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Proxy Battles in the Ethics of War^{*}

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1. Introduction

Interest in just war theory has boomed in recent years, as a revisionist school of thought has challenged the orthodoxy of international law, most famously defended by Michael Walzer.¹ These revisionist critics have targeted the two central orthodox principles governing the conduct of war: combatant equality and noncombatant immunity.² The first states that combatants face the same permissions and constraints whether their cause is just or unjust. The second protects noncombatants from intentional attack. In response to these critics, some philosophers have defended aspects of the old orthodoxy on novel grounds.³ Revisionists counter. As things stand, the prospects for progress are remote.

In this paper, we offer a way forward. We argue that exclusive focus on first-order moral principles—combatant equality and noncombatant immunity—has led revisionist and orthodox just war theorists to engage in ‘proxy battles’. Their first-order moral disagreements are traceable to deeper, second-order disagreements about the nature and purpose of political theory. These deeper disputes have been central to the broader discipline of political theory for several years; we aim to apply them to war, and we hope to enable a step forward.

In particular, we focus on two second-order questions:

- The ‘site’ question: Should principles of *jus in bello* apply to institutional design, or to individual conduct?
- The ‘feasibility’ question: What real-world facts, if any, should constrain principles of *jus in bello*?

In each case, our analysis comes in two parts. We first summarise the relevant debate in political theory, and illustrate how it underpins the controversy between revisionist and orthodox just war theorists. We then show how this novel framing enables advances on first-order disputes about war.

^{*} We are grateful to the audience at the conference on Just War and Feasibility (ANU, July 2014) for questions and comments.

¹ Michael Walzer, *Just and Unjust Wars: A Moral Argument with Historical Illustrations* (New York: Basic Books, 1977); Adam Roberts and Richard Guelff, *Documents on the Laws of War* (Oxford: Oxford University Press, 2000).

² For example, Lionel K. McPherson, “Innocence and Responsibility in War,” *Canadian Journal of Philosophy* 34, no. 4 (2005): 485–506; Cécile Fabre, *Cosmopolitan War* (Oxford: Oxford University Press, 2012); Helen Frowe, *Defensive Killing* (Oxford: Oxford University Press, 2014).

³ Appealing to a broadly rule consequentialist framework: 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 (Oxford: Oxford University Press, 2010), 87–111; Allen Buchanan, “Institutionalizing the Just War,” *Philosophy & Public Affairs* 34, no. 1 (January 1, 2006): 2–38; Jeremy Waldron, *Torture, Terror, and Trade-Offs: Philosophy for the White House* (Oxford: Oxford University Press, 2010). Appealing to a contractarian framework: by Yitzhak Benbaji, “A Defense of the Traditional War Convention,” *Ethics* 118, no. 3 (April 1, 2008): 464–95; Daniel Statman, “Fabre’s Crusade for Justice: Why We Should Not Join,” *Law and Philosophy* 33, no. 3 (2014): 337–60. Appealing to a deontological framework that methodologically has much in common with the revisionist approach: Seth Lazar, “The Responsibility Dilemma for Killing in War: A Review Essay,” *Philosophy & Public Affairs* 38, no. 2 (2010): 180–213; Seth Lazar, *Sparing Civilians: Moral Foundations of the Principle of Distinction* (Oxford: Oxford University Press, forthcoming); Patrick Emerton and Toby Handfield, “Order and Affray: Defensive Privileges in Warfare,” *Philosophy & Public Affairs* 37, no. 4 (September 1, 2009): 382–414.

Before we start, one caveat. While our approach should illuminate all areas of just war theory, in light of space constraints, we focus only on principles governing the conduct of war—i.e., *jus in bello*—in particular, combatant equality and noncombatant immunity.

2. The Site of Justice and Just War Theory

In this section, we first outline the political theory debate on the site of justice, and then draw parallels with recent disputes between orthodox and revisionist just war theorists. This novel framing will allow us, in Section 3, to point to a number of important implications for our thinking about *jus in bello*.

2.1 *The Site of Justice*

Much contemporary political theory expounds principles of justice, which set out agents' entitlements within a social system. For instance, members of a domestic society are entitled to equal civil and political liberties, and to a set of socio-economic opportunities. These entitlements are 'requirements of justice'.

Unsurprisingly, scholars disagree about the content of principles of justice, especially as regards entitlements to socio-economic goods. Some defend distributive equality, others distributive sufficiency, others still support whichever distribution maximally benefits the most deprived.⁴ Although much ink has been spilled on the first-order moral question of what socio-economic justice demands, theorists of justice have also been sensitive to the equally important, second-order question of the 'site of justice': the subject to which principles of justice apply. We focus on this second-order debate in what follows.

Two competing approaches have emerged, which we call 'political' and 'non-political'.⁵ Political approaches hold that principles of justice apply to the most important legal, political, and economic institutions within any given social system. Non-political approaches, by contrast, hold that principles of justice apply to the conduct of individual human beings.

John Rawls is the most prominent proponent of the political approach.⁶ On his view, justice is the 'first virtue of social institutions', and his principles of justice—equal liberty, fair equality of opportunity, and the difference principle—apply to the 'basic structure of society', namely society's main institutions. As A.J. Julius puts it, for Rawlsians,

to conclude that a society is just or unjust, I don't have to know what everyone in the society is doing. It's enough that I know how the society's institutions are arranged, or that I understand the basic framework that shapes its members' interaction over time or the basic mechanisms that distribute them over a range of prospects for living better and worse lives.⁷

Justice is a property of institutional systems, and its bearing on individuals' conduct is only indirect. Individuals' duties of justice derive from the institutional principles. In particular, when institutions are fully just, individuals' duties of justice are *exhausted* by the demands institutions

⁴ Harry Frankfurt, "Equality as a Moral Ideal," *Ethics* 98, no. 1 (October 1, 1987): 21–43; Richard Arneson, "Egalitarianism," in *The Stanford Encyclopedia of Philosophy*, ed. Edward N. Zalta, Summer 2013, 2013, <http://plato.stanford.edu/archives/sum2013/entries/egalitarianism/>; Derek Parfit, "Equality and Priority," *Ratio* 10, no. 3 (December 1, 1997): 202–21.

⁵ In the literature, this contrast is also known as that between dualistic and monistic approaches to justice. See Liam B. Murphy, "Institutions and the Demands of Justice," *Philosophy & Public Affairs* 27, no. 4 (October 1, 1998): 251–91.

⁶ John Rawls, *A Theory of Justice* (Oxford: Oxford University Press, 1999). For discussion see Iris Marion Young, "Taking the Basic Structure Seriously," *Perspectives on Politics* 4, no. 01 (March 2006): 91–97; Samuel Scheffler, "Is the Basic Structure Basic?," in *The Egalitarian Conscience*, ed. Christine Sypnowich (Oxford: Oxford University Press, 2006), 102–29.

⁷ A. J. Julius, "Basic Structure and the Value of Equality," *Philosophy & Public Affairs* 31, no. 4 (October 1, 2003): 321.

place on them (i.e. by the law); when institutions are unjust, individuals have duties of justice to reform them.

On the political approach, individuals in a complex social system do face other moral demands besides these institutional ones: as friends, parents, workers and so forth.⁸ But these further demands do not conflict with those of justice; instead, justice sets the boundaries within which we may legitimately honour our other moral concerns.

Philosophers like G.A. Cohen and Liam Murphy reject the political approach, arguing that justice applies, primarily, to individuals' actions and behaviour:⁹

any plausible overall political/moral view must, at the fundamental level, evaluate the justice of institutions with normative principles that apply also to people's choices. We should not think of legal, political, and other social institutions as together constituting a separate normative realm, requiring separate normative first principles, but rather primarily as the means that people employ the better to achieve their collective political/moral goals.¹⁰

On their view, in a just society every individual acts on the demands of justice that apply to him or her. The rules of justice embedded in institutions are, in turn, derived from the principles that apply to individuals. Unfortunately, non-political theorists are not fully transparent about how to effect this derivation. One, perhaps naïve option, would be to require institutional rules to exactly mirror the principles of justice for individual conduct, with no sensitivity to incentive effects.¹¹ We call this option naïve, however, because so arranging one's institutions might be counter-productive. For example, if moral principles for individuals are epistemically and/or substantively demanding, their direct embodiment in institutional rules will result in widespread, perhaps catastrophic non-compliance.

Non-political theorists should instead design institutions that maximally conduce to justice in the circumstances.¹² Following this instrumentalist rationale, facts about individuals' expected behaviour and the general conditions of society must be considered when elaborating institutional rules for a legal system.¹³ The resulting institutional rules will differ from interpersonal moral principles, but this difference is introduced to best realize the ideals behind those principles under real-world circumstances.

So far, we have outlined two contrasting approaches to the site of principles of justice. What does the distinction between these two approaches have to offer to debates about just war theory, specifically about *jus in bello*?

2.2 *Jus in Bello and the Site of Justice*

When it comes to *jus in bello*, we care about all normative principles that govern the conduct of war, rather than norms of justice strictly conceived. Still, the site question arises all the same, and

⁸ John Rawls, *Political Liberalism* (New York: Columbia University Press, 1996), 262.

⁹ G. A. Cohen, "Where the Action Is: On the Site of Distributive Justice," *Philosophy & Public Affairs* 26, no. 1 (January 1, 1997): 3–30; Murphy, "Institutions and the Demands of Justice." For discussion see Miriam Ronzoni, "Two Concepts Of The Basic Structure, And Their Relevance To Global Justice," *Global Justice: Theory Practice Rhetoric* 1 (2007): 68–85; Thomas Pogge, "On the Site of Distributive Justice: Reflections on Cohen and Murphy," *Philosophy & Public Affairs* 29, no. 2 (April 1, 2000): 137–69.

¹⁰ Murphy, "Institutions and the Demands of Justice," 253.

¹¹ Cf. what Allen Buchanan calls the 'mirroring view' in the philosophy of human rights. See Allen Buchanan, *The Heart of Human Rights* (Oxford: Oxford University Press, 2013), 14ff. Murphy explicitly rejects this option when he says that his view 'does not have the absurd implication that all morally defensible legal principles are ipso facto valid moral principles'. See Murphy, "Institutions and the Demands of Justice," 254.

¹² Murphy, "Institutions and the Demands of Justice," 254.

¹³ In G.A. Cohen's case, institutional rules would have to take into account not only justice, but also other values, in conjunction with contingent empirical facts. In other words, for Cohen, considerations of justice are one of many value-considerations factored into the design of 'regulative rules' for the basic structure of society. See G. A. Cohen, "Facts and Principles," *Philosophy & Public Affairs* 31, no. 3 (2003): 211–45.

underpins some of the main disagreements between orthodox and revisionist just war theorists. Most noticeably, almost all orthodox theorists focus on the morally justified institutions to govern armed conflict, while almost all revisionists focus on the moral demands that apply to individual combatants. Conversely, orthodox theorists are typically silent on the principles that apply directly to combatants, while revisionists discuss institutions only cursorily.

In what follows, we map out the logical space for different approaches to the site of *jus in bello*. As will become clear, bringing reflections on the site of justice to bear on disputes about *jus in bello* not only illuminates these disputes, but also highlights a portion of logical space so far unnoticed in debates about justice. For not just two, but three approaches to the site of principles of *jus in bello* present themselves: political, non-political, and mixed. We discuss each in turn.

2.2.1 Political Approaches to *Jus in Bello*

Political approaches to *jus in bello* specify the morally justified institutions to govern armed conflict, just as political approaches to justice specify morally just institutions to govern the distribution of entitlements. And as we have seen, the rules of a just ‘basic structure’ exhaust the justice-related demands applying to individuals; similarly, the rules set out in justified institutions for regulating armed conflict exhaust the just-war-related permissions and prohibitions applying to combatants.

What is more, for political just war theorists, these permissions and prohibitions always correspond to what combatants ought to do all things considered. This idea can be understood in two ways: one could concede that interpersonal moral demands apply to combatants’ actions in war, but believe they are trumped by the institutional demands grounded in the laws of war; or one could simply deny that, in war, *any* other principles govern the actions of combatants, at least in their capacity as combatants.

Many orthodox just war theorists endorse the political approach. There are two broad approaches, each defending a distinctive substantive principle for institutional design. The first justifies the institutions governing armed conflict on rule consequentialist grounds, by appeal to a general principle mandating the minimization of wrongful harm. Henry Shue most prominently advocates this position, which was also defended by George Mavrodes, R. B. Brandt, and more recently by Allen Buchanan and Ryan Jenkins.¹⁴ The second strand holds that justified laws of war result from a fair and mutually advantageous hypothetical contract. As it happens, the object of the contract corresponds to the existing laws of war, whereby combatants waive their rights against one another to grant each other the licence to obey the military orders of their state.¹⁵

2.2.2 Non-Political Approaches to *Jus in Bello*

Non-political approaches think *jus in bello* specifies moral principles that apply to individual combatants, and to their military and political leaders. Just like their counterparts in the socio-economic justice debate, non-political just war theorists think we should derive the institutional rules governing armed conflict from interpersonal moral principles. This derivation is, in turn, susceptible to more or less ambitious interpretations: some think the nature and circumstances of conflict mean that the laws can at best *approximate* those principles; others think the laws of war should (and can) *directly implement* them. In either case, however, for proponents of the non-

¹⁴ R. B. Brandt, “Utilitarianism and the Rules of War,” *Philosophy and Public Affairs* 1, no. 2 (1972): 145–65; Allen Buchanan and Robert O. Keohane, “The Preventive Use of Force: A Cosmopolitan Institutional Proposal,” *Ethics & International Affairs* 18, no. 1 (March 1, 2004): 1–22; Buchanan, “Institutionalizing the Just War”; George I. Mavrodes, “Conventions and the Morality of War,” *Philosophy and Public Affairs* 4, no. 2 (1975): 117–31; Ryan Jenkins, *Dissertation*, n.d.; Shue, “Do We Need a ‘Morality of War?’”; Janina Dill and Henry Shue, “Limiting the Killing in War: Military Necessity and the St. Petersburg Assumption,” *Ethics & International Affairs* 26, no. 03 (September 2012): 311–33; Henry Shue, “Laws of War, Morality, and International Politics: Compliance, Stringency, and Limits,” *Leiden Journal of International Law* 26, no. 02 (June 2013): 271–92.

¹⁵ Benbaji, “A Defense of the Traditional War Convention”; Yitzhak Benbaji, “The Moral Power of Soldiers to Undertake the Duty of Obedience,” *Ethics* 122, no. 1 (2011): 43–73; Statman, “Fabre’s Crusade for Justice.”

political approach to *jus in bello*, the demands of interpersonal morality *exhaust* the obligations and permissions applying to individuals in war.

At a first pass, the non-political approach seems to underpin the revisionist critique of orthodox just war theory. Many revisionist arguments challenge traditional principles of *jus in bello* by appealing to the demands of interpersonal morality. As revisionists have argued in detail, according to ordinary interpersonal morality, it is impossible to see how combatants advancing an unjust cause could be morally permitted to intentionally kill just combatants, or to kill noncombatants as unintended side-effects of pursuing their unjust goals.¹⁶ Combatant equality, as it is conceived in the laws of war, cannot track combatants' interpersonal moral duties. There is more dispute over noncombatant immunity, but most revisionists think that it, too, lacks foundations in interpersonal morality, since noncombatants can be responsible for contributing to unjustified threats, and this grounds liability to be killed.¹⁷

Some non-political just war theorists think the laws of war should replicate interpersonal morality. For example, David Rodin has rejected the arguments of Shue and others that those laws should aim to minimise wrongful harm, arguing instead that they should prohibit wrongful killing.¹⁸ Helen Frowe has tentatively endorsed this thesis, arguing against licensing wrongful harm in order to minimise it.¹⁹ Other theorists, more sympathetic to just-war orthodoxy, have instead argued that the laws of war should attempt to *approximate* what interpersonal morality demands of individual combatants under real-world circumstances. This is the view of one of us, and of Adil Haque, which we discuss in more detail below.²⁰

2.2.3 Mixed Approaches to *Jus in Bello*

Mixed approaches hold that different, and conflicting, principles govern the laws of war and the interpersonal morality of war. This means that combatants face pervasive conflicts between institutional (legal) permissions, prohibitions and requirements on the one hand, and their interpersonal (moral) counterparts on the other.

In debates about justice, this third possibility in conceptual space has not yet surfaced. Political theorists of justice acknowledge demands of interpersonal morality applying to individuals *beyond* what institutional justice requires. However, they also insist that, within a fully just state, no conflict between these two sets of demands arises. Non-political theorists of justice, by contrast, hold that, at the fundamental level, principles for institutions and principles for individuals coincide—their normative outlook is monistic, not mixed. When it comes to *jus in bello*, though, the mixed approach is in fact rather popular, and embraced—with different emphases—by some revisionist and orthodox theorists alike.

On the revisionist side, Jeff McMahan endorses a mixed approach. Acknowledging that straightforward legal implementation of combatants' interpersonal moral duties and permissions would have bad consequences, he concludes that the principles governing the laws of war should

¹⁶ E.g., Jeff McMahan, "Innocence, Self-Defense and Killing in War," *Journal of Political Philosophy* 2, no. 3 (1994): 193–221; David Rodin, *War and Self-Defense* (Oxford: Clarendon Press, 2002); C. A. J. Coady, *Morality and Political Violence* (Cambridge: Cambridge University Press, 2008).

¹⁷ McMahan, "Innocence, Self-Defense and Killing in War"; Fabre, *Cosmopolitan War*; Helen Frowe, "Self-Defence and the Principle of Non-Combatant Immunity," *Journal of Moral Philosophy* 8, no. 4 (January 1, 2011): 530–46. For dissent, see David Rodin, 'The Moral Inequality of Soldiers: Why *Jus in Bello* Asymmetry Is Half Right', in David Rodin and Henry Shue (eds.), *Just and Unjust Warriors: The Moral and Legal Status of Combatants* (Oxford: Oxford University Press, 2008), 44–68.

¹⁸ David Rodin, "Morality and Law in War," in *The Changing Character of War*, ed. Hew Strachan and Sibylle Scheipers (Oxford: Oxford University Press, 2011), 446–63.

¹⁹ Helen Frowe, *The Ethics of War and Peace: An Introduction* (London: Routledge, 2011), 45. In Frowe, "Self-Defence and the Principle of Non-Combatant Immunity," she seems more sympathetic to the Fabre/McMahan view, however.

²⁰ Lazar, *Sparing Civilians: Moral Foundations of the Principle of Distinction*; Adil Haque, *Morality and Law at War* (Oxford: Oxford University Press, 2015).

aim to minimise wrongful harm (as per Shue, and contra Rodin).²¹ Cécile Fabre also expresses sympathy for the mixed view, on grounds similar to McMahan's.²² From the perspective of 'mixed' revisionist theorists, when institutional and interpersonal moral demands conflict, interpersonal ones should very often take priority.²³

On the orthodox side, Jeremy Waldron also takes a mixed approach. He argues that the prohibition on intentionally attacking noncombatants is grounded in those noncombatants' retention of their rights to life, while the equal permissions enjoyed by combatants on either side to kill one another intentionally, and to collaterally kill noncombatants in the pursuit of their military objectives, derive from morally justified laws of war, which minimise wrongful harm.²⁴ When unjust combatants' institutional permission to kill conflicts with the interpersonal prohibition on doing so, Waldron thinks that the institutional permission wins out. Also in the mixed orthodox camp, Cheyney Ryan, Massimo Renzo, and David Estlund argue that combatants have institutional duties to obey the orders given to them by a legitimate state, which can exclude or override their interpersonal duties not to kill in unjust wars.²⁵

2.3 Concluding Remarks

Second-order disagreements about the site of principles of *jus in bello* underpin first-order disputes over the moral equality of combatants and noncombatant immunity. The first-order dispute is a proxy battle, fought by theorists whose disagreements run much deeper. Orthodox just war theorists give more weight to institutional demands, and endorse either a political approach, or a mixed approach that is weighted towards the political; revisionist just war theorists give greater weight to interpersonal moral demands, and endorse either a non-political approach or a mixed approach which is weighted towards the non-political. For this debate to make progress, we must settle the underlying second-order question. Otherwise just war theorists will talk past each other: political just war theorists might develop the most plausible account of the institutional norms governing war; non-political and mixed theorists might develop the most plausible versions of their own views; but their proposals would not strictly compete, because each presupposes an approach to the site of normative theorising that the others reject.

3. The Site of Justice and Just War Theory: Implications

We cannot here settle which approach to the site of justice is right. But we can identify the most important challenges facing political, non-political and mixed approaches to *jus in bello*, and gesture at possible responses to them. In doing so, we wish to prompt orthodox and revisionist theorists to more thoroughly defend the second order perspectives tacitly underpinning their first order views. The central question they all must answer is: insofar as we recognise both institutional and interpersonal moral demands, why does *your* approach—political, non-political, or mixed—describe the correct relationship between them?

²¹ Jeff McMahan, "The Morality of War and the Law of War," in *Just and Unjust Warriors* □: *The Moral and Legal Status of Soldiers: The Moral and Legal Status of Soldiers*, ed. David Rodin and Henry Shue (Oxford: Oxford University Press, 2008), 19–43.

²² Cécile Fabre, "Guns, Food, and Liability to Attack in War," *Ethics* 120, no. 1 (2009): 39.

²³ McMahan, "The Morality of War and the Law of War," 37–38.

²⁴ Waldron, *Torture, Terror, and Trade-Offs*.

²⁵ David Estlund, "On Following Orders in an Unjust War," *Journal of Political Philosophy* 15, no. 2 (June 1, 2007): 213–34; Massimo Renzo, "Democratic Authority and the Duty to Fight Unjust Wars," *Analysis* 73, no. 4 (October 1, 2013): 668–76; Cheyney Ryan, "Democratic Duty and the Moral Dilemmas of Soldiers," *Ethics* 122, no. 1 (2011): 10–42.

3.1 Challenges to the Political Approach

The political approach, in its purest form, states that one's obligations in war are exhausted by the obligations set out by the morally justified laws of war. And as we have seen, for orthodox just war theorists subscribing to the political approach, justified laws of war include combatant equality and noncombatant immunity.

The central challenge for the political approach is to explain why fundamental interpersonal moral demands—such as the prohibition on intentionally killing the innocent—should be silenced or trumped by institutional demands. The challenge is relatively easily met for noncombatant immunity. After all, even the most ardent revisionists are uneasy about their views' radical implications for the permissibility of intentionally killing noncombatants. Everyone recognises the intuitive pull of noncombatant immunity. So if the political account vindicates that intuitive pull, then that is all to the good.

Combatant equality poses a much more serious challenge. Nobody can plausibly deny that profound moral reasons weigh against intentionally killing people who are justifiably defending their lives and homes, and against collaterally killing wholly uninvolved people in the pursuit of an unjust objective. We ordinarily consider these the weightiest moral reasons that there are. Why should the presence of an institutional scheme that licenses such killings make any difference to their permissibility at all?

To answer this question, political just-war theorists must account for the *authority of international law*. In other words, they must explain why the mere fact that some act is prohibited (or permitted, required etc.) by morally justified laws of war gives the addressees of these laws decisive reason not to do it, even if it would be permissible at the bar of interpersonal morality. This is a daunting task. Many political philosophers recognise that, even in the best states, accounting for the authority of domestic law is hard.²⁶ And international society is a far cry from the ideal liberal state. Yet, short of a convincing account of the conditions under which international law has authority, and an argument showing that existing laws of war satisfy those conditions, the normative priority that the political approach assigns to institutional demands remains unvindicated.

Perhaps one could adequately defend the authority of international law. But if political just war theorists fall short of that goal, they might still salvage their approach by lowering its ambitions. Instead of defending the authority of international law *in toto*, they could reinterpret it, so that the legal standards less obviously clash with interpersonal demands. They could argue that the morally justified laws governing resort to war should apply to combatants as well as to states and their leaders. Then combatants who fight unjust wars ought not to fight at all, according to both their institutional and interpersonal reasons. On this reading, the laws of *jus in bello* do not licence actions that obey them, but instead offer minimal standards that everyone should obey, given that they decide to fight. For just combatants, there might be no conflict between their interpersonal and institutional reasons. For unjust combatants, the laws of *jus in bello* do not licence their behaviour. The institutional permission is nested within a broader institutional prohibition: the morally justified laws of war should say to unjust combatants 'don't fight unjust wars; but if you fight them, then obey the *jus in bello*'.²⁷

However, this would amount to a revision of current international law, which explicitly grants combatants the permission to kill in war (in accordance with the laws of armed conflict) without adverse distinction based on their nature of their cause.²⁸ International law does not enjoin individual combatants to fight only just wars. So, while the proposed solution might

²⁶ For discussion see A. John Simmons, *Moral Principles and Political Obligations* (Princeton, N.J.: Princeton University Press, 1979).

²⁷ This develops an idea of Dill and Shue, "Limiting the Killing in War"; Shue, "Laws of War, Morality, and International Politics."

²⁸ Article 43.2 of the first additional protocol: combatants 'have the right to participate directly in hostilities'.

salvage the plausibility of the political approach to just war theory, it comes at the cost that political just war theorists must be less conservative in their attitude to international law.

3.2 Challenges to the Non-Political Approach

The non-political approach, recall, holds that the principles governing the design of the laws of war are derived from the principles governing the conduct of individual soldiers in conjunction with salient facts. On the simplest, purist version of this approach, the laws of war should mirror interpersonal morality.²⁹ We think that this view should be rejected because it would have disastrous results. On this point, we agree with orthodox theorists like Shue, and revisionists like McMahan. This links up with the broader topic of how feasibility constraints should impact on institutional design, which we address in the next section.

A more sophisticated version of the non-political approach has been adopted in support of a broadly orthodox account of the laws of war. On this view, the existing laws of war are an imperfect attempt to approximate what interpersonal morality demands of individual combatants. As anticipated, this is the view of one of us, and Adil Haque.³⁰ It says, first, that while combatant equality is strictly false as a general moral thesis, it is a sensible approximation of the moral truth. The moral protections that just combatants enjoy are somewhat less robust than those enjoyed by justified self-defenders in ordinary interpersonal conflicts—they have voluntarily exposed themselves to the risk of harm, moreover most of them go to war recklessly, without examining the justice of their cause. The protections enjoyed by unjust combatants are somewhat more robust than those of unjustified attackers in interpersonal conflicts—their epistemic position is typically the same as for just combatants; often they act out of reasonable partiality for their compatriots. Moreover, on each side of a war, many individual combatants fight permissibly, and many fight impermissibly—all wars involve just and unjust aims and, more narrowly, just and unjust operations. These facts together make the legal equality of combatants a sensible approximation of the moral truth, given how difficult it is to determine of any particular just or unjust combatant whether he is fighting permissibly or impermissibly. Similarly, manifold arguments show that killing noncombatants in war is more seriously wrongful than killing combatants, which, combined with further premises, helps ground noncombatant immunity and other legal doctrines, like proportionality and necessity. In particular, noncombatants are more vulnerable than combatants, killing them involves running a greater risk of killing innocent victims than does killing combatants, and killing noncombatants typically involves an egregiously wrongful mode of agency, in which they are used as a mere means.³¹

Since the laws of war approximate interpersonal morality, for these orthodox-friendly proponents of the non-political approach, one's interpersonal moral obligations and permissions trump any obligations and permissions grounded in the law.

This approach faces two objections, from opposite perspectives. First, given the priority it grants interpersonal moral demands, the orthodox-friendly political approach construes the laws of war as entirely epiphenomenal. This gives those laws insufficient normative bite. Surely unjust combatants who abide by the laws of war are not morally on a par with equally unjust combatants who altogether disregard those laws? Non-political theorists, however, might be able to account for this intuition. They could point out that, when soldiers from different sides are symmetrically positioned with respect to the laws of war—in that they all endorse and follow them—their moral standing vis-à-vis each other changes. Suppose the soldiers of state A commit some interpersonal wrong in accordance with international law, but that the same international law is also endorsed and upheld by state B and its soldiers. If the latter subscribe to, endorse and uphold a system of law, they cannot simply treat the A-soldiers, who have acted in accordance

²⁹ E.g., Rodin, "Morality and Law in War."

³⁰ Lazar, *Sparing Civilians: Moral Foundations of the Principle of Distinction*; Haque, *Morality and Law at War*.

³¹ These arguments are developed and defended in detail in Lazar, *Sparing Civilians: Moral Foundations of the Principle of Distinction*.

with that legal system, just as they would if the system did not exist. By following the common legal system that binds both A and B, B and its soldiers lack standing to condemn the morally wrongful actions of the A soldiers, given that they themselves follow the rules licensing those kinds of actions.³²

Crucially, once the assumption of symmetry is lifted, this conclusion no longer holds. To see this, if we now stipulate that—unlike A—B and its soldiers reject international law and directly act on the demands of interpersonal morality, the A-soldiers' standing with respect to them becomes no different than it would be without international law. B would then indeed be entitled to metaphorically 'point its finger at A' and hold its soldiers to account for acting against the moral imperatives of interpersonal morality.

Second, an objector might protest that the laws of war, which explicitly grant unjust combatants a permission to kill just combatants, and to inflict proportionate collateral deaths, could not possibly be seen as an *approximation* of combatants' interpersonal moral demands. One way to respond is to advocate a change in the laws of war, similar to that required for political just war theory. The *jus in bello* should not grant unjust combatants an explicit licence to kill, as it does in article 43.2 of the first additional protocol. Instead, it should explicitly state that anybody who hopes to fight permissibly ought to adhere to these standards, but that adherence does not guarantee that one fights permissibly (though it will ensure that one does less wrong than one would by breaking the standards). Instead of being expressly permitted by the laws of armed conflict, on this view, participation in an unjust war should be decriminalised.

3.3 Challenges to the Mixed Approach

Finally, we turn to the *mixed* approach. The central difference between this and the non-political one is that, on the latter, the laws of war should mirror or approximate combatants' interpersonal moral demands, while on the mixed approach the norms grounding the laws of war are quite different from those grounding interpersonal morality. Adherents of this approach think that the non-political alternative commits 'the fallacy of approximation'.³³ Our attempts to approximate interpersonal morality in the laws of war might have such disastrous consequences that we should instead develop principles to govern the laws of war that are quite distinct from those of interpersonal morality. As explained earlier, taking this kind of view, Jeff McMahan argues that the laws of war presuppose consequentialist foundations—they aim to minimise wrongful harm—while the morality of war is avowedly nonconsequentialist in structure.³⁴

The mixed view could potentially let us 'have our cake and eat it too': we can have our rigorist principles of interpersonal morality, without accepting their radical and deleterious implications if implemented in international law. But of course this view must now explain what soldiers should do when law and interpersonal morality conflict. McMahan briefly 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.³⁵ Problematically, this discussion is neither

³² Interestingly, something similar is true of punishment: both 'vertically' and 'horizontally.' Vertically, it appears impermissible for a state to punish those bound by its rules for actions that do not contravene those rules—even if those rules are unjust from the perspective of interpersonal morality. Horizontally, it seems impermissible for individuals who all endorse and uphold the same less-than-just laws to condemn each other for doing so: since they all support the same legal system, it would be hypocritical for some to condemn others for acting in accordance with its injunctions.

³³ **(Ref to Estlund MS—ask for permission)** In economics, the theory of the second best governs cases when one or more optimality conditions for the application of some principle fails, the next best solution might involve changing or relaxing some of the other optimality conditions, rather than simply approximating the ideal case as closely as possible. See R. G. Lipsey and Kelvin Lancaster, "The General Theory of Second Best," *Review of Economic Studies* 24, no. 1 (1956): 11–32.

³⁴ McMahan, "The Morality of War and the Law of War."

³⁵ *Ibid.*, 37–38.

exhaustive (it is silent on legal requirements), nor theoretically grounded. McMahan never explains why legal demands can override moral ones, except by appealing to consequentialist considerations that clash with the deontological approach to interpersonal morality he otherwise endorses.³⁶

Advocates of the mixed account, like adherents of the political approach, must explain *under what circumstances/in what domain* the international law of armed conflict has authority. At least, they must do this if the laws of war are ever going to override combatants' interpersonal moral demands. Otherwise, if an action is permitted, prohibited, or required by interpersonal morality, then it is permitted, prohibited, or required simpliciter, regardless of what international law says. The laws of armed conflict would be epiphenomenal to what combatants in war actually ought to do, and the mixed approach would collapse into the non-political one.

For Waldron, Renzo, and others on the political side of the mixed camp, the central challenge is the same as for the political just war theorists: to explain why a legal permission, or the authoritative orders of a legitimate state, can override combatants' interpersonal obligations not to kill innocent people in pursuit of an unjust cause.

3.4 Concluding Remarks

Much of the dispute between orthodox and revisionist just war theorists depends on what the correct account of the relationship between institutional and interpersonal moral demands is. If orthodox theorists wish to vindicate combatant equality and non-combatant immunity, they must argue that the existing laws of war have legitimate authority, or that they successfully approximate/reflect interpersonal morality. Both tasks are hard to accomplish.

If revisionists wish to uphold the interpersonal moral prohibition on killing the innocent, while not altogether denying the moral force of broadly justified laws of war, they must explain why and when obedience to the laws of war affects one's moral standing. This again requires either developing a theory of the authority of international law or, more modestly, of the normative significance of international law, short of authority. The bottom line, however, is that progress in the first-order dispute between revisionist and orthodox just war theorists demands a re-orientation of the debate towards the second-order question of how institutional and interpersonal moral demands relate to each other.

4. Feasibility Constraints and Just War Theory

In this section, we first sketch the political theory discussion on feasibility constraints and the design of normative principles, then draw parallels with contemporary just war theory debate. Once again, this new framing will help us illuminate that debate and make some substantive advances within it.

4.1 Feasibility Constraints in Political Theory

When attempting to apply our moral and political theories to the real world, we often find that there are facts about human character and behaviour, our empirical circumstances, and the perverse incentives that we face, which make those theories hard to implement successfully. These facts are *feasibility constraints*.³⁷ Political theorists have, in recent years, expended much

³⁶ McMahan, "The Morality of War and the Law of War"; Seth Lazar, "The Morality and Law of War," in *The Routledge Companion to Philosophy of Law*, ed. Andrei Marmor (New York: Routledge, 2012), 364–79.

³⁷ For discussion see Pablo Gilabert and Holly Lawford-Smith, "Political Feasibility: A Conceptual Exploration," *Political Studies* 60, no. 4 (December 1, 2012): 809–25; Pablo Gilabert, "Feasibility and Socialism," *Journal of Political Philosophy* 19, no. 1 (2011): 52–63; Holly Lawford-Smith, "Understanding Political Feasibility," *Journal of Political Philosophy* 21, no. 3 (2013): 243–59; Anca Gheaus, "The Feasibility Constraint on The Concept of Justice," *The Philosophical Quarterly* 63, no. 252 (2013): 445–64; Juha Räikkä, "The Feasibility Condition in Political Theory," *Journal of Political Philosophy* 6, no. 1 (1998): 27–40.

effort identifying which feasibility constraints should set the parameters for principles of justice that aim to deliver action-guiding prescriptions. Their views can be represented on a spectrum, from utopian theorists at one end, to realists at the other.³⁸

Utopian theorists think that justice is unconstrained by the demands of feasibility;³⁹ realists think that all facts that render a principle even minimally unlikely to be successfully realised should be taken as parametric. Between these unpopular extremes, many theorists believe that normative theorising should make some concessions to feasibility constraints, but they differ over the extent of those concessions. Borrowing a label introduced by David Estlund, we distinguish between minimally and maximally concessive approaches.⁴⁰

Minimally concessive approaches consider only a thin set of feasibility constraints relevant to theorizing about justice. Provided some action enjoined by a principle of justice is physically and psychologically possible for the agent, it can be required of him.⁴¹ Facts about physical and psychological possibility will depend on (i) the agents in question and (ii) the environment around them. Ascertaining what (i) and (ii) involve may seem relatively straightforward. For example, it is physically impossible for a deaf person to act on the obligation ‘you ought to reply when your name is called out’. Similarly, it may be physically impossible for a well-meaning but desperately poor state to provide subsistence for all of its citizens.

Other cases are less clear-cut. Imagine John is standing on the shore of a lake, and sees a small child drowning, not far from him.⁴² John knows how to swim, and can pull the child out without risking drowning; however, he is paralysed by what he recognises as an irrational fear of entering the lake. He developed this fear as a child, after his father died in a boating accident. Is it psychologically impossible for John to walk in and pull the child out? It is hard to say, but minimally concessive theories must explain when psychological debilities count as genuine feasibility constraints.

Maximally concessive approaches emphasise not only facts about physical and psychological possibility, but also facts about what agents are *likely to do* given their preferences and dispositions.⁴³ To appreciate the difference, consider this prescription: ‘Every person ought to donate 50% of their income to the global poor, provided this is compatible with each still satisfying their basic needs’. Minimally concessive approaches could not object to this: though this prescription asks a lot, it is clearly physically and psychologically possible to donate half one’s income to others (barring exceptional circumstances or unusual pathologies). By contrast, on the maximally concessive approach, this prescription is indeed invalid, because it is so unlikely that people will comply with it. Given predictable selfishness and partiality, very few will be disposed to donate so much of their earnings, which is enough to undermine the prescription.⁴⁴

³⁸ Laura Valentini, “Ideal vs. Non-Ideal Theory: A Conceptual Map,” *Philosophy Compass* 7, no. 9 (2012): 654–64. See also Joseph H. Carens, “Realistic and Idealistic Approaches to the Ethics of Migration,” *International Migration Review* 30, no. 1 (April 1, 1996): 156–70.

³⁹ Arguably G.A. Cohen is such a theorist. See Cohen, “Facts and Principles.”

⁴⁰ David Estlund, *Democratic Authority: A Philosophical Framework* (Princeton, N.J.: Princeton University Press, 2008), chap. 14.

⁴¹ David Estlund appears to be concerned with physical possibility alone, hence he arguably belongs somewhere in between utopian and minimally concessive approaches. David Estlund, “Human Nature and the Limits (If Any) of Political Philosophy,” *Philosophy & Public Affairs* 39, no. 3 (2011): 207–37.

⁴² Cf. Peter Singer, “Famine, Affluence, and Morality,” *Philosophy and Public Affairs* 1, no. 3 (1972): 229–43. **Check w/CB about Gerhard’s case.**

⁴³ For a critique of these approaches see Estlund, “Human Nature and the Limits (If Any) of Political Philosophy.”

⁴⁴ Some forms of so-called ‘realism in political theory’ may be seen as leaning towards this position. For discussion see William A. Galston, “Realism in Political Theory,” *European Journal of Political Theory* 9, no. 4 (2010): 385–411.

4.2 Feasibility Constraints in Just War Theory

The divide between maximally and minimally concessive approaches is again reproduced in the split between orthodox and revisionist just war theorists, and in a rather stark way. The former are maximally concessive, the latter are minimally concessive.

4.2.1 Maximally Concessive Just War Orthodoxy

Orthodox theorists defend combatant equality and noncombatant immunity on maximally concessive grounds. The institutions governing armed conflict should not make demands that their addressees will predictably ignore. More specifically, some facts about warfare, human nature, and our predictable moral failings, make revisionist laws of war highly unlikely to be observed.⁴⁵

First, the circumstances of warfare mean that combatants are rarely able to find out, given the time and resources available, whether their cause is just, or whether their targets are liable to be killed. Moreover, there may be reasonable disagreement about what makes a war just, so different combatants' judgements will presuppose different standards (Rawls' 'burdens of judgment' apply here as elsewhere).⁴⁶ And even if—counterfactually—most combatants could converge on the same standard of justice, find out whether the war they are fighting is just, and distinguish the liable from the nonliable, they would not be able to confine their attacks to the liable, given how the two groups are intermingled, and given how relatively indiscriminate military technology still is.

Second, human nature is such that, arguably, the extreme exigencies of warfare make adhering to strict moral norms psychologically impossible for many combatants. Their own lives and the lives of their friends are immediately in danger; death and pain surround them; psychological trauma is, for many combatants, inevitable. This extreme stress reduces their cognitive ability to deliberate about the right course of action; it also almost certainly inclines them to reason more partially.

Third, and perhaps most importantly, combatants will almost always convince themselves that they are fighting for a just cause, no matter how much of a cognitive leap that requires. Their leaders will aid this self-deception through propaganda, deceit, and misinformation.

Together, these facts mean that if the laws of armed conflict rejected combatant equality and noncombatant immunity, then those laws would be, respectively, completely disregarded and brutally abused. If the law prohibits unjust combatants from fighting, they will fight nonetheless, whether because of the difficulty of knowing that their cause is unjust; or because, once their lives are at stake, they will predictably fight regardless of the justice of their cause; or because they convince themselves that their cause is just despite evidence to the contrary. Similarly, if the laws permit just combatants to intentionally kill liable noncombatants, they would predictably be abused. Many unjust combatants would arrogate to themselves the extra permissions reserved for just combatants (believing themselves justified), and many just combatants would take advantage of the additional permissions without adequate justification for doing so (in part, no doubt, because of the psychological exigencies of combat).

If a critical mass of combatants disobey the laws of armed conflict, then those laws cannot minimise the wrongful harms involved in war. Laws cannot achieve their goals if they are ignored. So the laws should not make demands of people that they will,

⁴⁵ Buchanan and Keohane, "The Preventive Use of Force"; Buchanan, "Institutionalizing the Just War"; Adam Roberts, "The Principle of Equal Application of the Laws of War," in *Just and Unjust Warriors: The Moral and Legal Status of Soldiers*, ed. David Rodin and Henry Shue (Oxford: Oxford University Press, 2008), 226–54; McMahan, "The Morality of War and the Law of War"; Henry Shue, "Laws of War," in *The Philosophy of International Law*, ed. Samantha Besson and John Tasioulas (New York: OUP Oxford, 2010), 511–30; Shue, "Laws of War, Morality, and International Politics"; Waldron, *Torture, Terror, and Trade-Offs*.

⁴⁶ Rawls, *Political Liberalism*, Lecture II, sec. 2.

predictably, not fulfil. Facts about likely compliance constrain which institutions can justifiably govern armed conflict. Orthodox theorists are maximally concessive.

4.2.2 Minimally Concessive Just War Revisionism

As already noted, revisionists focus primarily on interpersonal moral demands, discussing institutions only in passing. And where those interpersonal demands are concerned, revisionists are minimally concessive, as well as highly optimistic about what is psychologically possible for combatants at war. For revisionists, the pervasive uncertainty of war, psychological trauma, and predictable self-deception are at most problems of application. Normative principles are derived from sanitised hypothetical cases with none of these characteristics.

Faced with the objection that their normative theorising makes epistemic and psychological demands that normal combatants cannot meet, revisionists have a ready response: their demands govern whom combatants may kill, if they kill anyone. They can be satisfied either by killing only those who may permissibly be killed, or by not killing anyone at all. Although, for at least some combatants, it might be impossible to discriminate between the liable and the nonliable in war, it is certainly possible to adhere to the principle 'kill only the liable': simply kill no one.

Moreover, although stress and trauma might undermine some people's agency in war, many combatants overcome their circumstances to oppose unjust actions in war, so why should we assume that all humans are incapable of opposing wars that are unjust simpliciter? Revisionists believe, therefore, that (at least many) human beings can resist the corrupting effects of violence and war, and that, despite their survival instinct, they can adhere to norms that demand sacrificing their own lives, rather than take another person's to protect themselves. Since resisting one's survival instinct is undeniably hard, norms in opposition to that instinct are unlikely to be universally complied with. But for revisionists, predictable wrongdoing is no grounds for removing obligations we would otherwise have, at the level of interpersonal morality.

5. Feasibility Constraints and Just War Theory: Implications

As with the dispute over political and non-political approaches to the site of *jus in bello*, we again see that the controversy between orthodox and revisionist just war theorists derives from a deeper disagreement feasibility constraints in normative theorising. It is another proxy battle, which cannot be resolved without settling the second-order dispute. However, we think this task is easier for the feasibility question than for the site question, because the revisionist and orthodox approaches are not really at odds. Not only are they fighting proxy battles; they are engaged in a phony war. Why? Because there is no uniquely correct set of feasibility constraints.

Which constraints we should recognise depends on the site for which we are issuing prescriptions. Orthodox and revisionist just war theorists—for all their disagreement—actually endorse compatible approaches, and each is broadly right about the role of feasibility for the site that they consider. Orthodox theorists are right that when designing institutions we should be maximally concessive. But revisionists are equally right that, at the level of interpersonal morality, we should be only minimally concessive.

The key point is simple. When deciding what I, as an individual, ought to do, I cannot use my moral weakness as an excuse, because—setting genuine pathologies aside—I am in control of whether or not I am morally weak, and of how I behave more generally. By contrast, we cannot reasonably expect the same level of 'control' on the part of an institutional system, no matter how effectively enforced its rules are. It is not in the power of the law to secure compliance with its content, independent of what that content is. How likely individuals are to obey given rules

therefore makes a difference to what a system of rules can achieve in any given circumstance.⁴⁷ For this reason, institutional—as opposed to purely moral—rules for individual conduct ought, in the main, to take into account individuals’ likely non-compliance.

While the maximally vs. minimally concessive attitudes of orthodox and revisionist just war theorists at the institutional and the interpersonal level are laudable, some objections to both views can be derived from thinking about feasibility constraints. In what follows, we set them out in turn.

5.1 Challenges to Orthodox Theorists’ Treatment of Feasibility Constraints

Orthodox theorists are arguably *too* concessive in their understanding of which institutional norms might win assent. For example, one might have thought, during the Second World War, that any legal convention prohibiting intentional attacks on noncombatants would be impossible to implement, and yet over the twentieth century attacks on noncombatants became taboo, at least among liberal democracies.⁴⁸ In the same spirit, we should not be too pessimistic about the prospects for further reform of the laws of war. We should endorse and pursue concrete institutional proposals which might materially improve the likelihood of unjust combatants both finding out that their wars are unjust, and acting on that knowledge.

Whatever the shortcomings of Jeff McMahan’s proposal for an international court of *jus ad bellum*, using advances in technology and the increasing reach of international organisations to provide more public information about the proximate causes of war (along the lines already attempted by the OSCE, for example in South Ossetia in 2008) increases combatants’ prospects of discovering whether their causes are just.⁴⁹ Making greater provision within national armies for selective conscientious refusal could also materially diminish predictable voluntary wrongdoing.⁵⁰ New technologies, such as unmanned aerial vehicles equipped with high-powered cameras promise to make both distinguishing and discriminating between the liable and nonliable more tractable, as well as mitigating at least the antecedent psychological stress that makes conscientious action by soldiers in conventional wars so difficult.⁵¹ Though international law advances glacially, it does advance, and orthodox just war theorists should ensure they guide, rather than hinder, that progress.

5.2 Challenges to Revisionist Theorists’ Treatment of Feasibility Constraints

Revisionist just war theorists are too inattentive to real-world constraints characterizing the human condition in war, and to uncertainty in particular. We can indeed always abide by the duty not to kill nonliable people, by simply refusing to fight, but this is like saying that a blind person can obey the prescription ‘you ought to cross roads only when the green man is lit’ by never crossing roads. If they give us no more guidance than this as to what to do given our uncertainty in war, then our only option is to endorse pacifism.

Combatants at war are unable to reliably distinguish between liable and nonliable combatants and noncombatants; even if they could do so, they could not discriminate between them (that is, confine their attacks only to the liable ones).⁵² Invariably, they are also uncertain whether their cause is just, and whether it will be proportionate and necessary. If they are told

⁴⁷ Note that, since what institutions can achieve is partly dependent on what individuals are likely to do, there is a sense in which we are still ‘non-concessive’ with respect to the feasibility constraints applying at the *institutional* level. (Weinberg/LV—still ms; probably CUP/OUP collection post Bowling Green workshop)

⁴⁸ Colin H. Kahl, “In the Crossfire or the Crosshairs? Norms, Civilian Casualties, and U.S. Conduct in Iraq,” *International Security* 32, no. 1 (2007): 7–46.

⁴⁹ Jeff McMahan, “The Prevention of Unjust Wars,” in *Reading Walzer*, ed. Yitzhak Benbaji and Naomi Sussmann (New York: Routledge, 2014), 233–56.

⁵⁰ Jeff McMahan, “The Moral Responsibility of Volunteer Soldiers,” *Boston Review*, 2013.

⁵¹ Bradley Jay Strawser, “Moral Predators: The Duty to Employ Uninhabited Aerial Vehicles,” *Journal of Military Ethics* 9, no. 4 (December 1, 2010): 342–68.

⁵² Lazar, “The Responsibility Dilemma for Killing in War”; Dill and Shue, “Limiting the Killing in War.”

that they may kill only the liable, when doing so is necessary and proportionate to the service of a just cause, then their only way to be sure of complying with morality is to refuse to fight. Although pacifism should remain a live option, most just war theorists want to offer a middle ground between realism and pacifism, to explain why common sense is right, and some wars can permissibly be fought, despite their costs. This means explaining how to apply revisionist just war theory in the context of uncertainty.⁵³

Although one of us develops his own approach to the ethics of killing under uncertainty elsewhere, it is germane here to illustrate what the options are for revisionists who extend their theories in these ways.⁵⁴ The first approach is to first identify all of the objective moral reasons, then choose a decision rule that allows us to optimise compliance with our objective moral reasons, given our uncertainty. Paradigmatically, this means applying decision theory to our moral reasons. For any given decision problem, we first identify the options available to the agent, then the possible states that the world might be in, and the outcomes of those options dependent on those states. We assign probabilities to the states, and utilities to the outcomes, sum the products of those two values for all possible outcomes from the option, and choose the option that maximises expected utility.

On most accounts this is our best tool for decision-making under uncertainty, but it poses distinctive problems for just war theory, given its apparently consequentialist cast, and the avowedly nonconsequentialist approach to ethics of most just war theorists—certainly in the revisionist camp. It also raises its own problems—after all, we aimed to provide useful advice in the circumstances of war, but doing expected utility calculations is often no easier than working out the objectively right thing to do. Identifying salient outcomes and states, assigning utilities to the outcomes and probabilities to the states will often be an inordinately complex task. Some might even question whether we can assign probabilities in an endeavour as unpredictable and complex as warfare.

The second approach is to argue that first-order moral reasons govern what is permissible given our uncertainty—that is, we do not need a decision rule to optimise compliance with our objective moral reasons; on the contrary, our objective moral reasons can be understood in ways that make them action-guiding given our uncertainty. As an example, we might have reasons to give our friends the ‘benefit of the doubt’ when they need our help. Suppose you arrive at a bar and find your friend in a brawl. You have no idea who started the fight. Suppose that if you were trying to optimise compliance with your objective moral reasons, it would be wrong to intervene, because the risk of harming an innocent person outweighs the value of protecting your friend. And yet it seems intuitively plausible that, within a certain range of probabilities that your friend is not in the wrong, it is subjectively permissible to intervene, because you should give him the benefit of the doubt.

Of course, we could analyse this idea by speaking about the objective reasons of friendship, which weigh against the risks of harming an innocent person. But there is a different interpretation which sees this as one among many first order reasons that apply to moral action under uncertainty (many others have to do, for example, with the permissibility of imposing risks). Similarly, consider Adil Haque’s suggestion that whether an action counts as an intentional killing can depend on the agent’s degree of belief that the target was liable to be killed.⁵⁵ The challenge for those who favour this approach is to give a detailed account of those reasons, and to explain both why they cannot be simply integrated into the first approach, and what we should

⁵³ Jeff McMahan has some rough advice that combatants are permitted to kill people when it is reasonable for them to presume that their targets are liable to be killed, and Cécile Fabre has alluded to a precautionary principle, which enjoins deferring from the use of lethal force when there is doubt as to the targets’ liability.

⁵⁴ Seth Lazar, “In Dubious Battle: Uncertainty and the Ethics of Killing,” n.d.

⁵⁵ Jeff McMahan, “Who Is Morally Liable to Be Killed in War,” *Analysis* 71, no. 3 (July 1, 2011): 544–59; Adil Haque, “Killing in the Fog of War,” *Southern California Law Review* 86, no. 1 (2012): 63–116.

do when our first-order reasons governing action under uncertainty must be combined with, or conflict with, our reasons to optimise compliance with objective norms.

Lastly, revisionist just war theorists should re-examine their views on what counts as minimally concessive, especially the possibility that psychological stress and trauma could defeat obligations that we might otherwise have. The standing assumption is that the unique exigencies of war do not diminish the constraints that govern belligerent practice. But in other contexts, we often think of pathological psychological debilities as being, as Estlund puts it, ‘requirement-blocking’.⁵⁶ Of course, this is easier to explain when the requirements are, as in the drowning case above, positive requirements to aid others. In war, our central focus is on the ethics of killing, and it is hard to come up with cases outside of war in which a putative duty not to kill is blocked by the psychological stress faced by the duty-bearer.

But the revisionists tell combatants fighting for an unjust cause that they are morally required to lay down their weapons, even if that means sacrificing their lives. Consider a terrified soldier, worn down by weeks or even months of near-misses, seeing his friends and enemies arbitrarily cut down one after the other, who now faces attack. It seems relatively easy to think of cases in which it is psychologically impossible for such an individual to lay down his arms and let himself be killed. And we can perhaps go further. Is it psychologically possible, in such a case, to do nothing to defend yourself? Grant the revisionists that mere fear for one’s life cannot block the requirement not to kill an innocent person. But could it perhaps block the requirement not to subject an innocent person to a certain level of risk? Perhaps the psychological impossibility of doing nothing might licence this combatant to spray suppressive fire in the direction of his adversaries, in the hopes of pinning them down and preventing them from dealing the decisive blow. We do not mean to present a decisive case for this solution here. But we do think just war theorists should think more carefully about cases like these, which illustrate how the psychological impossibility of adhering to some constraints might block their application in war.

6. Conclusion

In this paper, we have argued that revisionist and orthodox just war theorists have fought proxy battles: their first-order disagreements over substantive questions in just war theory—in particular combatant equality and noncombatant immunity—often derive from second-order disputes over the nature and purpose of just war theory. Bringing these debates to the surface shows both how these different camps have been talking past each other, and how we can both make advances in the debate and, possibly, also reconcile their views. In particular, we have argued that normative theorising about war should concern itself both with the grounds on which the institutions governing armed conflict are morally justified, and with the moral demands that apply to individual actors in war. The interesting question is how the two relate to each other, and in the paper we have mapped out the relevant possibilities, and their virtues and vices. We have also argued that implicit disputes over feasibility constraints have underpinned the orthodox approach’s concessive attitude to unjust combatants who fight despite their moral requirements ‘as private persons’ not to, as well as the revisionists’ moral rigorism. In this dispute, we think a happy accommodation between revisionists and orthodox theorists should be possible: when designing institutions to govern war, we should consider all kinds of predictable non-compliance; in the principles governing individual actors, only physical and psychological impossibility should be parametric. Revisionists have not adequately adapted their theories to accommodate these considerations, but there is nothing to prevent them from doing so. And once they do, the gulf between their prescriptions and those issued by orthodox theorists may shrink.

⁵⁶ Estlund, “Human Nature and the Limits (If Any) of Political Philosophy.”

Bibliography

- Arneson, Richard. "Egalitarianism." In *The Stanford Encyclopedia of Philosophy*, edited by Edward N. Zalta, Summer 2013., 2013. <http://plato.stanford.edu/archives/sum2013/entries/egalitarianism/>.
- Benbaji, by Yitzhak. "A Defense of the Traditional War Convention." *Ethics* 118, no. 3 (April 1, 2008): 464–95.
- Benbaji, Yitzhak. "The Moral Power of Soldiers to Undertake the Duty of Obedience." *Ethics* 122, no. 1 (2011): 43–73.
- Brandt, R. B. "Utilitarianism and the Rules of War." *Philosophy and Public Affairs* 1, no. 2 (1972): 145–65.
- Buchanan, Allen. "Institutionalizing the Just War." *Philosophy & Public Affairs* 34, no. 1 (January 1, 2006): 2–38.
- . *The Heart of Human Rights*. Oxford: Oxford University Press, 2013.
- Buchanan, Allen, and Robert O. Keohane. "The Preventive Use of Force: A Cosmopolitan Institutional Proposal." *Ethics & International Affairs* 18, no. 1 (March 1, 2004): 1–22.
- Carens, Joseph H. "Realistic and Idealistic Approaches to the Ethics of Migration." *International Migration Review* 30, no. 1 (April 1, 1996): 156–70.
- Coady, C. A. J. *Morality and Political Violence*. Cambridge: Cambridge University Press, 2008.
- Cohen, G. A. "Facts and Principles." *Philosophy & Public Affairs* 31, no. 3 (2003): 211–45.
- . "Where the Action Is: On the Site of Distributive Justice." *Philosophy & Public Affairs* 26, no. 1 (January 1, 1997): 3–30.
- Dill, Janina, and Henry Shue. "Limiting the Killing in War: Military Necessity and the St. Petersburg Assumption." *Ethics & International Affairs* 26, no. 03 (September 2012): 311–33.
- Emerton, Patrick, and Toby Handfield. "Order and Affray: Defensive Privileges in Warfare." *Philosophy & Public Affairs* 37, no. 4 (September 1, 2009): 382–414.
- Estlund, David. *Democratic Authority: A Philosophical Framework*. Princeton, N.J.: Princeton University Press, 2008.
- . "Human Nature and the Limits (If Any) of Political Philosophy." *Philosophy & Public Affairs* 39, no. 3 (2011): 207–37.
- . "On Following Orders in an Unjust War." *Journal of Political Philosophy* 15, no. 2 (June 1, 2007): 213–34.
- Fabre, Cécile. *Cosmopolitan War*. Oxford: Oxford University Press, 2012.
- . "Guns, Food, and Liability to Attack in War." *Ethics* 120, no. 1 (2009): 36–63.
- Frankfurt, Harry. "Equality as a Moral Ideal." *Ethics* 98, no. 1 (October 1, 1987): 21–43.
- Frowe, Helen. *Defensive Killing*. Oxford: Oxford University Press, 2014.
- . "Self-Defence and the Principle of Non-Combatant Immunity." *Journal of Moral Philosophy* 8, no. 4 (January 1, 2011): 530–46.
- . *The Ethics of War and Peace: An Introduction*. London: Routledge, 2011.
- Galston, William A. "Realism in Political Theory." *European Journal of Political Theory* 9, no. 4 (2010): 385–411.
- Gheaus, Anca. "The Feasibility Constraint on The Concept of Justice." *The Philosophical Quarterly* 63, no. 252 (2013): 445–64.
- Gilbert, Pablo. "Feasibility and Socialism." *Journal of Political Philosophy* 19, no. 1 (2011): 52–63.
- Gilbert, Pablo, and Holly Lawford-Smith. "Political Feasibility: A Conceptual Exploration." *Political Studies* 60, no. 4 (December 1, 2012): 809–25.
- Haque, Adil. "Killing in the Fog of War." *Southern California Law Review* 86, no. 1 (2012): 63–116.
- . *Morality and Law at War*. Oxford: Oxford University Press, 2015.
- Jenkins, Ryan. *Dissertation*, n.d.
- Julius, A. J. "Basic Structure and the Value of Equality." *Philosophy & Public Affairs* 31, no. 4 (October 1, 2003): 321–55.

- Kahl, Colin H. "In the Crossfire or the Crosshairs? Norms, Civilian Casualties, and U.S. Conduct in Iraq." *International Security* 32, no. 1 (2007): 7–46.
- Lawford-Smith, Holly. "Understanding Political Feasibility." *Journal of Political Philosophy* 21, no. 3 (2013): 243–59.
- Lazar, Seth. "In Dubious Battle: Uncertainty and the Ethics of Killing," n.d.
- . *Sparing Civilians: Moral Foundations of the Principle of Distinction*. Oxford: Oxford University Press, forthcoming.
- . "The Morality and Law of War." In *The Routledge Companion to Philosophy of Law*, edited by Andrei Marmor, 364–79. New York: Routledge, 2012.
- . "The Responsibility Dilemma for Killing in War: A Review Essay." *Philosophy & Public Affairs* 38, no. 2 (2010): 180–213.
- Lipsey, R. G., and Kelvin Lancaster. "The General Theory of Second Best." *Review of Economic Studies* 24, no. 1 (1956): 11–32.
- Mavrodes, George I. "Conventions and the Morality of War." *Philosophy and Public Affairs* 4, no. 2 (1975): 117–31.
- McMahan, Jeff. "Innocence, Self-Defense and Killing in War." *Journal of Political Philosophy* 2, no. 3 (1994): 193–221.
- . "The Morality of War and the Law of War." In *Just and Unjust Warriors: The Moral and Legal Status of Soldiers: The Moral and Legal Status of Soldiers*, edited by David Rodin and Henry Shue, 19–43. Oxford: Oxford University Press, 2008.
- . "The Moral Responsibility of Volunteer Soldiers." *Boston Review*, 2013.
- . "The Prevention of Unjust Wars." In *Reading Walzer*, edited by Yitzhak Benbaji and Naomi Sussmann, 233–56. New York: Routledge, 2014.
- . "Who Is Morally Liable to Be Killed in War." *Analysis* 71, no. 3 (July 1, 2011): 544–59.
- McPherson, Lionel K. "Innocence and Responsibility in War." *Canadian Journal of Philosophy* 34, no. 4 (2005): 485–506.
- Murphy, Liam B. "Institutions and the Demands of Justice." *Philosophy & Public Affairs* 27, no. 4 (October 1, 1998): 251–91.
- Parfit, Derek. "Equality and Priority." *Ratio* 10, no. 3 (December 1, 1997): 202–21.
- Pogge, Thomas. "On the Site of Distributive Justice: Reflections on Cohen and Murphy." *Philosophy & Public Affairs* 29, no. 2 (April 1, 2000): 137–69.
- Räikkä, Juha. "The Feasibility Condition in Political Theory." *Journal of Political Philosophy* 6, no. 1 (1998): 27–40.
- Rawls, John. *A Theory of Justice*. Oxford: Oxford University Press, 1999.
- . *Political Liberalism*. New York: Columbia University Press, 1996.
- Renzo, Massimo. "Democratic Authority and the Duty to Fight Unjust Wars." *Analysis* 73, no. 4 (October 1, 2013): 668–76.
- Roberts, Adam. "The Principle of Equal Application of the Laws of War." In *Just and Unjust Warriors: The Moral and Legal Status of Soldiers*, edited by David Rodin and Henry Shue, 226–54. Oxford: Oxford University Press, 2008.
- Roberts, Adam, and Richard Guelff. *Documents on the Laws of War*. Oxford: Oxford University Press, 2000.
- Rodin, David. "Morality and Law in War." In *The Changing Character of War*, edited by Hew Strachan and Sibylle Scheipers, 446–63. Oxford: Oxford University Press, 2011.
- . *War and Self-Defense*. Oxford: Clarendon Press, 2002.
- Ronzoni, Miriam. "Two Concepts Of The Basic Structure, And Their Relevance To Global Justice." *Global Justice: Theory Practice Rhetoric* 1 (2007): 68–85.
- Ryan, Cheyney. "Democratic Duty and the Moral Dilemmas of Soldiers." *Ethics* 122, no. 1 (2011): 10–42.
- Scheffler, Samuel. "Is the Basic Structure Basic?" In *The Egalitarian Conscience*, edited by Christine Sypnowich, 102–29. Oxford: Oxford University Press, 2006.

- Shue, Henry. "Do We Need a 'Morality of War'?" In *Just and Unjust Warriors: The Moral and Legal Status of Soldiers*, edited by David Rodin and Henry Shue, 87–111. Oxford: Oxford University Press, 2010.
- . "Laws of War." In *The Philosophy of International Law*, edited by Samantha Besson and John Tasioulas, 511–30. New York: OUP Oxford, 2010.
- . "Laws of War, Morality, and International Politics: Compliance, Stringency, and Limits." *Leiden Journal of International Law* 26, no. 02 (June 2013): 271–92.
- Simmons, A. John. *Moral Principles and Political Obligations*. Princeton, N.J.: Princeton University Press, 1979.
- Singer, Peter. "Famine, Affluence, and Morality." *Philosophy and Public Affairs* 1, no. 3 (1972): 229–43.
- Statman, Daniel. "Fabre's Crusade for Justice: Why We Should Not Join." *Law and Philosophy* 33, no. 3 (2014): 337–60.
- Strawser, Bradley Jay. "Moral Predators: The Duty to Employ Uninhabited Aerial Vehicles." *Journal of Military Ethics* 9, no. 4 (December 1, 2010): 342–68.
- Valentini, Laura. "Ideal vs. Non-Ideal Theory: A Conceptual Map." *Philosophy Compass* 7, no. 9 (2012): 654–64.
- Waldron, Jeremy. *Torture, Terror, and Trade-Offs: Philosophy for the White House*. Oxford: Oxford University Press, 2010.
- Walzer, Michael. *Just and Unjust Wars: A Moral Argument with Historical Illustrations*. New York: Basic Books, 1977.
- Young, Iris Marion. "Taking the Basic Structure Seriously." *Perspectives on Politics* 4, no. 01 (March 2006): 91–97.