

THE MORALITY AND LAW OF WAR

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Introduction

This paper explores the relationship between the morality of war and the law of war. The focus is on permissible conduct in war, specifically the principle of noncombatant immunity, which confines belligerents to targeting only military objectives (see article 48 of the first Additional Protocol (API) to the Geneva Conventions, Roberts and Guelff 2000: 447), and the legal equality of combatants, which grants soldiers the same permissions and holds them to the same prohibitions irrespective of the justice or injustice of their cause (preamble to API: 422–23).

Call soldiers whose side satisfied *jus ad bellum*—the principles governing justified resort to war—j-combatants, and those whose side did not satisfy those principles u-combatants (for unjustified). The dominant figure in late twentieth-century just war theory, Michael Walzer, argued that all combatants enjoy equal permissions to target one another, grounded in the threat that they pose to each other's lives (Walzer 2006: 42–45). In virtue of that threat, u-combatants and j-combatants alike lose their rights against lethal attack, so are not wronged when their adversaries kill them. By contrast, noncombatants, unthreatening by definition, retain those same rights, so are not permissible targets. Noncombatant immunity and combatant equality, then, are grounded in a single argument: one may permissibly target only those who have lost their rights against lethal attack; all combatants have lost that right; all noncombatants retain it.

Walzer's position has developed into a conventional orthodoxy, bolstered by its consonance with international law. In recent years, however, many philosophers have become increasingly dissatisfied with his arguments. In particular, these revisionist critics have discredited his account of how one loses the right to life, showing its inconsistency with other plausible beliefs about permissible harming (see especially Coady 2008; Fabre 2010; McMahan 1994, 2004; McPherson 2004; Rodin 2002). Against Walzer, they argue that the morality of harming is almost always asymmetrical—a person who defends himself against unjustified attack does not become liable to be harmed by his attacker, simply by now posing a threat. To become liable to be killed, the threat one poses must be unjustified. Moreover, posing an unjustified threat is neither necessary nor sufficient for liability. A politician who sends a u-combatant to fight an unjustified war might be liable, despite not posing any threats himself; a child soldier, out of his mind on drugs and with a gun to his head, might not be liable, despite posing a threat. Walzer's critics have concluded that what matters for liability is (1) responsibility for

(2) contributing to threats of (3) unjustified harm (Coady 2008; Fabre 2010; McMahan 2004; Rodin 2008).

Though their criticisms of Walzer are shared, revisionists diverge in how they combine these three elements. How much and what kind of responsibility? What degree of contribution? Must the threatened harm be *pro tanto* or all things considered unjustified? Their views' practical implications depend on the answers to these questions, which determine where the liability bar is set; and revisionist though they are in theory, most of these critics endorse quite conservative practical conclusions. Though they reject the moral equality of combatants, they endorse conventional views, such as non-combatant immunity, and the rejection of pacifism (that is, they reject the view that warfare can never be justified). Insofar as they endorse these commonsense conclusions, however, they each face the same problem. If a significant number of u-noncombatants and u-combatants, in any given conflict, are responsible to just the same degree, for just the same quantum of contribution to the same unjustified threats, we cannot retain both noncombatant immunity and the rejection of pacifism.

Distinguish between micro-threats to specific lives and the macro-threat posed by a state. Many u-combatants neither pose micro-threats themselves, nor contribute to those posed by their comrades, while their contribution to the macro-threat posed by their state is negligible (Lazar 2010). By definition, u-noncombatants do not pose micro-threats, but many of them contribute to micro-threats, for example by producing the goods (military and nonmilitary) that sustain their armed forces' ability to fight (Fabre 2010). This also contributes to the macro-threat, which they also further through their taxes, popular support and, in a democracy, their vote. Moreover, many u-combatants—both those who contribute to micro- and macro-threats and those who do not—are guiltless for their actions, fighting either from duress or under a reasonable belief that their cause is justified. Meanwhile, many u-noncombatants will make their contributions without duress and without the nonculpable ignorance excuse. They will be culpable.

The liability theorists face a dilemma. If they endorse a low threshold of responsibility for liability—say, minimal responsibility for some small contribution to micro- or macro-threats—they will render too many noncombatants permissible targets (and their criterion of liability may also be independently implausible: Lazar 2009). If they endorse a high threshold—requiring a significant contribution to micro- and macro-threats, a significant degree of responsibility or both—they will struggle to justify the killing inevitable in justified wars, because too many u-combatants will not be liable to be killed, and j-combatants cannot discriminate between liable and nonliable u-combatants. This is the “responsibility dilemma” for the liability view (Lazar 2010). The first horn leads to permitting the justified side to target too many noncombatants; the second leads to contingent pacifism—the view that although wars can hypothetically be permissible, in all feasible cases we should not fight, for fear of violating our enemies' rights. If the liability theorists aspire to less controversial practical conclusions than these, their view needs additional support.

Some find this support in the distinction between the morality and law of war. They argue that the contingent pacifist and noncombatant immunity objections might be good reasons not to implement their view in the laws of war, but do not undermine their account of war's underlying morality (Fabre 2010: 39; Frowe 2011; Hurka 2005; McMahan 1994, 2004, 2008, 2009, 2010). The following sections first set out the most fully developed version of this argument, then criticize it, before asking just what the relationship between war's law and its morality should be.

The Appeal to Law

The appeal to law is quite simple. People often act wrongfully. Sometimes they choose to do so; other times they do so by mistake or accident, for example because they lack important information. How should this predictable wrongdoing impact our morality, and our laws? One response is that the predictable failure to act rightly should not alter what the right is, but might be relevant to choosing our laws. In war, two causes of predictable noncompliance are particularly troubling. First, combatants' lack of important information: whether their side satisfied *jus ad bellum*, whether this operation proportionately conduces to that just cause and whether their targets are liable are all very complex and urgent questions whose answers depend on often ambiguous or unavailable information. Second, voluntary noncompliance: of course, in one sense this is endemic to warfare, since without some voluntary wrongdoing, it is unlikely there would be any conflict in the first place. But especially salient here is the tendency of u-combatants to arrogate to themselves any permissions that are made available to j-combatants. Even if the injustice of their cause should be clear to them, they are likely to affirm themselves to be j-combatants, and so entitled to the relevant schedule of permissions.

Revisionists deny that this predictable noncompliance is relevant to the morality of war. The epistemic shortfall might make acting morally difficult, but that is to be expected: doing the right thing is often hard (McMahan 2005: 770). If we ought to *X* if we had full information, then we ought to *X* even when our information is incomplete (though we might be excused for failing to do so). Likewise, that others will abuse our principles is no argument against them, *qua* principles. However, these are both appropriate worries when devising the law. If people will routinely disregard a law, or if it makes unachievable demands, then the law will be regarded as irrelevant, unfair and unrealistic, and will lose its capacity to guide action. If the laws of war have any value or purpose (McMahan, for example, argues that they can be used to minimize wrongful suffering—2008: 28) then we must guard against this outcome.

Morality and law, the argument goes, should therefore come apart (McMahan 2008: 32; 2010: 506). Though combatant equality and noncombatant immunity lack substantial foundations in moral principle, they might nonetheless be justified as laws. If the laws of war enforced combatant asymmetry they would be unworkable, because uncertainty over who is liable to be killed would render them impossible to enforce (Fabre 2010: 57; McMahan 2008: 32). Moreover, any permissions granted to the justified side would be abused by the unjustified side as well. Similarly, noncombatant immunity must be retained in law because extending the permission to kill noncombatants to j-combatants would mean its abuse both by them and by u-combatants.

This approach enables the following response to the responsibility dilemma. Perhaps it does identify salient pragmatic concerns, and the liability view would be difficult to implement. But these pragmatic concerns are irrelevant to the moral principles that govern warfare. That a principle is hard to follow, or abused by some, does not make it false. The contingent pacifist objection worries that the liability view will deny states and people the moral option of fighting justified wars. But in practice, soldiers and states need not worry about killing only the liable, since they can instead adhere to the laws of war, which permit them to kill enemy combatants and noncombatants who are directly participating in hostilities. The noncombatant immunity objection worries that the liability view renders too many noncombatants permissible targets—but the laws of war will retain noncombatant immunity, so this worry is misplaced.

Why Should We Obey the Laws of War?

Although the appeal to law raises interesting questions, it does not resolve the problems with the revisionist position. We can begin with two general worries, before turning to specifics.

How should soldiers respond when legal and moral injunctions diverge? Though the appeal to law is often made, this vital topic has scarcely been discussed. If legal reasons always trump moral reasons, then the revisionist morality of war would be redundant in practice. If moral reasons always trump legal reasons, then the appeal to law would be equally pointless. For the appeal to law to work, moral reasons must sometimes trump legal ones, and vice versa. Most will agree that moral reasons can override legal ones; the reverse ordering is much harder to explain. First, because it requires an account of the duty to obey the law of armed conflict (LOAC), and it is notoriously difficult to ground a duty to obey any law—especially one that explicitly diverges from our other moral reasons. Second, even if we can produce some such account, if we ought to obey the law when it clashes with morality, then the law in this case describes what we ought to do, and the “morality of war” can be no more than a subset of the relevant moral reasons.

The second general worry is that the appeal to law cannot resolve the contingent pacifist and noncombatant immunity objections, it can only deflect them. To resolve the contingent pacifist objection, it must show that soldiers (at least j-combatants) may obey their legal permission to kill enemy combatants, even when morally prohibited from doing so because their adversary is not liable. But if our most fundamental moral prohibitions—against killing the nonliable—can be overridden by a mere legal permission, then the morality of war truly is irrelevant, and we should simply focus on the laws of war. Where noncombatant immunity is concerned, even if the law does reduce the targeting of noncombatants, that does not answer the objection that with a low liability threshold too many noncombatants will be liable. The appeal to law would then look like the utilitarian’s response to the slavery objection—enslaving some will never in fact maximize utility. Even if this were true, it would not adequately resolve the objection, which is that people’s freedom should not be vulnerable in this way to calculations of overall utility. Similarly, even if, given these laws, noncombatants will not often be targeted in practice, we can object that they should not, in principle, be morally vulnerable to attack.

Turning to specifics: McMahan (2008: 37–38) helpfully distinguishes between moral and legal permissions, prohibitions and positive requirements, then argues that when morality requires what law permits or prohibits, and when morality prohibits what the law permits, soldiers should obey their moral reasons. But when the law prohibits what morality permits, combatants should adhere to the law. He says little about clashes between legal requirements and moral permissions and prohibitions, since he thinks the law rarely requires positive action. This is an important oversight, since the additional protocols do require, for example, combatants to observe a duty of constant care toward civilians (article 57—see Roberts and Guelff 2000: 452–53). Moreover, soldiers are required by their own military law (often backed up by an oath of allegiance) to obey lawful orders. However, let us set that aside to concentrate on the orderings McMahan does defend.

For the appeal to law to have any purchase against the noncombatant immunity objection, we must first show that j-combatants are morally permitted, not required,

to kill liable u-noncombatants, and then that legal prohibitions trump moral permissions. Neither is easy to do. Combatants generally have strong positive moral reasons for action—they have natural duties to protect their comrades and their country, and contractual duties grounded in their roles and the oaths they took. If they can save their comrades or advance their just cause by killing liable u-noncombatants, then one could readily argue that they are required to do so. Since moral requirements trump legal prohibitions, the appeal to law would not resolve the noncombatant immunity objection.

Even if j-combatants are merely permitted, not required, to kill liable u-noncombatants, we can justify denying them this option only if we have a strong argument for a duty to obey the law. Again, despite the frequency with which the appeal to law is made, discussions of this crucial point are scarce and brief. McMahan adumbrates two relevant arguments. The first sees the fact that X is against the law as a reason not to consider other reasons for X -ing. He argues that “combatants should be reluctant to give their individual judgment priority over the law, for the law has been designed in part precisely to obviate the need for resort to individual moral judgment in conditions that are highly un conducive to rational reflection” (McMahan 2008: 41). This presupposes a particular conception of law’s authority, according to which law gives us “protected reasons,” which preempt the need to appeal to our own judgment (Raz 1979). The second sees the fact that X is against the law as providing an additional reason not to X —it argues for a pro tanto duty to obey the law, grounded in the fact that disobedience will lead to further breaches by others (McMahan 2008: 38).

The first argument fails: the laws of armed conflict do not provide protected reasons. If they did, then adherence would be required without exception, since if other moral reasons could justify disobedience to the law, then we would have to consult those reasons in any situation to determine whether it is exceptional. The law would not, therefore, obviate the appeal to our own judgment. Since McMahan thinks (plausibly) that some moral reasons do override legal reasons, the protected-reasons logic is unavailable.

Could revisionists make the narrower argument that the law governing noncombatant immunity, at least, grounds protected reasons? They might argue that few u-noncombatants will in fact be liable to be killed, while even j-combatants with the best intentions will likely inflate the permissions available to them, and so end up mistakenly killing nonliable u-noncombatants. Adherence to the laws of war will then better enable them to comply with their reasons not to kill nonliable noncombatants, since their own judgment will be excessively permissive.

There are at least two problems with this argument. First, if j-combatants are indeed sometimes morally required to kill the liable u-noncombatants, then they ought to disobey the law. They cannot therefore defer to the law’s authority: they must assess each case on its merits, against the full range of moral reasons. Second, the argument presupposes a high liability threshold, given the premise that few u-noncombatants will be liable. With a low liability threshold, j-combatants could plausibly argue that restricting their attacks to adult u-noncombatants is discriminating enough. Raising the liability threshold to ensure few noncombatants cross it must also mean rendering more u-combatants non-liable (those who make no significant contribution to micro- and macro-threats, and on some accounts those who are only minimally responsible for their contributions). This puts us squarely back at the contingent pacifist objection.

The second argument mooted by McMahan is that combatants have a duty to obey LOAC, since even morally permissible breaches will encourage others to impermissibly

breach it. Evidently this applies only if and when disobedience will actually lead to further disobedience by others. Breaking the law in secret, or when one's adversary lacks the capacity to retaliate, would still be permissible. But even when the empirical speculation holds, we still need more argument, which would have to be developed along these lines: if some soldiers kill liable noncombatants, other soldiers will likely end up killing nonliable noncombatants. The original soldiers are partly responsible for this outcome, and so are morally required to forego killing liable noncombatants even when it is otherwise permissible.

This argument's weakness is the idea that combatants are responsible for their adversaries' unjustified actions and retaliations, and should forego options that might save their lives and those of their comrades, as well as advance their just cause, to avoid bearing that responsibility. Elsewhere in most versions of the revisionist view (Fabre is an exception), our responsibility for our own wrongdoing is thought far greater than for the wrongful acts of others that we fail to prevent. And yet here we expect j-combatants to sacrifice their lives, and the opportunity to contribute to a just cause, because of speculative claims about how their conduct might connect with the voluntary wrongful actions of other combatants in the future. On the one hand this seems to demand too much of j-combatants. *Mala prohibita* in domestic society tend to impose small costs on us—driving at the speed limit, for example—not to remove options that can literally be the difference between life and death. On the other hand, if this principle goes through, then the appeal to law is not really an appeal to law but an appeal to an additional moral principle—that soldiers should sacrifice themselves if otherwise permissible self-defense might lead to others' predictable noncompliance. The argument works identically without any reference to the law.

Of course, if j-combatants never confronted situations wherein they can save lives or advance a just cause by harming noncombatants more than the laws of war allow, then this might be a purely theoretical worry. Unfortunately, this is not the case. In contemporary urban warfare, noncombatants can contribute to threats to combatants without directly participating in hostilities—for example, by (knowingly or unwittingly) revealing their position to enemy combatants, or by concealing information about potential threats. Moreover, the law not only prevents combatants from targeting liable u-noncombatants, it also demands that they minimize harm to noncombatants that is incidental to attacking their military objectives. This imperative often removes options that would reduce risks to j-combatants, to protect liable u-noncombatants. If the u-noncombatants are in fact liable to be killed, then, like liable u-combatants, harms to them should not need to be minimized, and j-combatants should be able to reduce their risks in these ways. We can also readily conceive of conflicts that could be won through air power alone, without the use of ground forces, which, despite minimizing friendly casualties, would be ruled out by the laws of war either for intentionally threatening u-noncombatants, or for exposing them to excessive risks of harm, but would be permissible under the morality of war, if enough of those u-noncombatants are liable to be harmed.

Especially in contemporary warfare, combatants must often choose between accepting additional risks to themselves, and either intentionally targeting noncombatants or disregarding foreseeable but unintended harms to them. If the morality of war says that they are entitled to shift these risks to liable u-noncombatants, but the laws of war deny them that option, then the laws of war deny them morally permissible means to protect their own lives and those of their comrades. It can do so only if we have a

plausible argument for a strong duty to obey LOAC, such as has not yet been offered by the revisionist camp.

Perhaps other arguments could be advanced, derived from the familiar debate over the duty to obey the law within states. It could be a requirement of fair play (Klosko 1987; McDermott 2004), or grounded in soldiers' actual or hypothetical consent to obey the law (Simmons 1979), or perhaps in some sort of associative obligation (Horton 2007), or identification with the law (Raz 1979: 259). However, even in an ideal state with perfect liberal institutions, deploying these arguments is not straightforward (Simmons 1979). International institutions lack capacity and legitimacy; the laws are vague and, on this account, diverge from our actual moral reasons. There is arguably no global community that could ground an associative obligation to obey the law, or give soldiers a sense that this is their law, one that they identify with and for which they must show respect. The fair-play argument presupposes that we are engaged in a shared and just project for mutual benefit—which is hardly how one would describe the belligerents in war. Perhaps the relevant project is adherence to the war convention, but this works to the participants' mutual benefit only on the assumption that they cannot increase their chances of military success by abandoning it—an assumption that often will not hold. Some soldiers do consent to obey only lawful orders, and so might derivatively be said to consent to international law, but that is only a subset; plus they can hardly be held to that consent when their adversaries refuse to comply. It is hard to see how a compelling argument could be advanced for a duty to obey LOAC; at the very least, the appeal to law remains inadequate until the revisionists have filled in this gap.

Applied Moral Principles

To set up the next line of critique, it will help to distinguish moral principles along an axis that extends from abstract at one end to applied at the other. Abstract principles are devised and/or defended in abstraction from important but extrinsic moral and nonmoral facts. Applied principles tend to arise by combining our abstract principles with other moral and nonmoral facts to yield action-guiding conclusions. All abstract principles are probably to some extent also applied, and vice versa—these classifications are neither precise nor mutually exclusive. In this section I make three closely related objections against the appeal to law. First, it wrongly dichotomizes normativity into abstract moral principles and laws, omitting applied moral principles. Second, the applied principles entailed by the revisionist view (though inadequately discussed by it) should be rejected. Third, since we should reject the applied principles entailed by the combination of their abstract principles and facts on the ground, then we ought to reject or modify those abstract principles as well, at least until the facts change.

The first point should be obvious. We must not confine our moral enquiry about a given practice to scenarios that abstract from all the complications endemic to that practice, and then seek guidance from the law when the complications are fed back in. This would imply that real-world complications render moral principles irrelevant, and the law exhausts our normative resources. But this seems obviously false. It clearly makes sense to ask, when the law prohibits me from *X*-ing in real-life situation *Y*, whether I morally ought not to *X* in *Y*; likewise, when the law permits or requires, there is always a further moral question to answer. The notion that we can confine ourselves to elaborating on the one hand an abstract morality of war and on the other hand more pragmatic laws of war, occludes and omits a fundamental component of our theory.

The revisionist critics of conventional just war theory must defend an applied morality of war. They cannot confine themselves to working out principles that abstract from the causes of predictable noncompliance in wartime. The question, then, is whether the applied morality that can be inferred from their fundamental principles is sustainable in light of the causes of non-compliance, in particular the uncertainty endemic to war. Citizens, commanders and combatants are regularly uncertain whether their side satisfied *jus ad bellum* at the outset, and whether continuing the conflict is *ad bellum* justified now (this point is conceded by revisionists, e.g., Fabre 2010: 57; McMahan 2008: 32). I have also argued, here and elsewhere, that unless the liability bar is set low enough to render large numbers of noncombatants liable to be killed, a significant proportion of u-combatants will also not be liable. Evidently, distinguishing between liable and nonliable u-combatants will be nigh on impossible.

It follows that, if some u-combatants will not be liable to be killed, and if j-combatants may intentionally kill only liable targets, then if j-combatants cannot discriminate between liable and nonliable u-combatants, they will intentionally kill some nonliable u-combatants. In which case, fighting can be justified only if some other reasons override the rights of the nonliable combatants whom they kill. Since, with one exception (Fabre, who reserves judgment), the revisionists all think that intentional violations of the right to life cannot be justified except to avert a rare and momentous catastrophe (Coady 2002; McMahan 2008: 38; Rodin 2011: 461), this means the revisionist view cannot justify fighting in these circumstances. The applied morality of war that derives from the revisionist position, then, is that we should endorse pacifism. This is why revisionists make such efforts to show that all u-combatants will be liable to be killed: they have no other resources on which to draw, should some u-combatants prove nonliable. The problem is that as they lower the requirements for liability to be killed, they expand the liability net to include noncombatants who should not be permissible targets.

Even if we could somehow arrive at a Goldilocks criterion of liability—one that perfectly encompassed all the u-combatants we will intentionally kill, while concurrently excluding all the noncombatants from liability who warrant that immunity—there would still be problems for the revisionist version of the applied morality of war. As already noted, in any given conflict there will be considerable uncertainty both over whether our side initially satisfied *jus ad bellum* and whether the campaign is at present justified by those *ad bellum* standards. This uncertainty ranges over both moral and nonmoral propositions: we do not know what the principles of *jus ad bellum* should be; moreover the nonmoral facts in any given case—for example, “who started it”—are often also extraordinarily difficult to ascertain definitively, and depend on information that is either inherently ambiguous or is unavailable to key participants in the conflict, such as citizens and combatants.

It is very hard, then, to know whether fighting was justified in the first place, and whether we are now justified in continuing to fight. Citizens, combatants and commanders who wish to implement the liability view must ask themselves what to do given this uncertainty. Even if it were true that, should they turn out to be in the right, they could fight without intentionally killing nonliable u-combatants, they still face a serious risk that if they turn out to lack *ad bellum* justification, they will engage in massive, outrageously wrongful rights violations. Of course, there will usually be good reasons against appeasement and submission, but these pale in comparison with the wrongdoing involved in fighting unjustifiably—particularly for adherents to the liability view, who

think that our responsibility for rights violations that we commit is considerably greater than any responsibility to prevent rights violations by others. The question, then, is how high the probability must be that we are j-combatants, and how strong the reasons in favor of fighting, for us to be justified in risking even a small probability of participating in the spectacularly objectionable wrongdoing involved in fighting an *ad bellum* unjustified war. The answers must surely be very high, and very strong, and we can reasonably ask whether real wars are likely to be sufficiently clear-cut to be justifiable on this account. When commanders, combatants and citizens are not all but certain that they enjoy *ad bellum* justification, they ought not to fight. The magnitude of the wrongdoing involved in an unjustified war is so spectacular that even a small chance that the war is unjust would render it impermissible from this *ex ante* perspective. In practice, the uncertainty endemic to war means that there is always a good chance that our side is in the wrong, such that fighting simply involves running too serious a risk. Applied to real-life scenarios, the liability view again compels us towards pacifism.

No account of the morality of war is complete until it shows how its fundamental principles should be applied in the messy reality of war. That messy reality cannot be fobbed off onto the laws of war—especially if we lack any viable account of why soldiers should obey the law instead of the relevant moral principles. In my view, the reality of war is that we will inevitably intentionally kill people who have rights not to be killed. The alternative to this is, I think, wishful thinking—a fanciful idea of a morally pure war. If this is right, then in practice the liability view leads us inexorably towards pacifism, because it cannot justify violating the fundamental rights of some, even to save others from having their rights violated. But even if this is wrong, and a morally pure war could be fought, the uncertainty that surrounds *ad bellum* justification—both in starting the war and in its operations and phases as it continues—means that the decision to fight involves taking a serious risk of committing unforgiveable wrongs. From the *ex ante* perspective, citizens, commanders and combatants applying the liability view ought to appease and submit, rather than risk engaging in such spectacular wrongdoing. Even if all u-combatants were liable to be killed, then, the chance that we are ourselves u-combatants, combined with the unmatched evil of killing the nonliable, should be enough to direct us toward pacifism if we endorse the liability view.

Of course, one response to this would be to simply endorse contingent pacifism as the consequence of applying our abstract morality of war to real-life situations. If that conclusion is untenable, however—if we think that we can permissibly fight some real life wars—then we should question the abstract principles that underpin the applied principles discussed here. In particular, we should ask whether the revisionists' powerful emphasis on the moral significance of individual rights, and their restrictive attitude to lesser-evil justifications, can really be sustained. If endorsing a more permissive attitude to lesser-evil justifications is what it takes to avoid pacifism in realistic war situations, then it would seem a price worth paying.

What Should the Relationship Be Between Morality and Law in War?

This penultimate section of the paper turns away from the revisionist critique of conventional just war theory, and asks instead what the proper relationship between war's law and its morality should be. Before presenting my own views, I briefly consider two contrasting accounts of that relationship. Each calls for a closer connection between the morality and law of war than that advocated by McMahan, though in quite different

ways. Henry Shue (2008) argues that the laws of war should be coextensive with the morally justified rules for war, and these should exhaust the morality of war. David Rodin (2011) argues that the laws of war should implement (his version of) the liability view precisely.

Shue contends that the laws of war should track the morally best rules for war. Insofar as they do not, we should change them to remedy this (Shue 2008: 95). These rules, Shue thinks, are quite different from the morally justified rules that govern ordinary life, since war as a practice presupposes a level of violent contention with no parallels outside of war. If there are to be rules for war—if we are not simply to outlaw it altogether—those rules must be quite different from the rules that apply to conduct in ordinary life. We cannot (and perhaps ought not) eradicate the practice of warfare (Shue 2010: 516). We should instead endorse rules that minimize the suffering it causes (Shue 2010: 515). Those rules, Shue asserts, include the legal equality of combatants and the principle of noncombatant immunity (and the other constraints of *jus in bello*). They exhaust the morality of war: besides them, there is nothing else.

Shue's argument includes two important propositions. First, that the morally best laws for war should aim to minimize the suffering that war causes. Second, these laws exhaust the morality of war. Each of these claims, taken on its own, is quite controversial. But their conjunction is surely false. A u-combatant fighting a war of territorial aggression, who realizes that he is fighting unjustifiably, should not continue to fight in accordance with the laws of *jus in bello*; if he realizes he is killing unjustifiably, he should simply stop (Shue in fact admits this at Shue 2008: 109). Shue's argument for the rules regulating war taking the minimization of suffering as their aim presupposes the practice of war: since we cannot eradicate war, the argument goes, the best rules should seek to minimize its calamitous implications. Individuals are not, however, entitled to justify their own wrongdoing on the grounds that it is inevitable, and so must be regulated, not proscribed. The laws of war are addressed to people in the third person, and on Shue's account they run like this: "Since people will unjustifiably fight, the moral imperative is to limit the damage they do." If we formulate this argument in the first person, however, we see how it cannot exhaust the morality of war: "Since I will unjustifiably fight, the moral imperative is to limit the damage I do." On Shue's account, the laws of *jus in bello* are justified in the third person, so they cannot exhaust the morality of war: we need a first-person account as well.

David Rodin agrees with Shue's second proposition, but denies the first, arguing instead that the morally best laws for war should be the precepts of the liability view, and that we should therefore reject the traditional *jus in bello* in favor of laws that permit combatants to kill only those who are liable to be killed (though Rodin thinks that the liability view might be able to support noncombatant immunity). He mounts two main objections against the first proposition. First, that it is based on unsubstantiated speculation about consequences (Rodin 2011: 453). And second, that it wrongfully instrumentalizes the rights of nonliable j-combatants.

The second objection starts by observing that j-combatants are not liable to be killed. Granting u-combatants the right to kill them, then, amounts to endorsing their violation of j-combatants' rights to life. Granting this right in order to minimize overall suffering amounts to treating their rights to life as a resource that can be sacrificed in the pursuit of better overall outcomes (Rodin 2011: 461). He drives home his point with an example. Imagine a society in which an ethnic minority is victimized, culminating in the annual sacrifice of one member of the group. The authorities have tried to prevent

the sacrifice, but in the years when they succeed, the minority suffers still worse abuse, including more murders. Should the authorities then legalize the annual sacrifice, in order to minimize the suffering caused by this ineradicable practice of minority victimization (Rodin 2011: 456)?

The example certainly pumps some strong intuitions; such a law would be clearly unjustified, and the analogy does appear appropriate. Nonetheless, there are two ways to challenge the analogy, and so defend the Shue/McMahan account of the purposes of legal equality.

The first important disanalogy is that in the scapegoating example, it is predictable who will be the victims, and who the perpetrators. In war, we cannot tell in advance who will end up on the unjustified side. Since we don't know this when we establish the symmetrical *jus in bello*, perhaps we could argue that it is in soldiers' *ex ante* interests that the law should be symmetrical. This is salient, but it doesn't seem decisive. After all, the ritual-sacrifice law could be justified on *ex ante* grounds to the members of the despised minority, but that does not seem sufficient to justify it all things considered. Plus, the argument does nothing to cater for combatants who join up only in order to fight justified wars.

The second disanalogy is that there are some obviously aggravating features of the ritual sacrifice that seem not to be salient for killing j-combatants. A vulnerable, defenseless, innocent person is usurped by an overwhelming force, to be sacrificed to the racist hatred of the majority. This is an egregiously wrongful form of killing. Even if killing j-combatants does violate their rights to life, we must surely distinguish between different violations of this right according to the degree of wrongfulness involved. Rodin himself concedes that there can be aggravating features of rights violations. Killing the defenseless and unthreatening, for the purpose of satisfying a loathsome hatred, is especially wrongful—mobilizing the whole power of the state against that one individual exacerbates matters. J-combatants are not defenseless, and are often killed when they pose immediate threats. They have chosen to place themselves in harm's way, and to occupy an institutional role defined by that choice. Even if these features are not sufficient to deny j-combatants the protection of their rights to life, it does seem likely that wrongfully killing a nonliable j-combatant is not as wrongful as the scapegoat killing. If it is less wrongful, then it might be easier to justify granting u-combatants a legal right to kill, in order to thereby minimize the calamities of war.

These disanalogies are important, but the key weakness of Rodin's case is not this critique of the Shue/McMahan account of the purposes of legal equality. That might actually go through. Instead, the real problem is the viability of his alternative to their position. Rodin assumes that the alternative to symmetry is asymmetry: j-combatants get the right to kill u-combatants, to whom the reciprocal right is denied. But if the arguments of this paper are correct, not only will it often be very difficult to determine who are the j-combatants and who the u-combatants, but some j-combatants will be liable to be killed, while some u-combatants will not. We cannot simply infer from their side having apparently satisfied *jus ad bellum*, that they will be liable to be killed. To endorse simple asymmetry, then, is to instrumentalize the rights of the nonliable u-combatants, in order to grant j-combatants the possibility of pursuing their cause. Instead, if the laws of war should mirror the liability view, then they must be not merely asymmetrical, but completely individuated—both to the agent and to the specific act. The laws of war would then be either extraordinarily complex, and therefore obviously not justiciable, or they would be too broad and vague to have any critical purchase.

Either they would specify each instance of permissible killing, or they would simply say to combatants: intentionally kill only those who are liable to be killed.

Given the arguments of this paper, the resulting laws would evidently lead us straight into the contingent pacifist objection. The only way for soldiers and states to ensure compliance with LOAC would be to endorse pacifism: if they cannot be sure that they are in the right (and when can they be?) then the risk of wrongdoing is exponential; even if they are in the right, they will inevitably end up intentionally killing many nonliable people—which the proposed laws of war will not allow. The laws of war would therefore make it impossible to fight a justified war (while respecting those laws). And perhaps that is the big disanalogy with the scapegoating example. By outlawing the sacrifice, we do not thereby deter others from the justified use of force to defend things of real value. But implementing the liability view in the laws of war would outlaw war. If there are justified uses of force, then this is a serious problem—and the intuition supporting political communities' right to use lethal force to defend themselves against some sorts of attack is as robust as the intuition grounding individual rights, on which Rodin's argument rests. But even if there are no justified uses of force, it is entirely unrealistic to expect states and soldiers to adhere to laws of war that in practice mandate pacifism. If the laws of war were based on the liability view, they would be universally disregarded.

Rodin might counter that it is better to have laws of war that map onto the moral truth, but are disregarded, than to buy states' and soldiers' conformity to the law by sacrificing the rights of the nonliable. We can see clearly here how Rodin's position is the mirror opposite of that of Shue. Where Shue argues that the third-person morality of rules of war is all there is to the morality of war, Rodin reduces it to his account of first-person morality. Each believes that our account of the morality of war cannot accommodate these two distinct perspectives. I think this is a mistake.

Both Rodin and Shue seek greater congruence between the laws and morality of war than seems viable. Shue allows predictable wrongdoing too great a role in determining war's morality, while Rodin is too indifferent to the epistemic difficulties of war, and too rigidly committed to respecting rights, even ultimately at the cost of endorsing pacifism. McMahan is surely right that laws, as institutions, depend on third-person moral arguments that should take some forms of noncompliance as parametric in ways that our first-personal moral reasons should not. The laws of war cannot track morality directly—either by bending our moral reasons to match the laws or shaping the laws to exactly follow our moral reasons. But I would defend greater congruence than does McMahan between these two sources of normative principles. Specifically, I think legal equality sometimes reflects moral equality (though it is also often a necessary compromise). And I think noncombatant immunity has principled foundations. More generally, unlike McMahan and the other revisionists, I think that both the morality and laws of *jus in bello* can be satisfied by both justified and unjustified combatants.

The legal equality of combatants is in part grounded in moral equality, because your side having satisfied or failed to satisfy *jus ad bellum* is not determinative of whether you are a justified combatant—whether you can justifiably use lethal force. I have argued throughout this paper and elsewhere that some u-combatants will not be liable to be killed, and some j-combatants will be liable. That alone suggests that the j-combatants who kill nonliable u-combatants might not be justified, while the u-combatants who kill liable j-combatants might be justified. More importantly, though, it indicates that if warfare as a whole is ever justified, it is as a lesser evil—all wars will involve wrongdoing,

which can only be justified if some stronger countervailing reasons override it. Whether you have sufficiently strong countervailing reasons is not determined by whether your side went to war justly. Some u-combatants, for example, will fight only to protect their fellow citizens (both combatants and noncombatants), and they might be justified in doing so. Some j-combatants, by contrast, will not have sufficient justification to violate the rights they will inevitably violate by fighting—though admittedly it is more likely that j-combatants will be justified combatants than that u-combatants will be. The key point here is that a strict moral or legal inequality of combatants, according to which u-combatants are considered unjustified combatants, and j-combatants considered justified combatants, is morally untenable.

If the laws were to track morality directly, then, they would be differentiated to identify justified combatants and unjustified combatants, regardless of the side they are on. Identifying which soldiers are justified and which unjustified would require a level of detailed information about individuals' reasons that is clearly beyond the reach of international law. Moreover, the matter is shrouded in considerable epistemic uncertainty, as argued above. The laws of war cannot be sufficiently subtle to distinguish justified from unjustified combatants, and even if they could be adequately specified, applying them would be impossible in virtue of this epistemic uncertainty. We are driven to endorse some form of equality between j-combatants and u-combatants. This could be captured with a universal prohibition on fighting, but the law should not prohibit justified combatants from fighting—not only because it would be disregarded, but because it is a greater wrong to outlaw justified fighting than to fail to criminalize unjustified fighting.

That last point is crucial. The laws of war should be neutral between j-combatants and u-combatants. But this does not mean we should enshrine, in international law, a right for all combatants to fight—as we see, for example, in articles 43 and 44 of the first Additional Protocol, and in the British *Manual of the Law of Armed Conflict* (UK Ministry of Defence 1994). Rodin is probably correct to argue that the law should not grant people the right to kill unjustifiably. The law should simply be silent on that question, neither granting nor denying combatants the right to fight. This would not need too radical a change in the laws of war as they currently stand—at present, the principal purpose of granting all combatants equal rights to fight is to guarantee their immunity from prosecution by their adversaries. But immunity from prosecution can be justified on its own terms; it need not be grounded in a right to fight.

Combatant legal equality, then, is partly grounded in moral principle and partly in practicality. What about noncombatant immunity? McMahan claims that all we need here is a legal doctrine of noncombatant immunity that can be justified in consequentialist terms. I reject the idea that noncombatant immunity is a purely legal artifact, for two reasons. First, the intuitions that underpin it are as strong and deeply rooted as any on which participants in this debate have drawn. Second, as argued above, if their moral reasons permit or require soldiers to kill noncombatants, but law prohibits it, they are either permitted or required to disregard the law, so legally protecting noncombatants is not enough. Of course, these two points are not sufficient to justify the principle of noncombatant immunity—they merely motivate the search for an adequate defense.

Fortunately, I think a solid defense of noncombatant immunity is available. First, I think the threshold for liability to be killed should be high, requiring some degree of culpability for a significant contribution to an unjustified threat. At that level, most ordinary civilians in a modern state will not be liable to be killed. That is the first

bulwark of noncombatant immunity, and an important one. Of course, it means many combatants will not be liable either. The challenge, then, is not to explain noncombatant immunity, but to explain combatant non-immunity. Combatants can be permissible targets, on my account, because killing nonliable combatants is less wrongful along a variety of axes than killing nonliable noncombatants. The two key axes, I think, are that combatants have consented to put themselves in harm's way—indeed, it is part of their profession to do so—while noncombatants have not, and that noncombatants are vulnerable and defenseless, while combatants are not. Killing nonliable people who have put themselves in harm's way is, other things equal, less wrongful than killing nonliable people who have not done so; killing nonliable people who are vulnerable and defenseless is, other things equal, more wrongful than killing nonliable people who are not. I develop these and other ideas in depth elsewhere (Lazar forthcoming); the point of mentioning them here is simply to show that morality's resources for justifying noncombatant immunity are profound and rich.

One final observation is warranted. One reason for McMahan, Rodin, Hurka and others denying that the legal equality of combatants can have moral foundations is that they think u-combatants cannot satisfy *jus in bello*. They cannot fight discriminately, insofar as discrimination requires killing only the liable. Nor can they satisfy the criteria of necessity and proportionality that are usually also built into *jus in bello*—each seems predicated on their use of force achieving some good, which if they are u-combatants is impossible. These philosophers share two mistakes. The first is to think that the principle of distinction mandates killing only the liable. As we have seen, if it did, then it would enjoin pacifism. Instead, the principle of distinction is genuinely a principle of noncombatant immunity, justified on the terms just summarized. Second, they mistakenly interpret the principles of *jus in bello* as specifying necessary and sufficient conditions for justified killing in war. Combatants who target only combatants, and who use the minimum force required to achieve their objectives, and cause only collateral damage that is not excessive in relation to the advantage they secure, are not thereby assured of fighting justifiably. These are necessary conditions of justified war fighting, but they are not sufficient. The laws of *jus in bello*—and the underlying moral principles—specify constraints which any combatant must satisfy in order to fight justifiably. But they must also have sufficient reason for the havoc they wreak, and the laws of war are silent on that. U-combatants and j-combatants can equally well adhere to these constraints. Otherwise unjustified combatants who adhere to these constraints do not thereby become justified—though they fight less wrongfully than they otherwise would. Otherwise justified combatants who fail to meet these constraints are to that extent unjustified.

Conclusion

The revisionist critique of conventional just war theory has undoubtedly scored some important victories. Walzer's elegantly unified defense of combatant legal equality and noncombatant immunity has been seriously undermined. This critical success has not, however, been matched by positive arguments, which when applied to the messy reality of war would deprive states and soldiers of the permission to fight wars that are plausibly thought to be justified. The appeal to law sought to resolve this objection by casting it as a pragmatic worry about implementation, which while germane to debates over the laws of war, need not undermine the fundamental principles the revisionists advocate.

This response is inadequate. Revisionists have not shown that soldiers should obey the laws of war, in practice, when they conflict with their other moral reasons—our worries about application remain intact. Moreover, a theory of war that offers only an account of the laws of war, and a set of fundamental principles developed in abstraction from feasibility constraints, is radically incomplete. We need to know how to apply those fundamental principles, and whether, when applied, they lead to defensible conclusions. Only two options seem to remain. Perhaps the revisionists' arguments for their chosen fundamental principles are sufficiently compelling that we should stick with them, and accept their troubling conclusions—in other words, accept pacifism. Alternatively, we need to revise our fundamental principles, so that when applied they yield conclusions that we can more confidently endorse.

Though it does not save the revisionist view from the responsibility dilemma and cognate objections, the appeal to law does raise an important, and previously inadequately theorized, question—or, rather, resurrects a neglected topic, discussed in depth by historical just war theorists such as Grotius and Vattel. There are good grounds for distinguishing the laws of war from the morality of war, and for adjusting the former to accommodate predictable noncompliance, that should not impact on our account of the latter. Nonetheless, I have argued that there are some profound moral insights underlying both combatant legal equality and noncombatant immunity: specifically, we cannot infer from a combatant's side having not satisfied *jus ad bellum* that he may not justifiably use lethal force; and other things equal, it is more wrongful to harm a nonliable noncombatant than to harm a nonliable combatant.

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Further Reading

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