The Law of Armed Conflict: International Humanitarian Law in War* (Cambridge, UK: Cambridge University Press, 2010), 359.

⁷⁴¹ *Ibid.*, 361.

⁷⁴² *Ibid.*, 359.

⁷⁴³ The following edited collections addressed the question of dissent in the military. David Whetham and Don Carrick, “Saying No’: Command Responsibility and the Ethics of Selective Conscientious Objection,” *Journal of Military Ethics* 8, no. 2 (2009); Andrea Ellner, Paul Robinson, and David Whetham, *When Soldiers Say No: Selective Conscientious Objection in the Modern Military* (Surrey, UK: Ashgate Publishing Limited, 2014).

⁷⁴⁴ Jessica Wolfendale, “Professional Integrity and Disobedience in the Military,” *Journal of Military Ethics* 8, no. 2 (2009): 128.

under such contested circumstances.”⁷⁴⁵ This is true if we demand that the individual soldier must make such a moral calculation for every action or deployment. Soldiers are not given that type of discretion.

But the corruption of the purpose of a military institution is a different story. David Estlund, for example, argues that soldiers have a duty to follow orders but that this depends on the background conditions in the political system that produced that order to go to war. That is, he suggests citizens must work to protect or restore or create a free, open and sometimes adversarial epistemic forum of political deliberation.⁷⁴⁶ This explains why, in McMahan’s example, the Nazi military was incapable of imposing moral duties on those who occupied roles within it.⁷⁴⁷

Second, military combatants have a moral duty to accept grave risks and costs. Walzer describes this as the higher duty of soldiers. He says that the “soldier, be he friend or foe, is charged with the protection of the weak and unarmed. It is the very essence and reason of his being . . . [a] sacred trust.”⁷⁴⁸ Walzer argues that because the soldier is equipped with military-grade weapons and “poses a threat to the weak and unarmed” he must take steps to shield them. This leads him to conclude that military combatants “must fight with restraint, accepting risks, mindful of the rights of the innocent.”⁷⁴⁹ Ross McGarry, Gabe Mythen and Sandra Walklate describe the UK’s “military covenant,” which acts as a set of moral and legal guidelines for its army personnel. This covenant, they suggest, formally acknowledges the sacrifices made by soldiers and details the protection, treatment and care they can expect in return for their

⁷⁴⁵ George R. Lucas, "Advice and Dissent: 'The Uniform Perspective'," *ibid.*: 141.

⁷⁴⁶ David Estlund, "On Following Orders in an Unjust War*," *Journal of Political Philosophy* 15, no. 2 (2007): 234.

⁷⁴⁷ McMahan, *Killing in War*, 73.

⁷⁴⁸ Walzer, *Just and Unjust Wars: A Moral Argument with Historical Illustrations*, 317.

⁷⁴⁹ *Ibid.*

duties.⁷⁵⁰ According to McGarry, Mythen and Walklate, the covenant explains the way in which soldiers must forfeit many of their rights, including the right to life, in service to the nation. They explain that it bestows an “unlimited liability” in circumstances where soldiers “represent the national interest in situations where nothing and no one else can” and undoubtedly include death or injury in the service of the state.⁷⁵¹

Although the military covenant expresses well the soldier’s moral duty to accept grave costs and risks, a notion of unlimited liability is false if it means that soldiers are treated as mere instruments in war. For example, the use of Kamikaze pilots by the Japanese armed forces during World War II meant certain death for the airman flying the planes. The moral problem here is that the Japanese pilots are treated as mere instruments of war; the moral equivalent of a missile. There is no acknowledgement of their inherent worth as human beings. The same principle also applies to the recent terrorist use of suicide bombers or the practice of using Zulu warriors to “test” the firepower of British soldiers during the Anglo-Zulu War. In such cases, the inherent worth of the soldier’s humanity is not given appropriate consideration.

Third, military combatants have a moral duty to identify themselves with, and serve, a legitimate political community. Charles Kutz turns to a modification of a tradition inaugurated by Rousseau, who conceived political authority as resting in a special relationship among individuals. When individuals’ wills are linked together in politics, he suggests, this affects the normative valence of what they do individually as part of that politics.⁷⁵² By “political,” Kutz means any forms of social action oriented around state or institutional formation, where power may in some sense be seen to rest at the level of individual voluntary commitment to the shared project. Hence, military

⁷⁵⁰ According to McGarry et al, the military covenant was updated in 2005 and absorbed into one complete volume of military policies known as Army Doctrine Publication: Land Operations. Ross McGarry, Gabe Mythen, and Sandra Walklate, "The Soldier, Human Rights and the Military Covenant: A Permissible State of Exception?," *The International Journal of Human Rights* 16, no. 8 (2012): 1184.

combatants enjoy combat privileges, he suggests, because they enjoy the political status of citizens.⁷⁵³ In other words, military combatants fighting a war on behalf of a legitimate political community act according to *military necessity*.

For example, the Allied forces fighting in Papua New Guinea in World War II were focused on achieving a military outcome: to defeat Japan's military forces in combat by killing or capturing Japan's soldiers. But the long-term goal was political. The Allied forces were fighting a defensive war against Japan's military aggression. The ultimate subjects of their defensive action were the political communities (and their citizens) threatened by Japan's military. And to achieve this political objective, it was necessary for the Allied forces to defeat Japan's military. Consequently, on the battlefield, the Allied soldiers deliberately targeted any person who is positively identified as an enemy combatant. So, unlike the paradigmatic case of killing in self-defence, it is *not* necessary for Japan's soldiers themselves to be a threat in order to be subjected to an Allied attack.

Military necessity is determined by commanders with access to a combination of sources, including classified information about the political context and battlefield intelligence. This means that the moral responsibility for the use of lethal force is drawn upwards in the military paradigm. We shift moral responsibility upwards towards military commanders because they have a better overview of the situation. They have a significant epistemic advantage over individual soldiers when making judgments about military necessity due to the intelligence to which they have access. As a result, individual soldiers have a low-level of discretion when using lethal force on the battlefield. In many cases, they must make the decision to use lethal force with little information about the target.

⁷⁵¹ Ibid., 1185.

⁷⁵² Kutz, 156.

For example, consider the way in which decision-making works on an Australian navy ship when it fires a surface-to-surface missile.⁷⁵⁴ The “decision” is formulated by the Principal Warfare Officer (PWO) then recommended to the Commanding Officer (CO) who will agree or not. The PWO will then order the Fire Control Officer (FCO) – usually a Lieutenant or senior Non-Commissioned Officer (NCO) from the Electrical Engineering, Weapons department – who will launch the missile. There is no “decision” made by the FCO: they merely operate the fire control panel under the orders of the PWO (or otherwise the CO if he/she decides to override the PWO).

In short, the military take on a number of moral duties (or role obligations) in using lethal force that do not apply to civilians. Military combatants have a state-imposed duty to: 1) obey lawful orders; 2) accept grave risks; and 3) identify with, and serve, a legitimate political community.

c. Military combatant’s permissions

Since military combatants fighting a war on behalf of a legitimate political community have this set of moral duties imposed upon them, they consequently have a number of exceptional moral permissions in the pursuit of military objectives. First, military combatants in war are morally permitted to “shoot on sight.” This means that military combatants in war are actively looking to kill enemy combatants whenever the opportunity presents itself on the battlefield. For instance, David Luban argues that the military paradigm offers combatants much freer rein to use lethal force. He suggests that in war, but not in law, it is permissible to use lethal force on enemy troops regardless of their degree of personal involvement with the adversary and “the

⁷⁵³ Ibid.

⁷⁵⁴ Thanks go to former Royal Australian Navy officer Sam Coleman for this example.

conscripted cook is as legitimate a target as the enemy general.”⁷⁵⁵ In comparison, the average person should avoid potentially lethal confrontations, or police officers should go to great lengths to avoid shooting a suspect. For example, I compared (in 1.2) the police shooting of Lovelle Mixon with the warfighting at the Battle of Buna. There was no obligation on the Allied troops to arrest Japanese soldiers or warn them of impending attacks. Killing enemy combatants with either a surprise attack or a well-planned ambush are considered good tactics in battle. Japan’s armed forces were well fortified in Buna, and warning them of Allied attacks would have significantly hampered the Allied advance. Hence, Allied soldiers were permitted to “shoot on sight” Japan’s armed forces regardless of an individual soldier’s capability to harm others or personal culpability for the conflict.

Second, military combatants are morally permitted to use military-grade weapons. The Allied soldiers were participants in a high-intensity conflict where the weaponry used was highly destructive. This weaponry included military rifles, machine-guns, grenades, rocket launchers, tanks, artillery and aerial bombs. Such weapons are designed to maximise the destruction of enemy military capabilities, including the killing of enemy soldiers. So, if a soldier at the Battle of Buna could, by using a grenade launcher, kill a Japanese officer (which creates a tactical advantage in the battle) then he is permitted to do so even if he can foresee that this is likely to injure or kill innocent bystanders. In contrast, we should expect more restraint from police when they are likely to injure or kill bystanders, such as the woman who ran out of the room in the Mixon case. And they certainly could not use a grenade-launcher to “take out” a suspect as standard practice.

Third, military combatants are morally permitted to do serious collateral harm. Luban suggests that in war “collateral damage” (i.e. foreseen but unintended killing of

⁷⁵⁵ Luban, "The War on Terrorism and the End of Human Rights," 9.

non-combatants) is morally permissible. For example, police cannot blow up an apartment building full of people because a murderer is inside, he suggests, but an air force might be permitted to bomb the building if it contains a military target.⁷⁵⁶ The doctrine of double effect plays an important role here. As I pointed out in Chapter 2, Shelly Kagan explains that the doctrine of double effect tells us that it may be morally permissible to perform an act with both a good effect and a bad effect, provided that the bad effect is a mere side effect. If harm is either your goal or a means to your goal, then the act is forbidden.⁷⁵⁷ In war, the crucial distinction for military combatants is that the intended target of an attack is a combatant. For example, it was permissible for Allied forces in World War II to use artillery to attack the village of Buna, knowing that villagers were still present, if the Allies had reliable intelligence confirming that the enemy combatants are an important enough target (a command element for example) to justify non-combatant deaths. But a terrorist bombing is morally impermissible because it intentionally targets non-combatants as a means for creating political pressure.⁷⁵⁸

In sum, the state-imposed duties of military combatants give them exceptional moral permissions for using lethal force in war. These moral permissions include: 1) killing enemy combatants on sight; 2) using military-grade weapons; and 3) doing serious collateral harm.

6.4 *Jus Ad Vim*

a. Walzer's conception

Having outlined the framework for justified killing by military combatants in war, my concern now, in this final section, is to address the moral problem that soldiers face

⁷⁵⁶ Ibid.

⁷⁵⁷ Kagan, 103.

when they are expected to kill in situations short-of-war. In non-standard cases involving armed conflict short-of-war, the military's morally exceptional use of lethal force requires the addition of a hybrid element to the justificatory moral framework outlined so far. I refer to this hybrid element as *jus ad vim*.⁷⁵⁹

Michael Walzer has suggested that a concept such as *jus ad vim* would improve moral judgment of the use of military force short-of-war.⁷⁶⁰ He argues that just war theory should include *jus ad vim* because he believes there is an "urgent need for a theory of just and unjust uses of force outside the conditions of war."⁷⁶¹ Walzer illustrates this point by describing the Iraq containment regime (1991-2003) as an example of the type of effective measures that states can use rather than going to war. Although international law says that embargoes and the enforcement of no-fly zones are judged to be acts of war, he argues that it is common sense to recognise that these measures differ from full-scale warfare.⁷⁶² Walzer suggests that containment should be easier to justify than a full-scale attack. His key moral point is that this type of measure is an exercise of a state's military force that avoids the full destructiveness of war and, as a result, they should *not* be evaluated on equal terms.⁷⁶³ Walzer goes on to argue that for such measures short-of-war to work against evil or dangerous regimes, they should be the common work of a group of nations because "collective security" must be a joint project.⁷⁶⁴ He then links the limits on when *jus ad vim* can be used (and also on the

⁷⁵⁸ C. A. J. Coady, "Terrorism, Just War and Supreme Emergency," in *Terrorism and Justice: Moral Argument in a Threatened World*, ed. C.A.J. Coady and M. O'Keefe (Melbourne: Melbourne University Press, 2002), 9.

⁷⁵⁹ See: Ford, "Jus Ad Vim and the Just Use of Lethal Force-Short-of-War."

⁷⁶⁰ Walzer's description of *jus ad vim*, or the just use of force short-of-war, can be found in the preface to the fourth edition of his book "Just and Unjust wars." *Just and Unjust Wars: A Moral Argument with Historical Illustrations*, xiii-xviii.

⁷⁶¹ *Ibid.*, xv.

⁷⁶² *Ibid.*, xiv.

⁷⁶³ *Ibid.*

⁷⁶⁴ According to Kupchan and Kupchan, "Collective security rests on the notion of all against one. While states retain considerable autonomy over the conduct of their foreign policy, participation in a collective security organization entails a commitment by each member to join a coalition to confront any aggressor with opposing preponderant strength . . . a collective security organization, by institutionalizing the notion of all against one, contributes to the creation of an international setting in which stability emerges

ways in which it can be used) with collective security.⁷⁶⁵ The collective recognition by a set of states of an unrealised but likely threat (such as a potential massacre or act of aggression) and subsequent response to ward off the threat, is a source of appropriate limitations on *jus ad vim* for Walzer. He contrasts this with unilateral uses of lethal force in cases where a state is permitted to intervene to stop actualised aggression or massacre.⁷⁶⁶

What are we to make of Walzer's description of *jus ad vim*? First, Walzer's use of the term "*jus ad vim*" is somewhat confusing. Tony Coady points out that the Iraq containment regime, which Walzer uses as his main example to describe *jus ad vim*, included three important elements: the arms embargo; the UN inspection system; and the no-fly zone. Coady then argues that *only* one of these directly involved the use of actual violence.⁷⁶⁷ So, pace Coady, Walzer appears to use *jus ad vim* in at least two importantly different ways. In the first sense, *jus ad vim* seems to refer to the kind of force usually reserved for war, but due to contingent circumstances, needs to be used outside of the context of war. In the second sense, *jus ad vim* appears to refer to some kind of force that is qualitatively and/or quantitatively different from the kind of force typically used in war. Or to put the confusion in the form of a question, does "force short-of-war" refer to the nature of the act, or does it refer to the nature of the context in which the act is carried out?⁷⁶⁸ Walzer is using *jus ad vim* in the first sense but he has not obviously precluded the second sense. I suspect the second sense is what Walzer means by "measures short-of-war."⁷⁶⁹ This then would be the broad sense of *jus ad vim* that captures all the options short-of-war available to a state in its application of military power. Although discussing the full-range of military measures available to a state is

through cooperation rather than through competition." Charles A. Kupchan and Clifford A. Kupchan, "Concerts, Collective Security, and the Future of Europe," *International Security* 16, no. 1 (1991): 118.

⁷⁶⁵ Walzer, *Just and Unjust Wars: A Moral Argument with Historical Illustrations*, xiv.

⁷⁶⁶ *Ibid.*

⁷⁶⁷ Coady, *Morality and Political Violence*, 88.

certainly a worthy subject, it is not one I tackle here. Instead, I am primarily concerned with Walzer's use of *jus ad vim* in the first sense, which offers moral guidance for the military's actual use of lethal force short-of-war.⁷⁷⁰

The second important point to note about Walzer's notion of force short-of-war is his claim that there is a significant moral distinction between one-off armed altercations (where the harmful effects are localised and limited) and full-scale war. Walzer argues that we approach uses of lethal force in war differently from uses of lethal force short-of-war because of the "moral gulf" between the two types of violent conflict.⁷⁷¹ His point is that a full-scale war, which might involve high-intensity fighting between a number of military forces over a period of years, is significantly morally worse than a localised one-off altercation between two small groups of combatants. As such, he argues that we should recognise a moral difference between them.⁷⁷² Walzer's point here is clear: a large amount of death and destruction is morally worse than a small amount.

Let us consider examples at either end of the spectrum by comparing the fighting that occurred in the Pacific against Japan's military aggression (1941-1945) with the Entebbe Operation (1976) in which an Israeli commando raid in Uganda successfully rescued 102 hostages. The Entebbe incident, as a use of lethal force short-of-war, involved intentional killing.⁷⁷³ But this killing was justified by the need to rescue innocent people who were wrongfully held hostage. The fighting against Japan's aggression in World War II was also justified. But we can still conclude that the war against Japan was "worse" than the Entebbe Operation for three reasons. First, the

⁷⁶⁸ Thanks to Ned Dobos for framing the problem this way.

⁷⁶⁹ Walzer, *Just and Unjust Wars: A Moral Argument with Historical Illustrations*, xiv.

⁷⁷⁰ Note that I use the terms "force short-of-war" and "lethal force short-of-war" interchangeably throughout the rest of this chapter.

⁷⁷¹ Walzer, *Just and Unjust Wars: A Moral Argument with Historical Illustrations*, xiv.

⁷⁷² *Ibid.*

⁷⁷³ Knisbacher.

Entebbe Operation consisted of one instance of low-intensity military conflict whereas the Pacific War consisted of many instances of varying levels of violent conflict. Second, the purpose of the Entebbe Operation was to rescue innocent people and lethal force was targeted at the culpable kidnapers. In contrast, the Pacific War involved killing people of varying levels of culpability, many of whom were innocent casualties. Third, the Pacific War resulted in much more overall harm than was the case in the Entebbe Operation. The Pacific War involved far more death and destruction than the use of military force short-of-war in the Entebbe Operation.

The third important aspect of Walzer's force short-of-war argument is that it weakens the last resort standard for using lethal force. That is, the threshold for permissibly using lethal force is lower in cases of *jus ad vim* than is the case for conventional just war theory. Walzer's immediate concern in writing on *jus ad vim* was to address the question of whether the permissions of just war theory should reach to democratisation and regime change, an issue he believes is closely connected to questions about preventive war.⁷⁷⁴ Walzer argues that while preventive war is normally not justifiable, under certain specific conditions, we might be able to justify preventive force. Preventive war is not justifiable either in standard just war theory or in international law, but what we might think of as "preventive force" can be justified when we are dealing with a brutal regime that has acted aggressively or murderously in the past and gives us reason to think that it might do so again.⁷⁷⁵

The fourth, and final, point to be made about Walzer's *jus ad vim* is that his conception applies the same *jus in bello* criterion of discrimination as in conventional war. This prohibits the intentional killing of non-combatants and, according to Walzer, *jus ad vim* is no different. In both forms of conflict, the use of lethal force should be

⁷⁷⁴ Walzer, *Just and Unjust Wars: A Moral Argument with Historical Illustrations*, xv.

⁷⁷⁵ *Ibid.*

limited in order to protect civilians from being harmed, he suggests.⁷⁷⁶ This view, however, is problematic. If the permissibility for targeting in *jus ad vim* is based on exactly the same *jus in bello* criterion of discrimination used in the conventional military paradigm, then weakening the *jus ad bellum* threshold becomes a risky move. For *jus ad vim* to be a worthwhile addition to the just war tradition, I believe that it should require soldiers to be distinctly more restrained in their use of lethal force than is required by the conventional *jus in bello* criterion of discrimination. *Jus ad vim* should only permit the use of military force short-of-war if, at the same time, it demands that we apply stricter and better specified rules of engagement for soldiers. Importantly, it should demand that the extraordinary permissions to kill that we allow in war do not become normative outside that context. And it should also demand more effective moral judgments about the just and unjust uses of lethal force that are *already* happening outside the context of war.

In sum, Walzer's suggestion that we develop the notion of *jus ad vim* is a worthwhile project. War is morally worse than short-of-war because: a) the scale of permissible harm (in terms of repeated acts of death and destruction) is higher with the potential to be even higher; and b) war permits a morally exceptional standard of justified killing. But Walzer's account of *jus ad vim* should be amended to focus on increasing the restraint on military uses of lethal force short-of-war. It needs to provide us with reasonable guidance for the additional constraints we apply to soldiers using lethal force short-of-war. *Jus ad vim* is "hybrid" in that it borrows from both domestic law (the policing paradigm) and just war theory (the military paradigm). The basic idea being that we permit the lowering of *jus ad bellum* thresholds in certain cases on the condition that we increase *jus in bello* restraints.

⁷⁷⁶ Ibid., xvii.

b. Criticisms

The notion of *jus ad vim* has been criticised on a number of grounds. One important source of criticism is from the individualist account, which holds that *jus ad vim* is unnecessary because there is nothing morally special about war. Helen Frowe, for instance, argues that *jus ad vim* is irrelevant because there is no such thing as military moral exceptionalism. She says that it adds nothing to the conventional understanding of just war proportionality.⁷⁷⁷ I have already addressed the individualist critique of the principled moral exceptionalism of the just war tradition above (in 6.2). But I would also like to briefly address one other specific point she has made recently in response to Dan Brunstetter's conception of *jus ad vim*.⁷⁷⁸

Frowe argues that having moral permissions that obtain only in war provides perverse incentives for fighters if scale is a factor in determining what counts as war. She suggests that some fighters might deliberately increase the scale of the conflict to get it over the threshold to count as war, even if doing so is *not* necessary or proportionate for achieving one's end. By deliberately escalating the conflict, fighters can then deem the conflict to be war and are morally permitted to do more harm. But an individual fighter's level of violence is not the determinative factor on its own. The comprehensiveness of military force in warfare requires more than the actions of an individual soldier. In making this argument, Frowe ignores the legitimate authority criterion, which says that war must be authorised by the appropriate authority. As Uniacke reminds us, the right to wage war is grounded in the duty of a political

⁷⁷⁷ Helen Frowe, "On the Redundancy of Jus Ad Vim: A Response to Daniel Brunstetter and Megan Braun," *Ethics & International Affairs* 30, no. 01 (2016): 117.

⁷⁷⁸ See: Megan Braun and Daniel R Brunstetter, "Rethinking the Criterion for Assessing Cia-Targeted Killings: Drones, Proportionality and Jus Ad Vim," *Journal of Military Ethics* 12, no. 4 (2013); Daniel Brunstetter and Megan Braun, "From Jus Ad Bellum to Jus Ad Vim: Recalibrating Our Understanding of the Moral Use of Force," *Ethics and International Affairs* 27, no. 1 (2013); Frowe, "On the Redundancy of Jus Ad Vim: A Response to Daniel Brunstetter and Megan Braun."

authority to protect the community. This is part of its wider duty, she suggests, to act for the good of the community for whose welfare it is responsible.⁷⁷⁹

What Frowe overlooks in her criticism of Brunstetter's approach to *jus ad vim* is that he does *not* apply it to the appropriate institutional actors. Daniel Brunstetter and Megan Braunstetter's original article argues that the CIA use drones as part of a counterterrorism campaign against al-Qaeda in regions outside the traditional battlefield, but with different standards compared to the military. Therefore, they recommend that we should step outside the conventional criterion of proportionality and assess CIA drones according to a moral category calibrated to limited levels of force, which is what they mean by *jus ad vim*.⁷⁸⁰ But this approach to *jus ad vim* is not based on an institutional account for the morally exceptional use of force by the military.

Mary Ellen O'Connell, for example, claims that "CIA operatives . . . have no right to participate in hostilities and are unlawful combatants."⁷⁸¹ The moral concern for O'Connell is that, in places such as Pakistan, the use of drones has "resulted in a large number of persons being killed along with the intended targets."⁷⁸² A moral problem in drone use, according to O'Connell, is the fact that some drone strikes are performed by the CIA (or CIA contractors) and this alone might account for the high unintended death rate.⁷⁸³ She suggests that CIA operatives are not trained in the law of armed conflict and so are not bound by the Uniform Code of Military Justice to respect the laws and customs of armed conflict.⁷⁸⁴ Under the law of armed conflict, only lawful combatants have the moral right to use intentional pre-emptive lethal force in fighting an armed conflict. According to O'Connell,

⁷⁷⁹ Uniacke, "Self-Defence, Just War, and a Reasonable Prospect of Success," 71.

⁷⁸⁰ Braun and Brunstetter, 316.

⁷⁸¹ O'Connell, 286.

⁷⁸² *Ibid.*, 268.

⁷⁸³ *Ibid.*, 270.

⁷⁸⁴ *Ibid.*

Lawful combatants are the members of a state's regular armed forces. The CIA is not part of the U.S. armed forces. They do not wear uniforms. They are not subject to the military chain of command. They are not trained in the law of war, including in the fundamental targeting principles of distinction, necessity, proportionality and humanity.⁷⁸⁵

O'Connell makes the point that persons with a right to take direct part in hostilities are lawful combatants; those without a right to do so are unlawful combatants.⁷⁸⁶ She suggests that CIA operatives, like the militants challenging authority in Pakistan, have no right to participate in hostilities and are unlawful combatants, which makes them vulnerable to criminal prosecution for extrajudicial killing.⁷⁸⁷ The point here is that operations that set out to intentionally and pre-emptively use lethal force in this way should be executed solely by military personnel.⁷⁸⁸

In response, Gregory McNeal argues that there is no distinction between the military and CIA uses of armed drones.⁷⁸⁹ His reasoning is twofold. First, the National Command Authority (the President or the Secretary of Defense) must approve any pre-planned strike where one civilian casualty or greater is expected, thus ensuring high levels of political accountability.⁷⁹⁰ Second, he argues that it is questionable that the CIA would exercise less care in its targeted killing operations in Pakistan when the military are operating just over the border in Afghanistan. And he points out that the CENTCOM commander supervised operations in both places.⁷⁹¹

But this does not clarify whether or not the CIA follows the same rigorous process of collateral damage estimation and mitigation as the military. Nor does it address the concerns about appropriate education in the use of lethal force. More importantly, it does not provide an adequate moral response to solve the problem raised by O'Connell

⁷⁸⁵ Ibid.

⁷⁸⁶ Ibid., 286.

⁷⁸⁷ Ibid.

⁷⁸⁸ Ibid.; Peter M Cullen, "The Role of Targeted Killing in the Campaign against Terror," (DTIC Document, 2007).

⁷⁸⁹ Gregory S. McNeal, "Are Targeted Killings Unlawful? A Case Study in Empirical Claims without Empirical Evidence," in *Targeted Killings: Law and Morality in an Asymmetrical World*, ed. C. Finkelstein, J.D. Ohlin, and A. Altman (Oxford: Oxford University Press, 2012), 332-33.

of the intelligence operative's combatancy status. In short, intelligence operatives are *not* morally permitted to use lethal force in the same way as the military because intelligence agencies do not have the same clearly agreed teleology for using armed force as do the military.

The other main source of criticism is the conventional just war perspective where it is argued that *jus ad vim* is a dangerous move to consider. In particular, Tony Coady provides a detailed critique of *jus ad vim* in his defence of a more conventional just war approach to political violence short-of-war. The first problem that Coady raises with *jus ad vim* is that it lowers the standard of last resort. He argues that lethal force short-of-war should not allow us to relax *jus ad bellum* requirements, especially that of last resort.⁷⁹² If we are talking about political violence, Coady suggests, then we neither need, nor should we have, a more permissive theory distinct from the conventional just war approach. His use of the expression "political violence" includes,

war as the primary instance of such violence, but it is also meant to cover other violent activities that some would not include under the heading of war. Such activities encompass terrorism, armed intervention (for "humanitarian" or other purposes), armed revolution, violent demonstrations or attacks by citizens aimed at less than the overthrow of their government, and the deployment of mercenary companies or individuals. It could also include other activities . . . such as certain forms of torture, assassination, and violent covert operations⁷⁹³

According to Coady, political violence of any sort should require satisfaction of a "genuine reluctance constraint." That is, last resort should draw attention to the need to seek realistic solutions to political problems that are *less damaging* than resort to political violence.⁷⁹⁴ But Coady agrees that the wrongness of war is tied to the level of destruction that it causes, and he argues that some wars are going to be easier to justify

⁷⁹⁰ Ibid., 332.

⁷⁹¹ Ibid.

⁷⁹² Coady, *Morality and Political Violence*, 93.

⁷⁹³ Ibid., 3.

⁷⁹⁴ Ibid., 93.

than others on the basis of levels of destructiveness.⁷⁹⁵ What should count in favour of a specific use of political violence, according to Coady, is that it involves far less killing and damage than some other proposed resort to violence might.⁷⁹⁶ In clarifying his critique of *jus ad vim*, Coady compares it to arguments supporting the use of drones in targeted killings which, he believes, start by claiming the high moral ground because of greater accuracy and targeting only combatants, but end by escalating conflict, targeting people who have no connection with the conflict and provoking more resentful military responses.⁷⁹⁷ He believes *jus ad vim* is likely to do all of this and it will also make the resort to serious violence easier and less constrained which, given the inherent tendency of violence to escalate, is a bad idea. He argues that it will begin with the more powerful military powers, particularly the U.S., and will continue by encouraging other powers in the same direction where they can get away with it.⁷⁹⁸

As I indicated above, I am likewise cautious about the potential consequences of any such “lowering-the-threshold” arguments. But I am not arguing that we should lower the threshold for full-scale war. As May points out, war is a horrible thing that can only be justified in the most extreme cases because of the widespread death and destruction it causes.⁷⁹⁹ Seth Lazar says that combatants in war have frequently inflicted high-levels of devastation: they have laid waste to the environment, destroyed cultural heritage, wounded, maimed and killed.⁸⁰⁰ War might be morally justified in some cases, but it is always a risky course of action and usually very harmful. There should be, however, greater reluctance to engage in full-scale war than to send a small armed unit to achieve a limited military objective. But then Coady argues that there are also dangers in even limited military operations. He points to the botched U.S. attempt to

⁷⁹⁵ Ibid., 7.

⁷⁹⁶ Ibid.

⁷⁹⁷ Coady expressed these concerns in personal communications, June 2012.

⁷⁹⁸ Personal communications, June 2012.

⁷⁹⁹ May, *Aggression and Crimes against Peace*, 23.

rescue its captive diplomats in Iran during the Carter presidency to illustrate these dangers. His view is that small-scale killing and destruction should still be prohibited when other feasible non-violent alternatives are available.⁸⁰¹ This is correct: any use of military force still requires moral justification. But Coady's point about the dangers in using a small armed unit to achieve a minimal objective is, arguably, one of military competence. The 1980 U.S. attempt to rescue its captive diplomats in Iran may have failed, and it might be judged as a poor decision because it was risky. But it does not follow that risky or bold military operations are therefore always wrong. Consider again the Entebbe Operation outlined (outlined in 1.4). Mitchell Knisbacher describes how the Israeli military were successful in their attempt to rescue civilian hostages in a raid into Uganda.⁸⁰² In this case, the use of military force short-of-war to rescue a group of innocent people, whose lives have been unjustly threatened by a culpable group of kidnappers, is the right type of moral justification.

Another aspect of Coady's concern about thresholds for using military force is that *jus ad vim* is a slippery slope. He believes that if we allow the military to use lethal force short-of-war then the frequency of political violence will increase, and inevitably the high-level of destruction will follow. Bernard Williams argues that a key point of a slippery slope argument is that there is no point at which one can non-arbitrarily get off the slope once one has got onto it. His point is that once we are on the slippery slope then it is likely we are heading towards a horrible result.⁸⁰³

I argue that *jus ad vim* works by inhibiting movement down the slippery slope. *Jus ad vim* can inhibit a slippery slope because it does not allow states to call everything

⁸⁰⁰ Seth Lazar, "Responsibility, Risk, and Killing in Self-Defense*," *Ethics* 119, no. 4 (2009): 699.

⁸⁰¹ Coady, *Morality and Political Violence*, 93.

⁸⁰² Knisbacher, 68-70.

⁸⁰³ He says that "It is worth distinguishing two types of slippery-slope argument. The first type – the horrible result – argument – objects, roughly speaking, to what is at the bottom of the slope. The second type objects to the fact that it is a slope: this may be called the arbitrary result argument." Bernard

war. So it prevents a state from justifying the higher levels of killing and damage normally permissible in war. But it only does this if – in lowering the threshold for using military force – it also insists on additional constraints. Therefore, a *jus ad vim* moral framework should include constraints that go beyond those applied by conventional *in bello* criteria. In other words, *jus ad vim* cannot simply apply the conventional just war understanding of “proportionality” and “discrimination.” The point of a successful hybrid moral framework is to also draw from the approaches we find in policing.

The second problem with using force short-of-war, according to Coady, is that it “softens” the description of political violence. He believes terms such as “lethal force” and “force short-of-war” embody an unsatisfactory softening of terms when describing political violence.⁸⁰⁴ To Coady, the force short-of-war description covers a wide-range of military interventions such as rocket strikes and bombing raids intended to punish, rescue or deter. He also points out that Walzer uses the term for more sustained violence such as the American “no-fly zone” bombing of Iraq carried out as part of the containment system imposed after the Gulf War.⁸⁰⁵

As I suggested above, I agree with Coady that Walzer’s notion of *jus ad vim* covers a wide a range of military interventions, and is perhaps too broad. But Coady could also be accused of a similar type of “softening.” He gives “political violence” a broad remit that, much like Walzer’s *jus ad vim*, also covers a wide range of phenomena. I tend to agree with Coady’s point that we do not want to let state actors off the moral hook by allowing them the use of self-justifying terms such as “force”

Williams, "Which Slopes Are Slippery?," in *Moral Dilemmas in Modern Medicine*, ed. M. Lockwood (Oxford University Press, USA, 1985).

⁸⁰⁴ *Morality and Political Violence*, 5.

⁸⁰⁵ *Ibid.*, 6.

while using terms that condemn the actions of non-state actors.⁸⁰⁶ But he does not make clear how we should then treat political violence short-of-war. Richard Norman, for example, concludes that moral arguments are unlikely to be advanced one way or another if they are conducted primarily in terms of the concept of “violence.” He suggests that this is because use of the term is likely to be determined by prior moral positions and the concept of violence cannot itself be used to defend these positions.⁸⁰⁷ Therefore, since it is not clear how Coady’s approach is superior to Walzer’s in this respect, I am not convinced that he has effectively ruled-out *jus ad vim* as a plausible approach.

To illustrate his objection to Walzer’s notion of force short-of-war, Coady makes his point using the example of the U.S. air strike against Sudan’s alleged chemical weapons factory in 1998.⁸⁰⁸ He argues that this incident could be described as a use of force short-of-war because: 1) the U.S. was not at war with Sudan at the time; 2) the incident was brief; and 3) the incident was self-contained. I have no disagreement with Coady’s first point, when he argues that a declaration of war is not significant for the moral assessment of political violence. A war does not require a formal declaration to meet the conditions I outlined earlier (in 4.3).

I take issue with Coady’s next two claims, however. Coady suggests that, although the duration of a conflict is a morally relevant factor, it makes no difference to our fundamental assessment of war *qua* war. Short and long episodes of war have the same quality: they are both war and should be judged accordingly.⁸⁰⁹ It is not the duration that is constitutive of war but the repeated violent conflicts. While wars might

⁸⁰⁶ Ibid., 3.

⁸⁰⁷ Norman, 37.

⁸⁰⁸ *Morality and Political Violence*, 6.

⁸⁰⁹ Ibid.

be short (e.g. The Six Day War⁸¹⁰) they can also be very long (e.g. The Hundred Years War⁸¹¹). But the point of *jus ad vim* is that it judges each altercation independently. And, as I have explained earlier, we have good reason for refusing to allow all cases of political violence to be described as war, because with war we permit a wider range of destructive actions. *Jus ad vim* prevents the expansion of the boundaries of war. So the moral exceptionalism we allow in war is applied to fewer cases. This way, we better meet Coady's "genuine reluctance constraint" principle, which I take to mean making decisions that lead to the least overall amount of political violence.⁸¹²

The third criticism Coady has of *jus ad vim* is that some nation (or group of nations) possessing massive military superiority over an adversary will be tempted to see the resort to political violence at the less spectacular end of the scale as an example not of war, but of something more like forceful correcting or policing.⁸¹³ He believes that such instances can turn into asymmetrical war where the opponent must resort to less direct forms of violence because it lacks the requisite military weaponry. I agree with Coady's negative assessment of what I have described as the policing paradigm for justifying the use of lethal force. As I argued earlier (in 4.5), simply applying the policing paradigm alone is an insufficient approach for dealing with the complexity of phenomena within *jus ad vim*. For an incident to be described as a policing use of lethal force it should meet the specific criteria that apply to policing (as I outlined in Chapter 5). As Kenneth Watkin points out,

systems of accountability developed to regulate the use of force domestically cannot simply be transferred to the international humanitarian law context. Consequently, both states and human rights supervisory bodies may have to readjust their understanding of the role human rights law can play in enhancing the accountability framework regarding the use of deadly

⁸¹⁰ Michael B. Oren, *Six Days of War: June 1967 and the Making of the Modern Middle East* (USA: Oxford University Press, 2002).

⁸¹¹ Christopher Allmand, *The Hundred Years War: England and France at War C.1300-C.1450* (Cambridge University Press, 1988).

⁸¹² Coady, *Morality and Political Violence*, 6.

⁸¹³ *Ibid.*, 7.

force in armed conflict. No gaps in the effort to apply appropriate norms of humanity can be allowed⁸¹⁴

The tools and methods of law enforcement are simply not capable of dealing with many of the conflicts we find in the range of *jus ad vim*. Hence it is necessary for the state to use military capabilities, and thus there is a requirement for a hybrid moral framework.

In short, the criticisms of *jus ad vim* have done little to undermine its theoretical and practical utility for understanding the ethics of using force short-of-war. It remains a promising area for further research.

c. A hybrid complement to convention

The basic thrust of the criticisms of *jus ad vim* thus far, whether from the conventional just war or individualist accounts, is that *jus ad vim* weakens key *jus ad bellum* standards while adding nothing to the *jus in bello* criteria of discrimination and proportionality. My point, in contrast, is that moral justifications for the use of military force under *jus ad vim* are more nuanced than conventional just war thinking currently allows. The *jus ad vim* discussion provides an opportunity to move away from an overly simplistic binary approach to the use of lethal force, where our only options are policing or war, while still remaining within the just war tradition. In this way, the moral framework of *jus ad vim* provides a better way of applying ethics to the use of military force in non-standard cases. The conventional just war approach suffers from a false dichotomy where the use of military force is judged through the lens of either no conflict whatsoever or all-out war. We should, instead, conclude that war (as described in 4.3) is worse than military force short-of-war because the scale of permissible harm is higher (with the potential to be much higher) and it permits the foreseeable harm of innocent people in the pursuit of war aims.

⁸¹⁴ Kenneth Watkin, "Controlling the Use of Force: A Role for Human Rights Norms in Contemporary

It is more reasonable to suggest that situations of conflict short-of-war might require a range of moderated responses, *including* military options. This means I agree with Walzer that we can (and should) make a distinction between military force in war and force short-of-war. *Jus ad vim* is better than the conventional just war account alone for judging such conflicts short-of-war because it acknowledges the need for a “hybrid” element to the moral framework for the state-sanctioned use of lethal force that inhibits the move towards the escalating violence characteristic of war. Coady’s fear is that freeing up the power of states to deploy the sword is more likely to wreak morally objectionable damage, at least in terms of scale, than anything non-state agents can achieve.⁸¹⁵ I agree with Coady that the distinction between state and non-state actors is not a good reason for letting state actors off the moral hook. But that is one of the reasons why I think *jus ad vim* is a better approach. It gives us a better ability to morally judge the actions of state actors and restrain their uses of military force.

For example, let us consider the use of the military force short-of-war in peacekeeping operations. The Regional Assistance Mission to the Solomon Islands (RAMSI) in 2003 was a peace operation that included a significant element consisting of armed soldiers. The security contingent of 2,200 personnel included 200 Australian infantry soldiers, a Fijian Rifle company, a Pacific Islands company, engineering and logistical support and 4 UAVs.⁸¹⁶ Although the military presence was reduced later in the same year, military deployments returned for brief periods in 2004 (in response to the shooting of a patrolling member of the deployment) and in 2006 (in response to riots). Robert McLaughlin describes the RAMSI mission as focused on law enforcement and stabilisation operations; that is, a military operation conducted overseas but which is not taking place within the context of an armed conflict (whether

Armed Conflict," *The American Journal of International Law* 98, no. 1 (2004).

⁸¹⁵ Coady, *Morality and Political Violence*, 3.

international or non-international). The major implication of this contextual situation, he suggests, is that the deployed military force had no access to the offensive components of the law of armed conflict.⁸¹⁷ The purpose of the military element was to help restore law and order and yet their capabilities and role were distinct from the policing element.

A problem with a non-standard case such as this is that if we choose to use military capabilities for a function that is something akin to a policing role, then we can end up transporting the warrior mindset about using lethal force along with the military personnel, equipment and training. If a state is using its military capabilities to fulfill a policing role, then the rules for using lethal force should be unlike the ones we permit in war; they should be much more restrictive. Perhaps they should not be quite as restrictive as those of the police working within a well-ordered society, but they should certainly be more restrictive than we are willing to allow in war. So in situations of conflict short-of-war, where they are expected to use lethal force, the military should adjust to the fact that they are not fighting a war and must be more restrained in their use of lethal force.

The key problem to focus on is that the conventional just war approach to political violence can *only* conclude that military force short-of-war is of the same kind as military force in war. So it permits the same morally exceptional uses of lethal force to conflict short-of-war as it does to conflict in war. But I have demonstrated that there is an important reason why we should refrain from doing this: to ensure that the moral permissions we grant in war remain the exception. My main concern is that expanding the boundaries of war, so that armed conflict encapsulates a wider range of incidents,

⁸¹⁶ Clive Moore, "The Ramsi Intervention in the Solomon Islands Crisis," *Journal of Pacific Studies* 28, no. 1 (2005): 57.

⁸¹⁷ Rob McLaughlin, "Use of Lethal Force by Military Forces on Law Enforcement Operations-Is There a 'Lawful Authority'?", *The Federal Law Review* 37 (2009).

permits more killing and destruction than is necessary. I agree with Coady's overall aim: that is, to hold state militaries to a more rigorous ethical standard in the practice of using lethal force and to minimise the overall harm caused by physical conflict. But we should be aiming to confine the "dogs of war" to the smallest range of incidents possible and apply more appropriate constraints on the military when it operates outside of that context.

So how does *jus ad vim* help restrain the warrior mindset? In what way might *jus ad vim* require soldiers to be more restrained in their use of lethal force? Here are some suggestions of the type of constraints that might prove useful to consider. First, we might say that foreseeable collateral deaths are either not morally permissible or equivalent to what we would be willing to accept in a standard policing operation. Michael Gross points out that targeted killing is a lethal tactic but one that is often accurate and avoids excessive civilian casualties. Good intelligence, precision-guided munitions and drones make targeted killing a more discriminating tactic.⁸¹⁸

Second, we might require different standards of evidence and proof for demonstrating that a target is, in fact, a culpable threat. Luban argues that the requirements of evidence are much weaker in war. He points out that soldiers only require plausible intelligence to attack a target in war rather than proof beyond a reasonable doubt (or even proof by a preponderance of evidence) that someone is an enemy combatant.⁸¹⁹ But Stephen Neff says that the Romans recognised a "middle way" between law enforcement and proper war. This was in order to address the problem of *latrociniae*, which were "criminal bands that were so well organized and so powerful as to require enforcement operations on a military scale."⁸²⁰ These operations, according to Neff, fell short of true wars but were also distinct in several ways from

⁸¹⁸ Gross, 10.

⁸¹⁹ Luban, "The War on Terrorism and the End of Human Rights," 9.

ordinary law enforcement. Military operations could be mounted against these enemies *en masse* without the scrupulous provision of proof of guilt in each individual case, which ordinary law enforcement requires.⁸²¹

Third, each operation involving military force should prove that other non-lethal options (such as arrest) were not available or would have been unacceptably risky. For example, Gross argues that a little-noticed feature of state behaviour during asymmetric conflict is the emphasis on capturing, rather than killing, enemy combatants. In conventional wars, the goal is to disable the enemy by death or injury; in asymmetric war, the means of disabling, particularly by the stronger side, are generally less lethal. Many state actors will choose arrest to killing when this does not overly endanger their troops.⁸²²

Fourth, we might choose to hold individual soldiers, who use lethal force short-of-war, to a higher level of personal responsibility than is the case in war. This means that the individual soldier would be required to justify any personal use of lethal force. If so, then individual soldiers should have a police-like discretionary power to choose not to shoot when given such an order by a commander.

6.5 Conclusion

In conclusion, the military's exceptional use of lethal force can be morally underpinned by a proper understanding of its institutional teleology. This says that a state's military should defend the common good of the political community it serves, which includes, but is not limited to, fighting wars against external aggression. But it has a moral obligation, albeit weakened in comparison with insiders, to use military force to protect the lives of outsiders. In order to defend the common good, the military

⁸²⁰ Neff, 19.

⁸²¹ Ibid.

have a number of exceptional moral duties and permissions when using lethal force in war. But the use of lethal military force short-of-war demands more restraint than is morally permitted by this conventional military paradigm. The notion of *jus ad vim* is a hybrid element to conventional just war thinking that provides a promising way of dealing with non-conventional cases that require the intentional pre-emptive state-sanctioned use of lethal force. This is because *jus ad vim* morally permits the use of military force necessary to defend the common good *and* inhibits the move towards the more destructive levels of violence characteristic of conventional warfighting.

⁸²² Gross, 10.

CONCLUSION

The circumstances when it is morally justified for the agents of state-sanctioned security institutions to use lethal force is when it is necessary to meet their state-imposed responsibilities. For the police, this means preserving public safety from criminal threats within their jurisdiction. For the military, it means defending the peaceful functioning of a state from armed threats or other forms of political violence. State institutions, such as the police and military, have access to additional moral justifications for using lethal force because they have state-imposed moral duties. That is, the state gives these actors, sanctioned to act on its behalf, additional moral permissions to use lethal force. This is not ultimately a form of self-defence. Self-defence says that the average person can be morally justified in killing another human being when this is necessary to ward-off an immediate unjust deadly threat. But if the threat is non-culpable or only partially culpable, then the defender should seek to share the cost and risk with the threat in order for both parties to survive.

It is also not defence of others. It is morally justified to kill a human being in defence of others on the same impartial basis that holds for killing in self-defence. That is, when a third-party intervenes to defend the victim of a deadly attack, the rescuer's action is still morally justified by the victim's possession of the right not to be killed. Furthermore, we all have a humanitarian duty to protect innocent humans from being unjustly killed. This means that a third-party should use forceful intervention (including lethal force) to protect an innocent human life in cases where the use of force against an unjust threat is morally permissible and a potential intervener has a duty to rescue a defender. And a potential intervener's obligation to rescue the defender is

strengthened when he has an agent-relative responsibility for the wellbeing of the defender.

In contrast, the use of lethal force by police and military is *not only* morally justified on this same basis. Instead, their state-sanctioned institutional role gives them special permissions and obligations when it comes to killing. The police should use lethal force when it is necessary to preserve public safety from a serious criminal threat. But the police use of lethal force is much more restrictive (less morally permissive) than the military's use of lethal force in wartime. And, in some cases, the police use of force is even less morally permissive than self-defence or defence of others. Police are obliged to go to great lengths to avoid shooting anybody in threatening situations. This includes taking on significant risks to their own safety. So it is also true to say that the moral justification for police use of lethal force is morally distinct from the military use of force.

Furthermore, the police continue to be granted exceptional justification to use lethal force in some non-standard cases. This means the police should continue to apply the policing paradigm of justification up to its limits. There are at least three ways in which the police use of lethal force – as an additional set of moral duties and permissions – should be limited. First, the policing paradigm for using lethal force is limited by police jurisdiction. A second limit for the policing paradigm is the use of lethal force during a state of emergency, where law enforcement is no longer effective. A third limit on the policing paradigm is the moral requirement to maintain the police-military distinction in order to avoid militarising the police role.

In contrast, the military can (or should) use lethal force when it is necessary to defend the common good, requiring them to defend the peaceful functioning of a state

from armed threats or other forms of political violence. Part of this military purpose includes the standard cases of fighting wars against external state aggression where military combatants have access to extraordinary moral permissions to use lethal force. This is the basis for morally justifying the use of lethal force within the conventional military paradigm, which says that it is *more* permissible, morally-speaking, to kill human beings in war. The just war tradition gives military combatants exceptional moral permissions to kill in war *not* granted to the average person. Military combatants in active theatres of war are morally permitted to kill unarmed enemy combatants without warning, use highly destructive weaponry and do serious collateral harm.

But the military purpose also includes the non-standard cases where they are required to respond to a wide-range of threats, in a variety of situations short of war, or where a state has moral responsibilities to the common good outside defending its own political community. In these non-standard cases, the military are required to be much more restrained. So we need a hybrid element added to the moral framework for the state-sanctioned use of lethal force. *Jus ad vim* provides a promising way of applying ethics to the use of military force when defending the common good in non-standard cases. This is because it complements the conventional military paradigm by permitting the use of military capabilities to defend the political community and protect jurisdictional inhabitants against serious threats in non-standard cases. It also inhibits the move towards the more destructive levels of violence characteristic of conventional warfighting. In practice, this means that the military should move closer towards acting like police in a law enforcement context.

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