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THE MORAL REALITY OF WAR: DEFENSIVE FORCE AND JUST WAR THEORY

by

MAJOR ROBERT E. UNDERWOOD III

Under the Direction of Andrew Altman

ABSTRACT

The permissible use of defensive force is a central tenet of the traditional legal and philosophical justification for war and its practice. Just War Theory holds a nation's right to resist aggressive attack with defensive force as the clearest example of a just cause for war. Just War Theory also stipulates norms for warfare derived from a conception of defensive force asserted to be consistent with the moral reality of war. Recently, these aspects of Just War Theory have been criticized. David Rodin has challenged the status of national defense as an uncontroversial just cause. Jeff McMahan has charged that Just War Theory's norms that govern warfare are inconsistent with the norms of permissive defensive force. In this thesis I defend the status of national defense as a clear case of a just cause. However, my defense may require revision of Just War Theory's norms that govern warfare.

INDEX WORDS: War, Warfare, Just War Theory, *Jus in bello*, *Jus ad bellum*, Combatant, Noncombatant, Michael Walzer, Jeff McMahan, David Rodin, Andrew Altman, National-defense, Self-defense

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MAJOR ROBERT E. UNDERWOOD III

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2009

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DEDICATION

For the twenty-two. *Dulce et decorum est* ...

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A paraphrase of a familiar Basic Training claim applies to whatever philosophical merits this thesis contains: "All that I am, or hope to become I owe to Andrew Altman and the members of my committee."

TABLE OF CONTENTS

ACKNOWLEDGEMENTS v

CHAPTER

1. INTRODUCTION – The Line of Departure 1

2. THE RIGHT TO NATIONAL-DEFENSE 14

The Baseline 15

A Lack of Normativity 18

The Analogy Falters 21

3. THE DEEP MORALITY OF WAR 31

The Surprise Attack Argument 32

The Asymmetry Argument 36

The Parallel Argument 39

The Implacable Pursuer 44

The Divergence of War's Morality 45

4. NORMATIVE SOVEREIGNTY AND THE MORAL REALITY OF WAR 53

Normative Sovereignty 54

Constructing a Right to National-defense 59

Forfeiture of Political Autonomy and the Normative Limits of National-defense 64

Inculpation, Exculpation, and Mediated Symmetry 66

Privileged Groups and Impunible Violence 67

Individual Liability for Group Actions 69

The Moral Reality of War and the *Jus in Bello* Tenets 70

Conclusion 73

REFERENCES 77

CHAPTER 1.

INTRODUCTION – The Line of Departure

War is no mere pastime; it is no mere joy in daring and winning, no place for irresponsible enthusiasts. It is a serious means to a serious end … – Clausewitz, *On War*

There are a variety of views to take regarding war. Realists like Hegel and John Boyd take war to be a necessary fact of human existence either because the realization of human freedom requires war, or because war is an instrument of Darwinian selection in the biological existence of humanity. Pacifists take war to be an irredeemably immoral practice–one that is never justified and always avoidable. A middle position–here we might find Kant, Michael Walzer, J.F.C. Fuller and others–views war as a deficient condition we must avoid if possible but, when unavoidable, may be a justified pursuit. I am inclined to the middle position and do not take up direct arguments against the other options here. War's necessity does not imply requirements for its frequency and ferocity. In short, it may be necessary; even so it will still remain a normative arena. Moreover, war's dubious moral status may imply that it is best left aside or even rigorously opposed. However, opposing war through abstinence may border on quixotic and ignores the possibility that there are things worth defending by lethal violence. Wherever our sympathies may lie, we are inclined to agree with Clausewitz that war is a deadly serious activity. However, if we do not want to be "irresponsible enthusiasts," we come very quickly to the task of determining how we might be responsible "enthusiasts," or at least participants, in war. This will be the line of departure for my paper: war is a deadly serious business that requires a normative perspective and investigation.

The philosophical and legal tradition known as Just War Theory is the best place to start an investigation into the norms of war. Just War Theory has been influential in the formation of the international laws governing war, and the best defender of Just War Theory is Michael

Walzer. The norms that govern personal self-defense are fundamental to Walzer's defense of Just War Theory in *Just and Unjust Wars*. The putative right of nations to defend their sovereignty against unjust attack is central to his claims that justify the resort to war. Furthermore, Walzer's account of permissible warfare derives from the norms of defensive force that are appropriate to the moral reality of personal self-defense in a war. The claim for a state's right to national defense draws its strength, almost exclusively, from our intuitions about personal defense. In this way the right of individual self-defense serves to justify the resort to war. Just as an individual is morally permitted to use violence to defend herself, so is a nation permitted to go to war for its own collective defense. Additionally, the limits imposed on the practice of war by Just War Theory and international law purport to be similar to the limits that guide acts of self-defense. In this way the right of national defense serves to govern our practice of war.

The apparently intuitive relationship between national defense and personal defense has recently come under effective attack from David Rodin in *War & Self-Defense*. In addition to Rodin's censure, Jeff McMahan argues that the central tenets of Walzer's position on the norms of warfare are inconsistent with the norms of defensive force. In particular, McMahan seeks to undercut Walzer's claim that the norms of warfare stand independent of the norms regarding the resort to war and are therefore the same for all combatants, regardless of the justice of their cause for war. These two attacks from Rodin and McMahan form a considerable challenge to the apparent normative force given to Just War Theory by the norms of personal defense.

The viability and consequences of the conceptual and normative analogies between personal and national defense for the norms of war are the concern of my thesis. My contention is that the arguments of Rodin and McMahan point to deep problems within Just War Theory but that some elements of Just War Theory can be salvaged. At the same time, the path that enables

Just War Theory to be salvaged in part–a normative conception of sovereignty developed by Andrew Altman and Christopher Wellman–closes the door to any cogent response to the arguments of McMahan. In short, resort to war can be justified on grounds of national defense, but the idea that the same norms apply to just and unjust combatants is dubious.

My argument will take three basic steps. In this chapter I will show the deep dependence of Just War Theory on the norms of defensive force by an examination of Walzer's position. In Chapter II I will show how Rodin's attacks undermine Just War Theory's primary cause to justify the resort to war. In Chapter III I will lay out Jeff McMahan's arguments for a different morality of war and show why Walzer's central tenets might be subject to his criticism. Finally, in Chapter IV I will use the Altman and Wellman conception of sovereignty to reclaim the right to national defense and apply its normative weight to the norms of warfare. The principal consequence of my argument is that, contrary to Just War Theory, the normative foundation that can justify the resort to war ought to inform the norms we prescribe to those who prosecute that war. In the remainder of this introduction, I explain Walzer's Just War Theory.

Just War Theory represents a centuries-long distillation of our considered moral and legal reflections about war and its practice. While it is debatable whether Just War Theory has had significant success at ameliorating the frequency or ferocity of war, it is clear that Just War Theory has had significant influence on international law regulating the resort to war and international humanitarian law regulating warfare. The influence of Just War Theory on international law in this regard is so strong that, insofar as we might judge current international law as correct with regard to war, we should also extend that judgment to Just War Theory. Michael Walzer's work in *Just and Unjust Wars* is a near canonical statement of Just War Theory and its central tenets. As such, I will use his views to provide a general exposition of the

norms currently governing the practice of war and warfare that constitute the *status quo* in both Just War Theory and international law.

The first part of Just War Theory concerns *jus ad bellum*, or the justice of a resort to war. *Jus ad bellum* is traditionally held to have six criteria: just cause, i.e., a grievance or wrong whose reconciliation can justify the resort to war; right intention, i.e., the intended aim of the war is only the reconciliation of the wrong received and no other aim; competent authority, i.e., the resort to war is only within the purview of a competent government; necessity, i.e., the resort to military force is necessary for the aim in question; reasonable hope of success, i.e., the war must be reasonably sure of having the intended effect; and proportionality, i.e., the goods the war achieves sufficiently counterbalance the evils that attend its prosecution. All these criteria are taken as necessary conditions for a just war but one is clearly predominating–just cause. This is so because we cannot begin to take stock of the other criteria without the presence of a just cause. The only goods that we may consider in a proportionality calculation are the goods stipulated by the just cause. Stated another way, we cannot offset the ills of war by the anticipated advance of medicine or technology in a wartime economy because these goals are not just causes for war. Similarly, war is only necessary insofar as it is a last resort for the satisfaction of a just cause and not other ancillary considerations such as the ability to leverage diplomatic or technological advantages.

Only the presence of a just cause allows consideration of the other *jus ad bellum* criteria, and the clearest case of a putative just cause for war is self-defense. In the history of Just War Theory there are two general strategies for grounding this putative right. These strategies are related to two general perspectives from which we can consider the norms that govern war and its conduct.[1] With Thomas Nagel and others we can take it that "war, conflict, and aggression

are relations between persons."[2] War is a human act that occurs between persons on a battlefield. As Nagel states, "[h]ostility is a personal relation."[3] This means that the norms that govern war can be drawn from the norms that govern simple interpersonal relationships. Viewing war as a state of affairs among individuals leads one to the "reduction" strategy. According to this strategy the right of national self-defense is strictly reducible to the individual's right to personal defense and takes two forms. In one form, national self-defense is seen as simply many individuals executing their right of self-defense at the same time and in an organized fashion. In its second form, the reductive strategy views national self-defense as the state exercising the personal right to defense on behalf of its citizens.

The other perspective, from Michael Walzer and others, takes war to be a relation "between political entities and their human instruments."[4] Here we may view war as "an instrument of policy."[5] That is, war is *collective* violence that is political in nature. As such, its norms will be political norms that govern the actions and rights of groups and their members. If we take the second perspective and give the primary moral status to states or groups this leads one to conceptualize the relationship between self-defense and national-defense by way of the analogical strategy. This strategy holds that the national right is a close analogue to the personal right. The essence of this view is that the national right should bear a close normative relationship to the personal right, viz., the norms that govern each right's practice. This brings us to Walzer's theory of *jus ad bellum* and a just cause for war.

Walzer's view is that all just causes can be expressed simply as the resistance to aggression because aggression "is a singular and undifferentiated crime" that "challenges rights worth dying for."[6] Indeed, he calls *jus ad bellum* the "theory of aggression."[7] Simply put, resistance to aggression in the form of self or other defense is the "paradigm" that forms our

"moral comprehension of war."[8] It does this by way of the "*domestic analogy*"[9] in which "the world of states" is a "political society the character of which is entirely accessible through such notions as … self-defense."[10] In our moral reasoning states take the status of individuals in civil society. Aggression challenges rights in the international order in the same way that crime challenges rights in civil society. It is this challenge to a state's rights–"the common life"[11] created by its political community, territory and people–that can justify the state's resort to war, and it is only the defense of these rights that can supply a state with a legitimate reason to fight.

If we look at what Walzer means by a nation's "common life," then the reliance on the analogy between personal self-defense and national self-defense in Walzer's "theory of aggression" becomes clear. One's right to life or personal autonomy grounds the permissibility of violent personal self-defense. This is also true in Walzer's "theory of aggression." The principal right at work in the "common life" of a people worth defending is autonomy, or in Walzer's terms "self-determination."[12] This is the right of a nation to a political process that is its own, and worthy of defense against existential threats *and* external intervention or interference. It is the right of "a group to shape their own political institutions and the right of individual" group members "to live under institutions so shaped."[13] For Walzer, the most important implication of the domestic analogy is that when an act of personal self-defense is permissible, a like act of national self-defense is also permissible.

Walzer's "theory of aggression" is remarkably similar to international law. Indeed, the United Nations Charter is virtually identical with Just War Theory in this regard. Article 2(4) states that nations "shall refrain … from the threat or use of force against the territorial integrity or political independence of any state."[14] Furthermore, states shall not use force in any way inconsistent with international law. This serves as an explicit prohibition against the use of force

in international affairs. The Charter, however, offers two exceptions to this rule in Article 51. These are: "the inherent right of individual or collective self-defense" against an armed attack, and any actions necessary to "maintain or restore international peace and security."[15] For Walzer any such maintenance or restoration of international order is defensive resistance to aggression. Indeed, though the Charter does not couch such actions in Walzer's terms, the operative history of the United Nations suggests it sanctions military action only in response to aggressive force. In this we can see the explanatory power of Walzer's "theory of aggression" and how it accords with common conceptions of justifying war. Resistance to an unjust attack on our political and territorial integrity is a paradigm case for a just war in both Just War Theory and international law. If anything justifies war, resistance to aggression through the defense of the state does. This justification, both in theory and law, rests on the permissibility of defensive force.

The second part of Just War Theory concerns *jus in bello*, or justice in war. There are four elements of *jus in bello* that are central to Walzer's position. The first is that combatants enjoy an equal moral standing that justifies their enmity and lethal actions towards one another. Provided combatants do nothing to violate their status–for example they don't use means *mala in se*, or banned weapons–then they share an equal right to kill one another as opportunity allows. The second element is the strict immunity of non-combatants from being the intended targets of military force. The third is the requirement of discrimination, i.e., that combatants must make concerted efforts to discriminate between legitimate and illegitimate targets in the application of lethal force. Finally is the requirement of proportionality. All of a combatant's individual and collective military actions must, through consideration of its intended and unintended consequences, be proportionate to their aims.

Walzer supports these elements with three tenets of Just War Theory. These are: the "independence" thesis, that is that matters of *jus in bello* are logically independent of matters of *jus ad bellum*; the "symmetry" thesis,[16] that is that all combatants are members of a certain class that can permissibly be targeted with military force–what Walzer calls the "moral equality of soldiers;"[17] finally, the "immunity" thesis which states that civilian or non-combatant immunity is irrevocable. I will take each of Walzer's tenets in turn.

The first tenet of the Just War Theory, the independence thesis, is that *jus in bello* and *jus ad bellum* are distinct moral questions. The sources of this distinction are historical. Our moral perspectives on war come from two dominant sources. From the traditions of aristocracy and chivalry we receive the ideas of *jus in bello* – that there is a morally unobjectionable way to fight in war that rests on a soldier's adherence to a set of recognized norms. On the other hand, there is the jurist and Christian tradition that produced the concepts of *jus ad bellum*–that war is a deficient moral state in which only one side may be said to act justly. In Walzer's eyes the upshot of the division is a pragmatically advantageous result of providing two normative frameworks to limit the disasters of war.

For Walzer the independence thesis is at first a straightforward claim: "The two sorts of judgment [i.e. *jus in bello* and *jus ad bellum*] are logically independent."[18] The most important consequent of his insistence on logical independence is that "[i]t is perfectly possible for a just war to be fought unjustly and for an unjust war to be fought in strict accordance with the rules."[19] What this means is that a war may be a crime, but the warfare that constitutes it not criminal. Moreover, a war may be justified, but its prosecution manifestly criminal. Walzer is not shy about the "puzzling" nature of this claim. For him there is a latent tension between questions about the ends of war, *jus ad bellum*, and the means of war, *jus in bello*. For Walzer, this tension

seems to be a simple fact of the "moral reality of war."[20] It is the only way to balance the rights of the individual in war with the rights of the group or state at war. When we judge the fighting of a war, "we abstract from all considerations of the justice of the cause."[21] We do this because the rights of the individuals in question–the combatants and noncombatants of all parties–are largely the same. Walzer's argument for this claim concerns the final two tenets and brings to bear the considerations of how one may go about forfeiting the right to life and become the rightful target of defensive force.

The second tenet of Just War Theory, the symmetry thesis, is that soldiers enjoy a moral equality implying a set of rules, liberties and rights that each combatant holds equally, regardless of the putative justice of their war. This includes, among other things, the right to apply lethal force to the enemy. Walzer's formulation of this tenet stems from two arguments to ground the equal moral status of soldiers. The first is an argument from mutual consent of the combatants. Soldiers who enter voluntarily into a war agree, if only tacitly, to the moral equality of combatants and all that it entails. So long as they adhere to the rules, all their actions are justified. Walzer's second argument is an exculpatory argument based on the instrumental role of soldiers in war. Soldiers are the "human instruments"[22] of nations at war and as such are morally equal to one another. Walzer states the arguments succinctly:

> … when soldiers fight freely, choosing one another as enemies and designing their own battles, their war is not a crime; when they fight without freedom, their war is not their crime. In both cases, military conduct is governed by rules; but in the first the rules rest on mutuality and consent, in the second on shared servitude.[23]

This is the essence of Walzer's argument for the symmetry thesis. That is, the justice of one's war bears no significant impact on the permissions and prohibitions on your conduct. Rather, these permissions and prohibitions accrue to you as a matter of class distinction. Simply being a

combatant in a war grants certain moral sanctions and liabilities because combatants possess the capacity to threaten harm. One's capacity to threaten harm or actually harm others in this way is the act through which the combatant has "surrendered or lost his rights."[24]

Walzer's claims for noncombatant immunity flow directly from his claims for combatant equality. Just as there is a class of combatants that we may permissibly kill, there is also a class of noncombatants that we may never intentionally kill. As he states: "noncombatants cannot be attacked at any time. They can never be the objects or the targets of military activity."[25] In Just War Theory noncombatants occupy the class of "innocents" who are never the rightful targets of military force. Moreover, the term "innocent" in the context of Just War Theory does not concern moral guilt or innocence. Rather, Walzer intends something more like "bystander" or one not currently engaged in "harmful" action.[26] This is clear enough, but there is one qualification. For Walzer, traditional noncombatants can lose their status and be "incorporated into hell"[27] by their actions. Almost no consideration can bear on the prohibition against intentionally targeting noncombatants. Rather, the critical question is that of which acts count for "assimilation" into the "class of combatants."[28] Acts of this sort are those that are "peculiarly warlike"[29] such as working in a munitions factory or sailing a merchant ship ferrying those munitions in a time of war. In the performance of these actions, noncombatants contribute directly to the war effort and have the unhappy privilege of achieving a more permissible status.

The symmetry thesis and the immunity of noncombatants provide Walzer with the basis for the claims of the independence thesis. Regardless of the putative justice of a war, the individuals caught within its calamity still have rights. These rights form the basis for the *jus in bello* requirements of discrimination and proportionality. One may only target those who are combatants. Also, one can only target combatants in a way that does not cause an unnecessary

amount of suffering, and is in accordance with the aims of the war, the proportionality requirement.

Like Walzer's "theory of aggression," his three tenets above have enjoyed influence on the actual laws that constitute international humanitarian law. These laws are virtually indistinguishable from Walzer's "war convention." They concern the rights of individuals and base these rights on distinctions similar to Walzer's class distinctions. Combatants hold an equal right to fight and kill one another, and noncombatants hold the same immunities for which Walzer argues.[30]

Just War Theory and its best apologist, Michael Walzer, offer a moral conception of war and warfare that is compelling and explanatorily powerful. It has been successfully codified into the laws that govern international relations and international conflict. The foundational principle of Michael Walzer's position is the justice of defensive force. In matters of *jus ad bellum* the defense of the state against aggression is the paradigm case of a just cause for war. If any war is to be justified, we should expect defense against stark aggression to fit the bill. In matters of *jus in bello* the rights of individuals come to turn on their capacity and currency as sources of threat. Combatants, as a class, have an enduring capacity to pose a threat and are thereby permissible recipients of lethal military force. Noncombatants, as a class, pose no threat. Insofar as they maintain this status, they hold the right of immunity to any military force.

Just War Theory has been successful and influential in almost every respect, and no expression of that theory has as much authority as Michael Walzer's *Just and Unjust Wars*. However, the powerful intuitive legitimacy of Walzer's view has not rendered it immune from philosophical criticism. His critics have taken issue with many of its central ideas. In the next

chapter I examine David Rodin's attack on Walzer's central *jus ad bellum* claim that a war of national defense is a paradigm case for a justified war.

Notes

[1] David Rodin calls this the "two levels" of war. Cf. Rodin (2002), 122.
[2] Nagel (2006), 64.
[3] Ibid., 64.
[4] Walzer (2006a), 34.
[5] Clausewitz (1984), 89.
[6] Walzer (2006a), 53.
[7] Ibid., 58.
[8] Ibid., 61.
[9] Ibid., 58.
[10] Ibid.
[11] Ibid., 57.
[12] Ibid., 87.
[13] Walzer (1980), 220.
[14] UN Charter (2009), Chapter II.
[15] UN Charter, (2009), Chapter VII.
[16] These terms follow the current consensus in the literature that follows David Rodin's usage. Cf. *Just and Unjust Warriors: The Moral and Legal Status of Soldiers*, D. Rodin a. H. Shue (ed.), (New York: Oxford University Press, 2008) 2-3.
[17] Walzer, (2006a), 34.
[18] Ibid., 21.
[19] Ibid., 21.
[20] Ibid., 21.
[21] Ibid., 127.
[22] Ibid., 36.
[23] Ibid., 37.
[24] Ibid., 135.
[25] Ibid., 151.
[26] Ibid., 30, 146.
[27] Ibid., 147.
[28] Ibid., 150.
[29] Ibid., 146.
[30] ICRC (2009), 3.

CHAPTER 2.

THE RIGHT TO NATIONAL-DEFENSE

The resort to military force is apparently most justified when it involves national-defense, i.e., when a nation has been attacked and its only recourse to reestablish the *status quo ante bellum* is to engage its attacker with force of arms. The two most familiar arguments for this national right to self-defense are the reduction of the right to the personal rights of the state's constituency and the attempt to draw a normatively analogous relationship between the personal right and its national corollary. David Rodin, in his book *War & Self-Defense*, casts doubt on the viability of either of these arguments. His basic contention is that self-defense is a normative relationship that stipulates permissions and proscriptions on defensive force that are not operative in national-defense by means of war. The "reductive" and "analogical" arguments thus fail. This failure is principally due, in each case, to their inability to provide a normatively substantive end or good that can generate normative limits on defensive force. I will deal only with Rodin's arguments against the analogical strategy and its attempt to build some sort of normative relationship between self-defense and national-defense.

Rodin's method of argument develops as follows. If self-defense and national-defense are normatively analogous, then national-defense should have a normative end that the right seeks to protect as the self-defense case does. If there is such an end, it should generate normative limits on the operation of national-defense. Rodin gives us reasons to doubt that such normative limits exist, which he attributes to the analogical strategy's inability to provide a normative end. This failure being the case, he claims that self-defense and national-defense are crucially disanalogous. This is a striking claim, directly attacking Walzer's domestic analogy. As we have seen, the apparent normative relationship between self-defense and national-defense

places national-defense as a paradigm case of a just cause in *jus ad bellum*. If this relationship proves problematic, it would seem to point to a fatal flaw that undermines the central *jus ad bellum* claim of Just War Theory.

The Baseline

Rodin begins *War & Self-Defense* with a thorough account of the personal right to self-defense. His account establishes the conceptual elements and normative standards operative in the individual right to self-defense. For my purposes here, I will not take issue with his argument for the individual right and deal with his account only insofar as it is necessary to make his view of self-defense clear. For, if the analogical strategy is to ground national-defense, it is the individual right that will serve as the conceptual and normative baseline for the collective right. Self-defense is a normative relationship between two moral agents created by an unjust attack. As such, there are normative criteria that serve to establish the presence of such a relationship, and there are norms that govern justifiable acts within this relationship. If there is to be a conceptual analogy between self-defense and national-defense, as the analogical argument stipulates, then we should expect instances of these two rights to look much the same. Moreover, if there is to be a normative analogy, as the analogical argument requires, the criteria that establish and the norms that govern an instance of self-defense should have some analogue in an instance of national-defense.

To make sense of Rodin's arguments and a normative relationship between self-defense and national-defense we need a notion of objectivity. Objectivity, for Rodin, means a value that is "trans-culturally valid."[1] An account of national-defense needs this sort of objectivity for two reasons. First, the inference we are investigating is one from self-defense to national-defense. In self-defense the ends protected by defensive acts must have a value proportional to the harm

inflicted. However, the determination of that value is not solely a question of the defender's assessment, but of other parties as well; so too with questions of national-defense. A second reason to search for cross-cultural objectivity is the fact that the operation of a right to national-defense will cross cultural boundaries; therefore, its end must be one that most cultures similarly esteem or should esteem.

Rodin develops and defends a rights-based account of self-defense as a species of a larger set of defensive rights. As he states, the "right of defense exists when a subject is at liberty to defend a certain good by … an action which would otherwise be impermissible."[2] Such rights, as he lays out, arise out of the "normative relationships" created by the interaction of four elements in a situation of self-defense:

(i) The subject or right holder
(ii) The quality of the act of defense
(iii) The object of the defensive act
(iv) The end–that which the subject seeks to defend[3]

Anyone seeking moral justification for acts of self-defense is subject to three norms governing action. (1) One must bear a proper normative relation to the end; Rodin characterizes this as satisfied by a "right to, or a duty of care towards" the end in question. (2) The act must be a "proportionate, necessary response to an imminent threat." (3) The object and the subject must bear the correct normative relationship, namely, that the object is morally responsible for the threat and the subject is morally innocent.[4]

Two examples will help lay out what the conceptual relationship between self-defense and national-defense might look like. Using Rodin's criteria and norms above, an instance of permissible self-defense would look like this:

> Stroller A (the right holder) is walking through Woodruff park when Mugger B (the object) assaults him. Because B is armed with a pistol, A has reason to believe that his life (the end) is in danger. Also, B is apparently clever and left no avenue of escape to A,

> so flight is not an option. Through a ruse of going into his rucksack for his wallet, A is able to confuse and then disarm B by a non-lethal strike (quality).

In this account, A's actions satisfy (1-3) above: he had a right to life (1), his action was necessary, proportionate and in response to an imminent threat (2), and we can assume that A had done nothing to warrant B's attack and that B is morally responsible for his conduct (3). Now consider an apparent instance of permissible national-defense:

> Country B (the object) unjustly attacks and begins occupation of its resource-rich neighbor Country A (the right holder). Because of the occupation and a long history of aggression by B, A has reason to believe that its sovereignty and the rights of its citizens (the end) are in danger. Moreover, because of the geo-political situation, A has little to no hope of an external check on B's attack. Through force of arms A's military prosecutes a successful counter attack that restores the original border between A and B (quality).

In this account, A's actions putatively satisfy (1-3) above: A holds a right to sovereignty and a duty of care towards its citizens (1), the counter-attack was necessary, proportionate, and responded to an imminent threat (2), and A had done nothing to warrant B's attack and that B is morally responsible for its conduct (3). This is roughly how the analogical argument sees the conceptual and normative relationship between self-defense and national-defense.

The examples above highlight how national-defense enjoys "enormous intuitive legitimacy from the analogy with personal self-defense."[5] This applies both to the conceptual as well as the normative analogy of the two rights. As we have seen, the apparent legitimacy of this analogy runs so deep that current international law is formulated in accordance with the criteria and norms above. Because of this similarity, we can expect international law to codify the normative criteria and limits operative in national-defense. In terms of criteria, national-defense in international law gives to states a "Hohfeldian liberty" to use defensive force. As Rodin states:

> States are constituted by their existence as sovereign entities and they have the claim-right against other states not to destroy their political independence or interfere in their territorial integrity.[6]

Given the putative relationship between self-defense and national-defense, international law views national-defense as a right. The analogous normative criteria in national-defense are: the state is the right holder, and the end it defends is its sovereignty.

Rodin challenges this analogy because "sovereignty is a factual and not a normative concept."[7] As such it is an "empty vessel"[8] that cannot generate normative limits on the operation of national-defense that are analogous with self-defense. Rodin supports this claim by looking to the current limits on national-defense in international law. The first sign of trouble comes when we try to and establish normative limits that can guide the exercise of the right involved in national-defense. If we find, as Rodin does, the current normative limits on national-defense in international law to be disanalogous with the limits operative in self-defense, then we might have reason to doubt the presence of a sufficiently normative end at work in national-defense. We might agree that sovereignty is an "empty vessel" of ineffective normative worth.

A Lack of Normativity

Rodin claims the current limits on national-defense in international law are disanalogous with the limits on self-defense. That is, they lack a sufficient level of normativity to be held analogous to the limits on self-defense. If the national right had the same normativity of personal right, there should be similar limitations to the rights. Those limitations are necessity, imminence, and proportionality.[9] As he explores these limits in the context of national-defense Rodin begins to foreshadow the breakdown of the analogy between national and self-defense. Taking each limitation in turn he demonstrates how the analogy begins to falter under its own weight.

Necessity in self-defense is both an enabling and limiting criterion–one is only permitted to use that force which is necessary to thwart an unjust attack that one cannot avoid. If I strike a lucky blow in the opening moments of a mugging and render the assailant unconscious, I am not justified or allowed to strike a further lethal finishing blow. In national-defense, Rodin claims, necessity acts only as an enabling criterion. That is, necessity applies to "the commencement of a conflict, not throughout the war."[10] International law offers little guidance on when or if a state must end a war. Moreover, it is customary for states to fight beyond the simple restoration of the *status quo ante bellum*. For Rodin, the goal of war in national-defense is not the simple restoration of a right violated. Rather, it is intermixed with a legacy of "punishment, reparation, and revenge."[11]

The imminence requirement in self-defense is a derivative concept of necessity and requires that the use of defensive force "must be neither too soon or too late."[12] That is, for a threat to be a legitimate target of self-defense it must be imminent, and to be imminent it must be about to happen. However, there is hardly a consensus operative in international law regarding imminence and national-defense. This is so for two reasons, and both relate to "the distinction between *pre-emptive* and *preventive* military action."[13] A preemptive military action is one that attacks an aggressor that both has the intention to attack and has taken steps to demonstrate that the attack is imminent, i.e., has massed forces on a border, or has begun the groundwork for an attack with a WMD. The military action is preemptive insofar as the enemy tanks have not crossed the border or the WMD has not reached its target. The preemptive strike does not need to wait for the aggressor to commence. A preventive military action is one that attacks a potential aggressor state's burgeoning advantage: it does not require that the other state intends to attack to satisfy the requirement of imminence, only for the advantage in question to be

decisive and make future aggression likely. The advocates of preventive war argue that the standard of imminence is unjustly high. That is, given the facts of modern war, they believe that to wait on circumstances to meet the standard of preemption–which entails imminence–is tantamount to suicide. We may, by adhering to misguided notions, forfeit a decisive advantage to the enemy or miss an opportunity to thwart a particularly ruinous attack at a safer distance from our borders. In a related point, there is no settled consensus on where the distinction between preemptive force and preventive force lies in modern war. What is to constitute massing on a border when most mechanized forces can cover up to a hundred kilometers in a day's march and air forces can span the globe in hours? What is to constitute an intention to attack when a WMD can go from a storage house to a target city in only a few hours? As such, the ideas of preemptive and preventive war offer little normative guidance and thereby will fail to limit the use of military force.

The final limit to force, proportionality, also suffers from confusion in application to national-defense. Rodin holds that self-defense is proportional only when the "harms inflicted" are "commensurate with the value of the goods and rights preserved."[14] That is, lethal defensive force is a proportionate response to a threat against my life but not to a threat against my having a certain book. In contrast, international law and the practice of war hold that defensive use of force need only be proportionate to the nature and scope of the force used by the aggressor. Here I do not need to gauge my action against the good I am protecting, only the means used by my attacker. Rodin's first objection is that this will not limit force in any way. Rather, it will set a scale of proportionality that is "intrinsically open-ended … and subject to escalation."[15] Second, Rodin sees little hope of making the required comparison of the goods threatened to the means used to protect them. As he states:

> If the balance we are required to make is between the harms inflicted in the course of war (measured in terms of number of dead, destruction of property) and the protection of … sovereignty, then … the task seems to require the comparison of incommensurables.[16]

There is at least a *prima facie* difficulty with how we are to compare the loss of sovereignty and the death and destruction of war. As such, it seems that proportionality, as understood in international law, cannot serve the limiting role in national-defense as it does in self-defense.

On Rodin's position the lack of normative force behind necessity, imminence, and proportionality as they function internationally is indicative of a normative confusion surrounding national-defense. This divergence between self-defense, which enjoys clear normative limits, and national-defense, where the limits are blurry, is the first step in Rodin's argument. The difficulties above in determining these limits point to at least two possibilities. On the one hand, we may have an imperfect grasp of the end that grounds the right to national-defense. On the other is a deeper problem for holding national-defense as analogous to self-defense: national-defense may lack any normative foundation at all. Rodin's final step in the argument against national-defense is to affirm the latter proposition. This would mean that an instance of national-defense cannot have the last of the four elements present in an instance of self-defense–the end the subject seeks to defend. For this reason any participant in national-defense cannot satisfy the three norms that govern self-defense. The inadequacy of the current normative foundations for national-defense is Rodin's next target.

The Analogy Falters

Rodin's charge in the last section was that there is moral confusion on the normative limits to force in pursuit of national-defense. Therefore, we have cause to be suspicious of any analogy of normativity between self-defense and national-defense. Specifically, we should now be in doubt about what end grounds national-defense. The arguments in this section take aim at

defenders of the analogical strategy and their attempts to characterize such an end. Ultimately, Rodin offers compelling reasons for why these commonly held conceptions fail to offer a normative end proportional to the use of defensive force.

Rodin formulates three questions we must answer about national-defense to hold it as conceptually analogous to self-defense:

1) Who or what holds the right of national-defense?
2) Against whom or what is the right held?
3) What is the value or end the right seeks to preserve?

Rodin takes 3) as the most important. As he states, "the question of the normative grounding of any defensive right is first and foremost … about its end."[17] The "reduction" strategy seeks as its end the defense of the life of the individual. The analogical strategy seeks to defend what Rodin will characterize as "the 'common life' of the community."[18] Rodin's attack on the reduction strategy is compelling; however I will deal only with his criticism of the analogical strategy.

The analogical strategy offers the common life as the end that justifies military resistance to aggression. Rodin's target is lofty. The idea of the common life is a central concept for most modern defenders of Just War Theory. Most notably, the common life is the end or good offered by Michael Walzer in his justification for the resistance to aggression. Given the importance of the common life, Rodin casts a wide net that includes the three most prevalent expressions of the end common life. These are: a Hobbesian account of state sovereignty as the end; the cultural or historical heritage of groups as the end; and political self-determination or autonomy as the end. According to Rodin, all these ends fail to give an adequate ground for the right of national-defense.

In his first argument, Rodin addresses the end of political sovereignty constructed along Hobbesian lines. This sovereignty rests on a state's ability to order human affairs. Those states

that can provide the advantage of community, any community, over the state of nature are legitimate and have authority over their own affairs and territory. A Hobbesian conception of sovereignty has the sort of objectivity needed for national-defense, the argument goes, because it offers a minimal account of state legitimacy. However, Rodin has a striking objection to using the "Hobbesian social contract"[19] to support national-defense. Instead of supporting the right of national-defense, the logic of Hobbes' argument is "deeply antagonistic to it."[20] The end of the social contract is the security of the individual from the state of nature. To gain security one joins in political association that alleviates the hardships of the primary state of nature. However, the operation of this contractual process creates an international state of nature that is just as dangerous to the security of the individual. If the need to overcome the first state is valid, it seems there is also a need to overcome the second as well. What this means is that holding a right to political sovereignty of smaller groups appears to be a conceptual barrier to association that would end international anarchy. The concern of national-defense is not protection of the individual from the state of nature, but protection of a group as a distinct political entity. National-defense is then a right that runs counter to the normative force of a Hobbesian contract.

The second difficulty associated with holding political sovereignty as the end needed to ground national-defense is that the value of a Hobbesian contract is "the value of order over … the state of nature."[21] Since international aggression rarely takes on the flavor of a barbarian horde seeking to replace political order with anarchy the Hobbesian contract would seem to imply "a duty to capitulate quickly."[22] It seems only to provide for defense against an aggression that threatened to "destroy the political life as such."[23]

At this point one may object that Rodin's arguments simply show that the Hobbesian account of legitimate sovereignty is too threadbare and permissive. We may object that a more

robust account of the way in which a state becomes legitimately sovereign would rebut Rodin's arguments. Rodin has two replies to objections of this sort. First, any such account must adjudicate the defensive rights of legitimate states. That is, if we are to take a certain, more successful political ordering as the basis for national-defense, then how are we to account for one legitimate state's right to defend against another legitimate state if they embody the same type of political order? The second, deeper reply is that we need a "moral reason not to defend order, but … a particular form of order."[24]

Rodin now considers a second conception of the common life as a cultural heritage worth protecting. Against this value, Rodin levels the charge that it is too subjective to ground national-defense. That is, any judgment about the value of a cultural heritage is "accessible primarily from the internal perspective of those within the common life in question."[25] This is incompatible with the idea of objectivity we need for national-defense. The values in question here are, almost by definition, not trans-culturally valid. Furthermore, Rodin argues that the substantive moral judgments we make about certain "immoral, oppressive, or unjust"[26] communities complicate the picture. There are communities that, because of systemic human rights violations, we hold to be objectionable. Moreover, their cultural heritage is the very quality we see as objectionable and as an end unworthy of defense. At the same time those within the objectionable culture, even those who suffer from its excess, are likely to value it and seek to defend it. The mere existence of a common culture then seems unable to offer an objective value judgment sufficient to ground national-defense.

The final target is the most worthy. Rodin turns to those who seek to ground the right of national-defense in the end of group autonomy or political self-determination. Here he takes as a target Michael Walzer's conception of the "common life." Against Walzer he levels three

charges. First, that Walzer's "common life," if understood politically, is too subjective. Second, that Walzer's position allows the tacit endorsement of political force. Finally, that Walzer's position is insufficient to determine discrete communities.

His first objection is that Walzer's "common life" lacks objectivity because we seem to be advocating defense of only democracy. As Rodin states: "Only in a democratic society can persons in a community be said to freely shape their common life and enjoy the good of collective self-determination."[27] Here Walzer and others would rightly object, and Rodin concedes, that this conflates two concepts at work in Walzer's position – self-determination and political freedom. For Walzer it is self-determination that is the "more inclusive idea" that "describes … a particular institutional arrangement" and the "process by which a community arrives at that arrangement."[28] Self-determination does not necessarily endorse only one type of political process. Rather it is the larger process by which a group decides on its political association, institutions, and the character thereof. It is the right to the "process" of self-determination that is the end that can ground national-defense–a right Walzer calls "communal liberty."[29] The process Walzer has in mind is inclusive of everything from peaceable political incorporation to outright civil war.

It is at the point of including civil war that Rodin brings in his second objection. If self-determination does not involve only democratic rights, it seems thereby to tacitly allow force and coercion. Walzer deals with a similar objection in *Just and Unjust Wars*–that such a view of self-determination may convey legitimacy to those whose only virtue is the effective use of force. Against this Walzer claims, "force could not prevail … over a people ready 'to brave labor and danger' "[30] in the process of self-determination. However, Rodin is doubtful that any "military outcome can serve as an accurate proxy"[31] for the results of self-determination. Walzer

himself seems to echo this idea in a condemnation of the Iraqi Baathist regime's resistance to the United States' invasion in 2003.

> Self-defense is the paradigmatic case of just war, but the self in question is supposed to be a collective self, not a single person or tyrannical clique seeking desperately to hold onto power, at whatever cost to ordinary people.[32]

Walzer claims that our convictions about the justice of a group's defense of its self-determination through war are supposed to stem from the presumptive "respect that foreigners owe to a historic community and to its internal life."[33] The "historic community," regardless of its shape or institutions, is supposed to be the "self" that grounds national-defense. That being the case, Walzer's dependence on this assumption demonstrates that his conception of self-determination faces serious difficulties in trying to provide a full account of a normative end that can ground national-defense. Using Walzer's view and strictly adhering to political freedom results in a subjective value that is insufficient to ground an objective right. If we follow Walzer and retreat from a "straightforwardly political"[34] definition of self-determination to account for this difficulty, then we are put in a position of giving normative legitimacy to simple force and coercion.

There is a further difficulty in Walzer's position that is endemic to all the attempts to base the right of national-defense on the rights held by or the value of social communities. The "organic unity" of communities and the current international order of states are in conflict. Rodin sees the individual as a member of "complicated … vertically nested communities"[35] defined by the political and communal ties of families, cities, provinces, and states. Cutting across these communities are "numerous horizontally ordered communities"[36] such as social class, religious groups, and racial affiliation. From this general conception, Rodin offers humanitarian intervention to protect communities within a state as an indirect argument against

Walzer's position. If "communal liberty" is the basis for the right to national-defense, then how is one to make sense of a situation in which the protection of a community by armed humanitarian intervention conflicts with a state's right to national-defense? Humanitarian intervention seems to show that "the rights of communities to autonomy and integrity do not underlie the defensive rights of states but … stand in direct conflict with them."[37] This first problem leaves us wanting some manner in which to delineate between two sorts of groups: those groups whose internal conflict is part of their "communal liberty, and those groups whose internal conflict is really just one group's persecution of another group. This leads us to a second problem, namely, how are we to determine when a conflict is happening between two groups or within one group? From these considerations of humanitarian intervention, Rodin formulates a criterion required for an end to adequately account for the right of national-defense. Any such end must provide a clear way of identifying particular communities.

We have seen that the three leading arguments aimed at providing the analogical strategy with an end worthy of the use of defensive force have failed. Hobbesian sovereignty, rather than offering any such ground, seems logically opposed to national-defense. The second attempt, holding a group's cultural heritage as an adequate end, trades on the illicit use of a subjective value for an objective right. Walzer's use of self-determination to overcome the subjectivity of the second attempt leads to a normative endorsement of force and coercion as an expression of that self-determination. Finally, all three attempts failed to give clear indication as to how we might determine who or what could have such an end and thereby a right to defend it.

Let's take stock at this point. The first step in Rodin's argument demonstrated how the current normative limits on national-defense are disanalogous with the normative limits on self-defense. This leads to two possibilities: either the current limits are imperfectly related to a

relevant normative end, or there is no way to conceptualize an end for national-defense that can hold the normative force of the analogical strategy. The second step of Rodin's argument criticizes the best current attempts to conceptualize the normative end of national-defense aimed at affirming the latter proposition. Rodin's criticisms demonstrated that currently national-defense lacks a normative foundation. National-defense cannot adjudicate between the defensive rights of legitimate states in conflict, and it seems to alternately give and deny the defensive rights of illegitimate states. A solution to these problems must also do the following: It must be objective, and it must offer a way to demarcate the groups to which the end applies. Rodin summarizes these criteria in the following:

> What we require is a value that is both objective and particular–it must be objective and recognizable as valid across cultures, yet still provide a reason for defending a particular state or community.[38]

If Rodin is right, there is no such value. This is a striking predicament. The possibility of a just cause based on the right of national-defense might be *the* normative concept underlying the entire framework of the Just War Theory and its answers to the questions of *jus ad bellum*. If Rodin's arguments deprive Just War Theory of this concept, it is not entirely clear the extent to which the traditional theory could retain any of its relevance in our discussions of the justice of a state or group's resort to war.

David Rodin's arguments in *War & Self-defense* give reasons to question a central feature to Michael Walzer's "theory of aggression." In the next chapter I will take up Jeff McMahan's arguments against Walzer's theory of *jus in bello* that he calls "the war convention." McMahan's aim is to establish a view of war's morality that is antagonistic to "the war convention" and therefore at odds with the *jus in bello* tenets of Just War Theory. By trying to

understand war's morality from the norms of individual self-defense, McMahan calls into question the "independence," "symmetry," and immunity theses.

Notes

[1] Rodin (2002), 99.
[2] Ibid., 99.
[3] Ibid., 99.
[4] Ibid., 99.
[5] Ibid., 107.
[6] Ibid., 110.
[7] Ibid., 119.
[8] Ibid., 119.
[9] Ibid., 111.
[10] Ibid., 112.
[11] Ibid., 112
[12] Ibid., 41.
[13] Ibid., 113.
[14] Ibid., 115.
[15] Ibid., 115.
[16] Ibid., 115.
[17] Ibid., 126.
[18] Ibid., 127.
[19] Ibid., 146.
[20] Ibid., 146.
[21] Ibid., 147.
[22] Ibid., 147.
[23] Ibid., 147.
[24] Ibid., 149.
[25] Ibid., 151.
[26] Ibid., 151.
[27] Ibid., 156.
[28] Walzer (2006a), 87.
[29] Ibid., 87.
[30] Ibid., 88.
[31] Rodin (2002), 158.
[32] Walzer (2006b), 160.
[33] Walzer (1980), 212.
[34] Rodin (2002), 158.
[35] Ibid., 159.
[36] Ibid., 159.
[37] Ibid., 160.
[38] Ibid., 155.

CHAPTER 3.
THE DEEP MORALITY OF WAR

The guiding norm of Just War Theory is the permissibility of defensive force. For questions of *jus ad bellum*, the permissibility of defensive force is supposed to ground acts of national-defense as clear-cut cases of a just cause for war. In the last chapter, I argued that Rodin effectively criticized Just War Theory in this respect and gave us reasons to doubt that the permissibility of self-defense is normatively analogous to national-defense. In this chapter I will argue that the three tenets of Just War Theory that undergird its conception of *jus in bello*–the independence thesis, the symmetry thesis, and the immunity thesis–are similarly inconsistent with the permissibility of defensive force. The foremost critic of these tenets is Jeff McMahan and I will focus on his four central arguments against Just War Theory and the work of Walzer. McMahan offers compelling arguments against Just War Theory that aim at revealing what he calls the "deep morality of war." My contention will be that, in principle, the arguments of McMahan carry and give us reason to think that the current Just War Theory answers to *jus in bello* questions are not consistent with the norms of defensive force or the "deep morality of war." The loss of these theses renders a very different conception of the moral reality of war. Just War Theory splits war's morality into questions of *jus in bello* and *jus ad bellum*, but McMahan's arguments expose a connection between the two branches.

McMahan's arguments use a number of terminological distinctions. First is the distinction McMahan makes between "just combatants" (hereafter JC) and "unjust combatants" (hereafter UJC).[1] The distinction is straightforward enough. JCs are those who fight in a war for a just cause, whereas, UJCs fight in a war for an unjust cause. Second, McMahan's use of "innocent" is different from its use in Just War Theory and bears some clarifying remarks. The key here is to understand what McMahan believes makes a moral agent "innocent in the relative

sense."[2] We must first see that innocence does not speak directly to a lack of guilt. Rather, it concerns only "the permissibility of killing."[3] That is, one has the presumptive right against attack and is thereby innocent. But, one can forfeit that right through actions and become non-innocent. McMahan states that the innocent "have done nothing to lose their right not to be attacked."[4] This is what it means to be "innocent in the relative sense." For McMahan, those who are innocent are those who have done nothing to forfeit their presumptive right not to be attacked; likewise, the non-innocent are those who have. This notion of innocence is very much in line with Just War Theory. However, where McMahan is unorthodox is his account of how one may move from the category of innocent to non-innocent. Just War Theory holds that one's innocence turns on whether or not one poses a threat to others. As Walzer makes clear, it is the "arms that make … an army."[5] In contrast, as we will see, McMahan will cash out his conception of innocence along the lines of moral responsibility and just cause.

The Surprise Attack Argument

McMahan's first argument is the "surprise attack" argument and aims to show that the independence thesis and the symmetry thesis are not consistent with permissive defensive force. It attacks the former by demonstrating how our decision about the just or unjust status of a combatant depends on *jus ad bellum* considerations and not *jus in bello* considerations. It attacks the latter by demonstrating that in a likely wartime situation, it is counter-intuitive to hold to the "moral equality of soldiers."

The "surprise attack" argument unfolds like this. Suppose Country A launches an unjust surprise attack on Country B. However, B's military is either garrisoned or in a purely defensive posture. If A's military targets only B's military, then the traditional Just War Theory view of *jus in bello* would hold that they (A) are justified in their actions, that they do no wrong by

attacking "legitimate targets."[6] Recalling the disposition of B's military, McMahan claims that this justification is incompatible with the presumptive rights of the defenders. Traditional Just War Theory holds that only one's participation in threatening acts renders one noninnocent. Since they are not engaged in threatening activity, B's forces are innocent in the "relevant sense."[7] It would seem that, rather than justifying A's application of military force to B, the conception of innocence at work in Just War Theory condemns such actions. This leaves us in an uncomfortable position. We can maintain B's status as combatants and therefore legitimate targets only at the "cost of forfeiting the traditional theory's grounds for claiming that all combatants are legitimate targets of attack."[8] Recall that the Just War Theory grounds for holding B's forces as legitimate targets was that all combatants were non-innocent. But in McMahan's scenario B's forces do not offer threat and are thereby innocent. So in this first instance of the argument, the moral symmetry of combatants seems inconsistent with the traditional view of *jus in bello* innocence. Since the conception of innocence in question is derived from the norms of defensive force, it would appear that the symmetry thesis is in conflict with these norms.

One possible response to the argument would be to tinker slightly with the status of B's forces in one of two ways. First, we could hold B's forces in some sort of "conditional combatant"[9] status. In one sense, this status could mean something similar to Walzer's argument to ground the symmetry of combatants on the consent of the combatants in question. The members of B's forces have, by joining the military, consented to the risk of being killed and such consent also involves the implicit or tacit consent to being killed. However, here McMahan finds support in David Rodin's objection to Walzer's argument from consent. This objection turns on a distinction between a combatant's consent and her acknowledgement of a necessary

fact about war. That is, in war people die, and it is perfectly clear that soldiers very quickly accept this fact. However, it is one thing to accept one's death as a likely result of an activity and another to consent to that death. As Rodin remarks, combatants "fight knowing they may be killed, but they do not thereby permit their enemies to kill them."[10] The argument from consent appears to trade on a view of war as a gruesome sport. The rules are set, the stakes are clear, and soldiers regard their lives the way they regard a critical piece in a game of chess. But such a view of war is not an ethically attractive one.

The members of B's military could also be "conditional combatants" in a second sense: they pose a conditional threat because they will fight if they or their country were attacked. McMahan rejects any such solution because it would render the distinction between combatant and noncombatant as strictly arbitrary. Any number of persons or classes could be reasonably expected to fight should they or their country come under attack. Why, then, limit the initial attack to only military personnel? The result "empties the distinction between combatant and noncombatant of any significant content"[11] in a way that is clearly intolerable.

Another response to the "surprise attack" argument might be to stick hard with the traditional conception of innocence and hold B's forces as "military noncombatants"[12] retaining their immunity. This is more tolerable, as it ostensibly limits violence and serves as a moral check on unjust attacks. However, for McMahan it also undermines the symmetry thesis. For, it holds that UJCs *can* participate in an unjust war *and* abide by the principles of *jus in bello*. But in this case, if B's forces are "military noncombatants," then A's attack violates the principles of *jus in bello*. In this one case, abiding by *jus in bello* is one thing that UJCs *cannot* do.

For some adherents of the traditional theory, this result may seem to be an acceptable qualification or caveat to the base theory because it limits and checks war and condemns

aggressive action. But this concession, however beneficial, does not relieve the initial trouble for the symmetry thesis and glosses over a troubling result of this line of reasoning. For McMahan the concession implies two things. First, UJCs in the initial invasion do wrong, but that subsequent actions of these UJCs and follow-on forces are justified by simply acting in accordance with the demands of *jus in bello*. For, in response to the attack, B's forces may begin to resist the invasion. Once they have begun a counter-attack or active defense, they pose a threat to A's forces and thereby become legitimate targets. However, this is still in conflict with the symmetry thesis because not *all* combatants share a moral equality. We would still have reason to hold the initial wave of A's forces as UJCs and the follow-on forces of A and B's defensive forces as JCs. Second, the concession seems to imply that all one need to do is provide adequate warning to those under attack. So long as you grant sufficient time for your enemy to posture, you can satisfy the requirements of *jus in bello*. This result, for McMahan, would give credence to the criticism that Just War Theory is "nothing more than a quaint chivalric code"[13] that we should be rid of to our advantage.

A variation of the "surprise attack" argument aims to cast doubt on the independence thesis. By slightly changing the conditions of the argument, McMahan demonstrates that we ought to alter our judgments of A's combatants because of the considerations of *jus ad bellum* and not *jus in bello*. Suppose that B's security forces were spilt into a purely defensive military, say B1, and paramilitary internal security force, say B2. Now, suppose that B2 is conducting the genocide of a minority population in B and that B1 is, or will, protect B from outside interference. It would seem in this case that A's forces, given they satisfy certain *jus ad bellum* requirements, would be justified in launching the same surprise attack. Moreover, their forces would be, provided they abide by the dictates of *jus in bello*, JCs. For McMahan this "is

inconsistent with the traditional theory's insistence that *jus in bello* is independent of *jus ad bellum*"[14]–the independence thesis. This is so because what justifies the action of A's combatants–what makes them JCs now–is not some different, morally correct form or warfare that they follow–that is, a practice more in line with *jus in bello*. Rather it is the satisfaction of the requirements of *just ad bellum*–most importantly, a just cause of humanitarian intervention.

The Asymmetry Argument

McMahan's "asymmetry" argument is a simple one that relies on the norms at work in self-defense and national-defense. The argument aims to give further reasons to doubt that the independence thesis and the symmetry thesis are consistent with the norms of defensive force. In particular, these theses falsely assume that *all* defensive force is justified. McMahan draws out this error by using a simple instance of self-defense to show that there is a normative asymmetry between the attacker and a defender in a criminal assault.

The first premise of the argument recalls that Just War Theory grounds the permissibility of defensive force in the status of innocence. The noninnocent, regardless of the justice of their war, are in some capacity threatening harm and thereby are the permissible targets of defensive force. But this is not the same for a typical instance of individual self-defense. During the act of self-defense, I become a threat to an unjust attacker. However, simply because I am now threatening the attacker, I do not thereby become a permissible target of his defensive repulse of my counter-attack. If this were the case, we might reach a counter-intuitive position: "If defensive force is permissible, the fact that you now pose a threat to your attacker makes it permissible for him to attack you."[15] So there is reason to doubt that all defensive force, simply by being defensive, is justified.

The upshot of McMahan's "asymmetry" argument is that the independence and symmetry theses are subject to further, difficult objections. As he states:

> It is false that unjust combatants do no wrong to fight provided they respect the rules of engagement. And it is false, *a fortiori*, that *jus in bello* is independent of *jus ad bellum*."[16]

The permissibility of defensive force rests on one's right against attack. Where no such right exists, we cannot otherwise justify force simply because it is defensive. In most cases of violent altercations, personal and national, one party's violent action is a permissible use of force to defend their rights, whereas, the other party's violent action is *the* act whereby they lose this right. This creates a moral "asymmetry" between the attacker and defender–the criminal and the guiltless. The moral difference between an attacker and defender undermines the symmetry thesis. It also undermines the independence thesis because the method of the unjust attack cannot overcome the moral character of the act. An UJC can no more justify his actions by citing their conformity to the principles of *jus in bello* than a mugger can justify his actions by citing the fact that he only attacked me and not my wife and children. However, such a "justification" McMahan contends, is exactly what Walzer and Just War Theory make on the behalf of UJCs.

Walzer recognizes that criminals have no right to defensive force. On this McMahan pushes with the following question: why is there a difference between the criminal and the UJC? Walzer's response to this is that warfare and war are different from criminal activity because of the "necessity" involved. Here again is Walzer's instrumental argument that most combatants, just and unjust, are subjected to any number of forces–social, political, economic, and patriotic–sufficient enough to constrain their will so that participation in a war is not "their crime." McMahan's response to Walzer's argument is two fold. First, he argues that it is not at all a

settled question that all combatants are sufficiently restrained in their ability to act. This again would lead us to the conclusion that combatants can be both just and unjust. Walzer might not argue against this conclusion. However, it is the way in which we determine the combatants' status that is in conflict with Walzer's position. Those combatants whose will is sufficiently restrained–conscripts and the like–are just, but those whose will is not constrained–volunteers, officers–are unjust. This is not the manner in which Walzer would separate the just and the unjust. So long as a sufficiently responsible combatant executes an unjust war "strictly within the rules," Walzer would hold him as a JC. It is only those who fail to comply with *jus in bello* standards that Walzer holds as unjust. A different sort of distinction is at issue here. Some combatants, based on their caste and set, would meet the justifying criteria while some might not. Thus, we are lead to accept some combatants as just and others as not, based on their relative moral responsibility and not on their compliance with the standards of *jus in bello*. This conclusion works to undermine the symmetry thesis because it holds that compliance with *jus in bello* is the basis for wartime rights.

McMahan's second response is that coercion, duress, ignorance and any such extenuating circumstances are never thought to justify wrongful action but only to excuse. As McMahan states:

> the various considerations that Walzer cites are at best excuses. They may show that a particular unjust combatant is not a criminal and is not to be blamed or punished for what he does, but they do not show that he acts permissibly.[17]

We still need a way to distinguish the permissible from impermissible, and Walzer's instrumental argument fails to provide any basis for holding that some UJCs act permissibly, as opposed to only excusably. That failure undermines the symmetry thesis.

The Parallel Argument

McMahan's "parallel" argument argues against the independence thesis and the symmetry thesis from the considerations of just cause and its implications for defensive force. McMahan begins by claiming a moral priority for just cause as a consideration of *jus ad bellum*. This is so because if there is a lack of a just cause, then most other requirements of *jus ad bellum* "cannot be satisfied even in principle."[18] McMahan states that a just cause is a "restriction on the *type* of aim or end that may legitimately be pursued by the means of war."[19] It is a distinction of principle and not, except in extreme circumstances, of scale. It is for this reason that McMahan claims its primacy. Recall that the general consensus is that the guiding principles of *jus ad bellum* are: just cause, competent authority, right intention, reasonable hope of success, necessity, and proportionality. McMahan narrows the list by claiming that reasonable hope of success is "subsumed by the proportionality requirement,"[20] rejecting competent authority as a consideration of *jus ad bellum*, and holding the remaining requirements to be necessary conditions to justify the resort to war. However, McMahan further argues that just cause plays a critical role in the satisfaction of these remaining requirements. To satisfy right intention we must wage a war for the express purpose of achieving a just cause. That is, the end that can justify our resort to war must be our goal and not a morally contrived smoke screen for some other purpose. The principle of necessity dictates that our resort to war is the last option available to achieve a just cause. That war is necessary for the achievement of some other–less than just–cause or good holds no "justificatory force."[21] Finally, "proportionality" holds that the ends pursued by war must be proportionate in value to the goods or ends lost. For McMahan, those goods that can count in this calculation are only those that are constitutive of, or instrumental to, the just cause. To hold otherwise implies the incoherent view that "war is

justified, at least in part, by the fact that it would achieve certain goods that cannot permissibly be achieved by the means of war."[22] I take McMahan's claim for the primacy of "just cause" in the considerations of *jus ad bellum* to be essentially correct.

Returning to the "parallel" argument, McMahan highlights the dependence of proportionality calculations on the presence of a just cause. This requirement of *jus ad bellum* proportionality appears to have a parallel requirement in *jus in bello* proportionality. Simply put, *jus in bello* proportionality requires that the goods achieved by any act in war must outweigh the bad effects. For McMahan only those goods that can count in the *jus ad bellum* calculation–goods stipulated by or instrumental to the just cause–can count in the *jus in bello* calculation:

> For if other goods cannot contribute to the justification for *war*, they cannot figure in the justification for the individual *acts of war* that are together *constitutive* of the war.[23]

This leads to the following two conclusions. First, in the absence of a just cause–a criterion of *jus ad bellum*–no act of war can satisfy the requirements of *jus in bello* proportionality. This is an obvious challenge to the independence thesis because *jus in bello* appears to supervene on *jus ad bellum*. Second, if we take the requirements of *jus in bello* to be necessary requirements of permissible warfare, it follows that "no act of war by an unjust combatant can be permissible."[24] This is an obvious challenge to the symmetry thesis because the UJC *cannot*, in principle, abide by *jus in bello*; therefore, the UJC cannot lay claim to *jus in bello* compliance to justify his acts.

An example may help to make the implications of the previous three arguments more clear. The example will concern Private Sajer, an infantryman in the Wehrmacht and his status as either a JC or UJC based on fictional situations in a historically relevant context. In 1941, the Wehrmacht[25] launched Operation Barbarossa as a continuation of Hitler's policy of aggression. Since any conquest of the Soviet Union would require the capture of Leningrad, the Germans

attack to capture this city. In planning for the city's investment, the Wehrmacht identifies a large Red Army barracks as a key subordinate objective. Sajer's battalion is assigned to the task and his company takes as its mission the capture of a further subordinate objective–an apartment complex over-watching the barracks. Sajer is a competent soldier and plays an important role in the capture of his company's objective. During the attack Sajer has done nothing to violate the traditional tenets of *jus in bello*, but his actions have killed a few noncombatants and many Red Army combatants.

McMahan's "parallel" argument would claim that Private Sajer cannot, in principle, meet with the *jus in bello* requirement of proportionality because the objective of seizing the apartment complex is not the type of good that can off set the deaths the action caused. This is because the apartment complex is a subordinate goal that supports the larger, unjust Operation Barbarossa. If we hold that Sajer has failed to meet the proportionality requirements of *jus in bello*, then he is an UJC. However, the fact that he failed to meet the requirements of *jus in bello* did not depend on the actions he took, but the end those actions supported. We have no reason to think that Sajer has fought outside the rules of Just War Theory, only that the cause that required his action on that day was unjust. Therefore, we have strong reasons to believe that *jus in bello* cannot be held independent of *jus ad bellum*. Rather, for one to hold the rights of *jus in bello* requires the prior satisfaction of the requirements of *jus ad bellum*.

McMahan's "asymmetry" argument would claim, contrary to the symmetry thesis, that Sajer had no right to attack the building or return fire, while the Red Army soldiers he faced did hold such a right. This is because Sajer's participation in Operation Barbarossa, through the attack on the apartment complex, is the act by which he forfeits his presumptive right not to be attacked. The Red Army soldiers, on the other hand, act in accordance with a justifiable right to

defend themselves and others. In this situation the combatants, Sajer and the Red Army, are not moral equals, and this undermines the symmetry thesis. Moreover, McMahan would claim, based on the "asymmetry" argument, that Sajer's example undermines the independence thesis because Sajer's acts that are in adherence with *jus in bello* requirements do not justify him, they indict him.

A slight change in Private Sajer's condition will help to bring the conclusions of the "surprise attack" argument into focus as well. In this situation Sajer is now stationed in 1944 Germany. His unit has generally abandoned all actions expect those required to defend the local populace from a now murderous campaign of retribution and conquest by the Red Army. In a local battle, Sajer leads an attack to capture a building required to thwart a Red Army attack on a village. Sajer's actions have the same result, a few dead civilians and many dead Russians.

In the light of the "surprise attack" and "parallel" arguments our judgment of Sajer's actions are now, according to McMahan, quite different. This was not because of any difference in Sajer's actions. They were, in both cases, roughly the same. The moral distinction we make between the two actions relates to the respective ends of the action, not the quality of the action. In the examples above our judgments about *jus ad bellum* came before and informed our judgments about *jus in bello*. This conclusion runs counter to the independence thesis. Furthermore, we have no reason to think Sajer did not act with honor. Indeed, we could cast him as a very chivalrous combatant taking pains and risks to limit the harm he inflicted and it does not change the basic reaction that he and his adversaries are morally asymmetric in each case. This conclusion contradicts the symmetry thesis.

The Implacable Pursuer

McMahan's "Implacable Pursuer" argument reasons from the norms of defensive force and aims to cast doubt on the strict immunity of noncombatants. It does this by challenging the grounds upon which Just War Theory makes the traditional distinction between combatant and noncombatant. The thought experiment at the center of the argument has three principle characters: the "Implacable Pursuer" who is wholly controlled by the "Initiator" and bent on the killing of the "just defender."[26] The key element here is that the "Implacable Purser" is a "Nonresponsible Threat."[27] That is, she figures prominently in the causal structure of the threat posed to the "just defender" but bears no moral responsibility for that threat. This renders her "morally indistinguishable from an innocent bystander."[28] Therefore, it seems wrong to state that the "Implacable Pursuer" has made herself liable to attack simply by posing a threat. McMahan reinforces this conclusion by adjusting the conditions slightly. In the second case, the "just defender" must choose between killing the "Implacable Pursuer" or, in the process of escaping, kill the "Initiator" who poses no current threat. McMahan concludes that:

> Because the Initiator is the one who is morally responsible for the fact that someone must die, he should, as a matter of justice, bear the costs of his own voluntary and culpable action.[29]

The conclusion is that what makes one liable to attack–the way in which one might forfeit the right against defensive force–is "responsibility for initiating or sustaining" an unjust threat.[30] McMahan calls this the "responsibility criterion."[31]

Since the act of posing a threat was the basis for the distinction between combatant and noncombatant in Just War Theory, we can see that McMahan's "responsibility criterion" would serve to undermine the strict immunity of noncombatants. For, if we expand the "responsibility criterion" to applications in war what distinguishes legitimate targets from illegitimate targets is

not threat, but a "moral responsibility for an unjust threat … or, more generally, for a grievance that provides a just cause for war."[32] The most obvious consequence of this criterion is that "virtually all" UJCs will fall into the category of legitimate targets. But there is an important caveat that McMahan draws out based on his "eccentric" view of responsibility that will serve to refine the determination between legitimate and illegitimate targets. This is the distinction between culpability and responsibility. McMahan is insistent that one may be responsible for an unjust threat, but hold varying degrees of culpability. However, for now it is useful to note that McMahan's conception is that moral responsibility is a question of scale and culpability is the relevant factor in determining one's place on the scale. All those who hold a moral responsibility–combatant or not–for an unjust threat or grievance are legitimate targets. This is an unusual, if not also troubling, conclusion in the discussion of the ethics of war. That it may be, even if only in principle, permissible to target civilians not currently contributing to the war effort, or posing a threat, is unorthodox.

The Divergence of War's Morality

McMahan's four arguments offer a compelling critique of the three *jus in bello* tenets of Just War Theory. His "deep morality of war" runs at odds with virtually every important aspect of current Just War Theory and the international humanitarian law that is its corollary. The independence thesis appears false because in the first three arguments the judgment between JC and UJC turned on *jus ad bellum* considerations and not satisfaction of *jus in bello* requirements. This would lead us to a conception of war's morality that is not bifurcated but linked. The requirements of *jus ad bellum* are not distinct from *jus in bello*. Rather, *jus ad bellum* requirements travel far in determining the *jus in bello* norms that are applicable to combatants and noncombatants. The symmetry thesis appears false because in the first three arguments we

found reasons to make relevant moral distinctions within the traditional class of combatants. This would lead us to the need for a principled way to make such distinctions, and, given the loss of the independence thesis, to suspect such distinctions come by way of our *jus ad bellum* considerations. The immunity thesis appears false as well because the "Implacable Pursuer" argument has given us reasons to think that posing an active threat is not the only consideration relevant to determining one's liability to attack. The process by which noncombatants may be viable targets in this respect has now become an open question.

McMahan's dissenting conclusions have come in for some sharp criticism from Walzer, Rodin, and Henry Shue. The fundamental issue is the degree to which war's morality ought to be divergent from the morality of normal human relations. McMahan is committed, almost stridently, to the idea that war and its relations can reduce to the ideas of individual morality–that is, there is no significant divergence. His critics hold that the moral reality of war is either irreducible to individual rights of self-defense–Rodin–or, that it is completely distinct from the norms of everyday human affairs–Walzer and Shue.

David Rodin is specifically critical of McMahan's account of noncombatant liability. His criticism turns on the fact that if we alter the conditions of the "Implacable Pursuer" only slightly to accord more readily with moral agency of soldiers, our intuitions "align very differently."[33] Rodin charges, and McMahan admits, that combatants rarely, if ever, lack moral agency as completely as the "Implacable Pursuer." So Rodin offers a case more in line with the traditional combatant. In this case the principal actors are a "provocateur" and a "pursuer" duped or enraged into attacking the defender. In this example Rodin claims that "we would favor killing the pursuer who is currently posing a threat"[34] over the person who may bear more responsibility for the threat. For Rodin, this is so because "a minimally responsible agent intervenes with an

action more proximate to the unjust threat."[35] Rodin's objection is essentially that McMahan's account of liability is insufficiently complex to capture all the relevant norms in the collective action of war. It seems clear from McMahan's argument that noncombatants can bear responsibility for unjust attacks or unjust wars, but altering the arguments even slightly towards an account more in line with collective action appears to render the noncombatant immune to lethal force.

Rodin then doubts the "Implacable Pursuer" argument. As it turns out, the charge that McMahan's account of liability is too individualistic may be a powerful critique of McMahan's project. Both the "surprise attack" and "asymmetry" arguments depend on McMahan's use of individual self-defense to carry. If war and warfare occupy a moral realm so divergent from normal life that analogies from personal or interpersonal morality cannot carry any force, then McMahan's project may be fundamentally misguided. Such a divergence is at the heart of Walzer's position when he states that war "has no equivalent in a settled society."[36] Walzer writes:

> What Jeff McMahan means to provide … is a careful and precise account of individual responsibility in time of war. What he actually provides, I think, is a careful and precise account of what individual responsibility in war would be like if war were a peacetime activity.[37]

Henry Shue in "Do We Need a 'Morality of War' " makes the point even more forcefully:

> At bottom, McMahan is arguing by analogy from ordinary situations to situations in war that are crucially disanalogous; the assumption that the two cases, ordinary life and war, are analogous begs the question against the laws of war.[38]

Both Walzer and Shue support this claim with an account of the nature of combat that is sympathetic to combatant's predicament. That is, that McMahan's position is unfairly burdensome to those fighting because of his insistence on discerning moral liability as the necessary criterion for application of force. As Shue states, the objection is a "matter of ought

presupposes can."[39] Walzer echoes this when he states that McMahan's account of liability isn't "going to make a difference on the battlefield–because of what battlefields are like."[40] For both Shue and Walzer, war is simply a tragedy that must have a morality significantly different from normal life because of the extreme circumstances. If the moral reality of war is divergent from normal life, then it would constitute a decisive objection to McMahan's deeper morality. However, the case is not as decisive as Walzer and Shue make it to be.

There are two things to say to the objection based on war's moral reality. One Shue recognizes, and one he and Walzer may not. The first comment is a theoretical point: the argument about the moral reality of war only carries against McMahan's conception of liability, which he derives from reflecting on individual morality. Were we to sufficiently flesh out a concept of moral liability that we could index to war fairly, the objection would seem to fall away. That is, if we could develop a conceptual framework for the assessment of member liability for group actions, we might come closer to the mark of an account of liability that is fair to use in war. McMahan is committed to the assumption that morality in war is directly drawn from or reducible to individual morality. With Walzer, Shue, and Rodin, I find this aspect of McMahan's view problematic. War is essentially a group activity. For this reason, events and arguments that draw on the normative relationship between only a few individuals like a mugger and a stroller are only very roughly analogous to normative relations in war. The norms of war, however, do not reduce to these less complicated relations. As Shue makes clear the UJC is the "nearest–but not very near–analogue to the mugger" while the JC is the "nearest–but not very near–analogue to the stroller."[41] For this reason, McMahan's "surprise attack," "asymmetry," and "Implacable Pursuer" arguments are initially compelling, but stand in need of a substantial account of individual responsibility within the context of group, or collective, activity. However,

the "parallel" argument appears to retain its force. The strength of this argument was the moral priority of just cause, and not an account of liability. So as it stands now, the independence thesis seems dubious based on McMahan's arguments. However, the viability of the symmetry and immunity theses of Just War Theory will stand or fall based on an account of liability that is in line with the moral reality of war.

The second point is the following: The objection of Walzer and Shue is essentially that a soldier's lot is already rough, and that placing further constraints beyond the mere determination of threat borders on being morally intolerable. But, Walzer and Shue simply overstate the relevant facts about the experience of war. While it is clear that *combat*, or more specifically, *direct fire contact*, is not the time or the place to be determining whose bullets are morally liable and morally justified, combat is not the sum total of a combatant's experience. War, as an experience, consists of long periods of boredom and drudgery punctuated by moments of excitement that can become painfully, inhumanely, terrifying. To judge the possibility of what we can or ought to do in war from the perspective of these moments of "punctuated terror" is mistaken, or at least only half right.

Walzer and Shue describe the state of a combatant in terms that emphasize the uncertainty of combat, and the pervasive presence of threats, and the tyranny that war places on one's humanity. However, this description is more characteristic of what it is like to be losing a *fight* in a war and there is more to being a combatant than simply fighting. Uncertainty and the "friction of war"[42] are clearly elements of the battlefield. However, they are elements that soldiers must train to handle and plan to overcome simply to win. It is not beyond the pale to think that they could add some measure of moral reasoning and reflection on liability to their planning before during and after direct fire contact. An exhaustive account of the nature of war's

reality and any way that may bear on what we can consider war's moral reality is beyond the scope of my work. I want only to point to the fact what combatants ought to do in war may not meet with McMahan's requirements, but the moral reality of war may come quite a bit closer to normal life than Shue or Walzer realize. How close it comes will determine the extent to which McMahan's arguments apply to the *jus in bello* theses of Just War Theory.

Jeff McMahan's "deep morality" of war comes by way of his application of the norms of individual self-defense to the realities of war. His four arguments provide reasons to take the traditional *jus in bello* tenets of Just War Theory as inconsistent and in conflict with the norms of self-defense. The impendence thesis is a lost cause. Based on McMahan's arguments there seems little hope of holding to the "logical independence" of *jus in bello* and *jus ad bellum*. The viability of the remaining theses in the face of McMahan's arguments, however, depends on the applicability of an analogy from individual self-defense to the reality of war. This is related to the results of Chapter II. If we can find an adequate ground for the right to national-defense, then it should offer a view of the norms that govern warfare. In this light we can determine the success or failure of McMahan's arguments. This is my aim for Chapter IV: an end worthy of defense and the limits it implies for the use of military force in its defense.

Notes

[1] McMahan (2004), 693.
[2] Ibid., 697.
[3] Ibid., 695.
[4] McMahan (2006), 379.
[5] Walzer (2006a),146.
[6] McMahan (2004), 696.
[7] Ibid., 697.
[8] Ibid., 697.
[9] Ibid., 697.
[10] Rodin (2002), 172.
[11] McMahan (2004), 697.
[12] Ibid., 697.
[13] Ibid., 698.
[14] Ibid., 698.
[15] Ibid., 698.
[16] Ibid., 700.
[17] Ibid., 700.
[18] Ibid., 708.
[19] McMahan (2005), 4.
[20] Ibid., 5.
[21] Ibid., 5.
[22] Ibid., 5.
[23] McMahan (2004), 709. Thomas Hurka, in "Proportionality and Necessity," offers a strong argument for why certain goods, as a matter of type, are held out of *jus in bello* proportionality calculations. The argument is consistent with McMahan's position. Cf. May (2008), 127-144.
[24] Ibid., 709.
[25] The irony of applying the title "Werhmacht" to Hitler's army is worth noting.
[26] Ibid., 719-721.
[27] Ibid., 720.
[28] Ibid., 720.
[29] Ibid., 721.
[30] Ibid., 721.
[31] Ibid., 726.
[32] Ibid., 722.
[33] Rodin (2008), 48.

[34] Ibid., 48.
[35] Ibid., 50.
[36] Walzer (2006a), 127.
[37] Walzer (2006b), 43.
[38] Shue (2008), 98.
[39] Shue (2008), 99.
[40] Walzer (2006b) 44.
[41] Shue (2008), 103.
[42] Clausewitz (1984) 88.

CHAPTER 4.

NORMATIVE SOVEREIGNTY AND THE MORAL REALITY OF WAR

The arguments of Rodin and McMahan have left Just War Theory on shaky ground. The permissibility of defensive force, either between states or on the battlefield between soldiers, is one of the guiding norms of Just War Theory. However, Rodin's arguments against the right of national-defense have shown that there is no normative relationship between self-defense and national-defense. This is because Just War Theory cannot offer a normative end capable of grounding national-defense. McMahan's arguments have shown that there is reason to believe that the Just War tenets of *jus in bello* are inconsistent with the permissibility of defensive force. The independence thesis seems flatly false, but the viability of the remaining theses depends only on the extent to which the moral reality of war diverges from the moral reality of everyday life. The loss of the independence thesis brings us to the point where the moral questions of *jus in bello* and *jus ad bellum* appear linked. So, if we were to find a normative end robust enough for national-defense, we can expect that end to go far in determining the moral reality of war and the light it can shed on McMahan's remaining arguments.

In *A Liberal Theory of International Justice*, Andrew Altman and Christopher Wellman offer a normative conception of a state's right to political self-determination that may provide the end national-defense requires. That is, it will offer a right based on a normative conception of sovereignty (hereafter AWS) that can give national-defense a normative foundation sufficient to govern its practice. The generation of these normative limits on national-defense will help determine the moral reality of war and the extent to which McMahan's arguments stand or fall in this light. My following argument has two main aims: First, I will see how AWS meets Rodin's challenges to national-defense. For this, I will reverse his method of argument by

showing that AWS is a normative end that is unobjectionable from Rodin's position. I will then demonstrate how AWS can generate the normative limits Rodin requires. These are requirements of *jus ad bellum* that limit military action. That is, to meet Rodin's requirements, we need to show limits that apply only the resort to war and when war should cease. However, this will lead to the second aim of my argument–the moral reality of war in the light of AWS. My contention will be that the right of political self-determination can ground national-defense. However, this normative foundation will support McMahan's call for significant revision of the current tenets of *jus in bello*. Specifically, AWS further undermines the independence thesis, weakens the symmetry thesis and leaves the immunity of noncombatants as an open question.

Normative Sovereignty

Altman and Wellman (hereafter A/W) offer a normative view of sovereignty as a group right to political self-determination based the moral value of individuals within and outside of the group. What is of key importance is that AWS is a normative account. It offers both reasons to respect the right of a group and criteria that show how and when that group may lose its right to political self-determination. Simply put, AWS is a moral right of a properly legitimate political group to determine its own political affairs and it has a deontological basis in the individual value of its constituents.

A/W establish the claim for a right to political self-determination by examining the decolonization movement of the twentieth century. By looking to this history, we can see that decolonization was "an effort to vindicate the collective moral right of political self-determination."[1] This right is subject to two principles:

> 1) A state has a moral right of political self-determination if and only if it adequately protects and respects human rights.

> 2) A nonstate group that aspires to become a state has a moral right to political self-determination if and only if it is willing and able to become a state that adequately protects and respects human rights.[2]

These principles form the normative force behind AWS because they predicate a right to sovereignty or political self-determination on the protection of human rights. These principles have three important consequences.

The first important consequence of AWS is a distinction between political and non-political groups. The groups subject to the two principles and thereby potential rights holders are political groups. This distinction has as two important consequences. First, it works as a limiting criterion. The groups to which this right applies must be political and nothing else. Second, it also offers a sufficiently broad enabling criterion. That is, the right is a generic political right that is consistent with a range of political systems; we will not be in a position of arbitrarily touting one political system's deontological status over another. For A/W, even a non-democratic system can have a right of political self-determination, as long as it adequately respects and protects human rights.[3]

The second important consequence of AWS is what I will call the legitimacy threshold. Only those groups that can meet this threshold are able to claim the right of political self-determination. Here I must mark out what A/W consider a legitimate state. It is one that "adequately protects its constituents' human rights and respects the human rights of all others."[4] A/W characterize this as the "requisite political functions"[5] of the legitimate state. Along with the connection of legitimacy to human rights, there are several other characteristics that are important to note here. First, since AWS intends to confer the right of political self-determination on those states that have "political legitimacy" there is a constitutive requirement

to "rule a territory."[6] That is, to count as legitimate any group in question must be able to offer some politically organized territory to its members.

The character that any political organization must take to count as legitimate is also given by the "requisite political functions". That is, the group claiming political legitimacy not only protects the rights of its constituency; it must also respect the "human rights of all others". Here it is important to note that the key distinction is between protection and respect, and not members and non-members. Politically legitimate groups do have a different normative relationship to members and non-members. To its constituency it owes a duty of care and protection for their rights. To all others that fall outside the class of a state's political constituency it owes a duty to not impinge upon their rights. There may well be territorial inhabitants who are not members of the group. Their participation in the group's political action, however, is not a prerequisite for the group's obligation to respect their rights. These last two requirements are limiting criteria: they serve as a way to limit the actions that the group may take to protect its right to self-determination from internal challenges and external interference.

The final consequence of AWS is that it is a group right with deontological value. For A/W the deontological claim to political self-determination stems from a proper view of the rights of the individuals in the group. In this A/W are trying to reconcile "value-individualism" with their claim to a state's right to self-determination. It is key to note here that A/W are not looking to establish a state right based on an analogy between the state and the individual. Rather, they will develop a right to political self-determination based only on the achievement of the group's members in collective activity. The requirement to respect individual rights grounds the requirement to respect the group's right. A/W say as much in the following:

> When an individual's right to autonomy is violated, the individual herself is wronged. In contrast, when a state's right of self-determination is violated, it is

> the individuals *qua* members of the political group–rather than the group itself–who are wronged.[7]

A/W recognize rightly that the rights of the group are owed to its members by virtue of their status as a member of the group. As they state further, "people are owed … respect because of their special roles, standing, or abilities."[8] There is no reason to think that political groups could not enjoy similar enhanced moral standing based on their effective protection of human rights.

We must be careful here as well to mark out what A/W are not claiming. The right that the group holds is consistent with "value-individualism" but it is not simply a reduction to individual rights, nor is it the result of a bundling of many rights of the individual. Rather, A/W are trying to capture the process by which a group gains rights that individuals *could not have* on their own. In this sense, it seems clear that it could not be just a reduction or amalgamation of rights that confers the right to political self-determination:

> the group is entitled to dominion over its self-regarding affairs only because it has achieved a certain status, a status achieved by the collective efforts of the individual group members. Put plainly … a group of citizens who are able and willing to perform the requisite political functions have a right to political self-determination.[9]

It is the group effort, the individual's role therein and, importantly, the results (or at least the potential results) of the effort that bestow a right to the group as such. The right stems from the collective activity of the group; but its violation is a wrong against the members of the group as individuals.

There is one more point to cover that is important given my current project. If groups have rights based on the application of the AWS legitimacy threshold and this threshold is connected to the protection and respect of human rights, then we must get hold of some notion of what counts as a human right and what does not. Here A/W are helpful. They see human rights as individual "moral rights to the protections … against the standard and direct threats to leading

a minimally decent human life."[10] The important concept here is "standard and direct threats." Threats that satisfy the conditions of "standard and direct" will have a corollary protection that will constitute a human right. The conditions of being a "standard" threat are straightforward. Some exemplars of such threats are: torture, persecution (political, racial, etc.), and arbitrary imprisonment. A/W explain the conditions making a threat a "direct" threat by contrasting them with indirect threats. Taking arbitrary imprisonment for example, it is a "direct" threat to a "minimally decent life" because it–in and of itself–makes such a life impossible or unlikely. In contrast, one's ability to afford a lawyer would be an indirect threat to a "minimally decent life" because one is thereby at a greater hazard to suffer the "direct" threat of arbitrary imprisonment. Therefore, threats that in and of themselves make a decent human life impossible or unlikely are "direct;" whereas threats that make such life unlikely through the mediation of some other factors are instrumental. The existence of the right depends on the nature of the threat. For A/W, where there is a direct threat, there is a corresponding human right to protection. Where there is an instrumental threat, there is only a corresponding "human-rights based claim"[11] for amelioration.

AWS is a normative account of state sovereignty. The conception is robust and has three defining characteristics. First, it is a generic political right. That is, it only applies to political groups, but does not demand what form those groups take. Second, it is subject to the legitimacy threshold. The right only exists for those political groups that protect and respect human rights. Finally, it is a right held by groups (properly functioning) and grounded in the moral value of the constituents.

Constructing a Right to National-defense

To see how AWS can meet the challenges of Rodin, it will be useful to reverse his method of argument. That is, I will start by showing that the right to political self-determination entailed by AWS is the end that can ground national-defense in a way that is unobjectionable on the basis of Rodin's concerns. After this, I will argue that political self-determination can impose normative limits on the operation of national-defense. What should come to light is a right to national-defense that is normatively analogous to the right of self-defense. This will meet the first basic aim of my argument by salvaging national-defense as the collective right of a group to protect its own political self-determination. To do this I need to show that AWS provides a normative foundation to national-defense that meets Rodin's requirements. These are: the end is normative and not simply factual; it is objective, i.e., cross-culturally valid; and it is particular in that it demarcates to whom or what the right accrues.

AWS is a normative conception of sovereignty that rests the right to political self-determination on a group's ability to protect and respect human rights. Recall the charge from Rodin against holding sovereignty as the normative foundation of national-defense. He claimed that it is an "empty vessel" that cannot do the moral work required because it is a "factual and not a normative concept."[12] Moreover, the concepts behind sovereignty did little more than serve as legal justification for "power protecting itself."[13] It should be clear at this point how AWS has filled this vessel with moral content. What is of interest in AWS is not the protection of power, but the use of power to protect people. Its foundation is the moral worth of the individual. This is consistent with Rodin's requirements for normativity that he takes from Joseph Raz's "humanistic principle". This Raz defines as:

> the claim that the explanation and justification of the goodness or badness of anything derives ultimately from its contribution, actual or possible, to human life and its quality.[14]

We might correctly describe AWS as an application of Raz's principle to the traditional concepts of sovereignty. The result is a normative foundation in the deontological right of groups to political self-determination through the group's protection and respect for individual rights. This is an end that AWS entails.

Two of Rodin's concerns–that the right to national-defense ought to be objective and particular–are conceptually related. In the first case we are looking for an end that is "objectively" valid and must meet two requirements–it must be a generic political right and must not admit to the tacit endorsement of force. A/W hold the same view; AWS implies a generic political right. It does not make claims in favor of any form of government or culture, only its effects. Moreover, only those forms of government that fail to respect and protect human rights receive censure. This relieves our initial worries that we might be in "the embarrassing situation of excluding non-democratic regimes"[15] from holding a right to national-defense. However, Rodin's deeper criticism of Walzer's retreat from a political view of self-determination does not clear so easily.

Rodin is concerned that Walzer's position allows force and coercion to act as grounds of self-determination. A/W's position is free of this concern because it grounds the collective right to political self-determination in the protection of human rights. A group may choose "any institutional arrangements–democratic or otherwise–that adequately respects and protects human rights."[16] So long as the founding movements of any particular regime respect the rights of its members and others, AWS makes no claims to shape its institutions. The point here is that AWS places theoretical limits on how a group may "brave labor and danger" in their pursuit of

political autonomy. These limits allow us to retain a generic political right that is "objective" but not committed, tacitly or otherwise, to an endorsement of force or coercion as the legitimate grounds of the right to self-determination. This is not to say that AWS would not apply to current government regimes that developed out of a morally suspect past. But neither would it endorse such regimes until they could meet the "legitimacy" threshold. Moreover, it seems that AWS would require such regimes to take adequate steps to redress any remaining significant human rights grievance attending its formation and consolidation of political power.

The way in which AWS obtains objectivity sets the groundwork for its satisfaction of Rodin's call for particularity. In this criterion we are after requirements that demarcate to whom or what the right of political self-determination accrues. There are two problems here. The first is that we face what Rodin calls the "Russian doll effect" of groups within human society.[17] That is, individuals are members of any number of communal and social groups. Why is it that the right to political self-determination adheres to political groups and not to these other groups? The second related problem is how are we to go about determining individual communities? Our second question is a bit easier for A/W to answer–only political communities count, therefore, the boundaries are political. Although the drawing of political boundaries is problematic, they may be simply the only way in which the protections of human rights can be secured in the modern world. Any other criterion seems fraught with difficulty–in the case of familial, cultural, or national communities lines of demarcation might blur intolerably. The theoretical ability of political association to cut across the many other options leads to the answer of our first question. Political associations, subject to the legitimacy threshold, possess defensive rights. A legitimate state has the right to go to war to protect its right of political self-determination. The situation is roughly analogous to the right of an individual to defend by force her right of autonomy. But

note that not all states are analogous to individuals in this regard: only states that meet the legitimacy threshold are analogous because they have a right to political autonomy.

Discussion of a few examples relevant to Rodin's objections demonstrates how AWS applies to particular political communities. These examples involve the resolution of conflicts between legitimate states and the status of an illegitimate state's defensive rights. AWS can allow for the possibility of war between two legitimate states without making one necessarily illegitimate. The legitimacy threshold would travel far in preventing any sort of political conflict between currently legitimate states escalating to force of arms. However, should such action come about, one can conceive of a limited war between two legitimate states that would not threaten either states' legitimacy. As examples I would offer conflicts like the Falklands War–with qualifications–or perhaps a military conflict over rights to ocean resources.

However, here Rodin might charge that there is a deeper point in this example. Although it is important to see how AWS can allow two states to clash and not, by that fact, become illegitimate, more important to Rodin is a description of an end that would make it "wrong for one liberal democratic state to conquer and rule another."[18] Here again AWS can meet the criterion. For, the right to political self-determination articulated in AWS is a deontological right, not an instrumental measure. If State X meets the threshold, it is legitimate and thereby its constituency has a right to political self-determination. That State Y operates further above the threshold, or could offer a qualitatively better life to those in State X does not void the right of State X to determine and order its own affairs. Rather, those in State Y have a duty to respect and not violate the rights held by the members of X.

As to illegitimate states, AWS has a simple answer–they have no right to political self-determination, therefore they have no right to defend it. That is not to say that there are no

considerations of right and justice applicable to individual citizens of such states. The AWS legitimacy threshold that denies the rights of illegitimate states similarly constrains the actions of legitimate states. The requirement to "respect the rights of all others"[19] implies that a state's lack of defensive rights is not a simple litmus test for the application of military force. It is a necessary, but not on its own sufficient condition to justify force. In a relevant discussion of the status of illegitimate states, A/W offer the following statement of an illegitimate state's rights:

> the lack of a moral right to political self-determination does not mean that a group should not have its own politically independent state; it does mean that the group's case for political independence is much more vulnerable to empirical contingencies.[20]

The best context for this discussion is the current debate about the permissibility of Armed Humanitarian Intervention. A/W discuss this at length and offer a "two-pronged account"[21] of when it is permissible to violate the political integrity of an illegitimate state. The first prong in this case is the legitimacy threshold. That is, we must first decide if the state in question is legitimate or not. If the state is not legitimate we move to the second prong, which is a proportionality requirement. To satisfy this prong the armed intervention must meet all the normal requirements of *jus ad bellum* proportionality. In short, the A/W account licenses cross-border force against illegitimate states in order to protect individuals in those states from human rights abuses.

AWS looks to meet all of Rodin's requirements for a normative end worthy of national-defense. It is normative, objective and particular. It offers a value that is widely valued and clearly establishes to whom it applies. It accounts for the defensive rights of legitimate states and for a lack of defensive rights of illegitimate regimes based on normative and not *de facto* sovereignty. However, there is still one more task to go–how can AWS serve to limit resorts to force? The key concept to understanding the limits AWS imposes is that the right it implies is

not inalienable or inherent; it is earned, and can be lost. Explaining how a group might forfeit the right to political self-determination will mark the normative limits of the force used to protect it and meet our second principle concern.

Forfeiture of Political Autonomy and the Normative Limits of National-defense

My exploration of the normative limits imposed on national-defense by the two principles of political self-determination will have one guiding idea: a group's conduct can forfeit the collective right to political self-determination. In particular, group actions that fail to protect the rights of its constituency and respect the rights of non-members undermine the group's claims to political self-determination. The framework of necessity, imminence, and proportionality is useful in setting the limits to national-defense within AWS. It will also serve to strengthen the normative ties between national-defense and self-defense; I will discuss each in turn.

In so far as necessity acts as an enabling criterion, there is no change between the traditional limits of force and the limits set by AWS: military force must be the last option. However, the deeper concern is how AWS might guide our understanding of when we should cease military force. Here necessity requires that we take only those measures required to restore the right in question. Any further action, like the killing of an unconscious assailant in self-defense, is a transgression of a right we have a duty to respect. This seems to give us a first approximation as to the normative limits on force in AWS. We can act to defend our political autonomy from military aggression. However, the action is allowable only insofar as it restores our autonomy. Moreover, we are not similarly allowed to fight against the aggressor's ability to commit future crimes. This is so because such action is likely to involve the transgression of the rights of others; namely, the citizens of the offending states. Put simply, AWS predicates a group's claim to the right that justifies a military defense on that group's political legitimacy. A

violation of the rights of groups or individuals threatens that status and thereby the group's claim on the right of political self-determination.

The role of imminence in the defense of AWS is not quite as clear as necessity. However, imminence does seem clearer than its current contentious state. AWS allows the defense of political self-determination. This serves to limit those actions that we can rightly view as threats into two broad categories. Primary threats are uses of force that directly limit or impinge upon a group's political autonomy as such. In this sort are the more traditional "conquer and rule" threats. Secondary threats are uses of force that indirectly undermine a legitimate group's autonomy by attacking those who fall under the group's protection. Terrorism is the exemplar of this category. These two categories offer a framework for what would count as an imminent threat. In the first category state A's mere disposition to directly attack state B's autonomy is not enough to justify B's military action. Rather, there must be a demonstration by A of a willingness and ability to act on such dispositions. Similarly in the second category an act is only a threat if it is a clear that an attack is or will shortly offer harm. This would seem to rule out preventive force and move the debate back to the idea of pre-emptive force.

The normative foundation of AWS can finally help us articulate the scope of a proportional use of force in national defense. We are looking for a concept that can tell us when the "harms inflicted" are "commensurate with the value of the goods and rights preserved."[22] The connection of political sovereignty with the respect and protection of human rights is the concept that allows AWS to render sovereignty commensurate with evils of war. The right of sovereignty is an earned human right that we can measure against other rights when considering the justice of a military action. The baseline of AWS is not the action of the aggressor. It does

not view the violation of right as a license to do the same. Rather the baseline is the rights of the individuals concerned.

The A/W conception of sovereignty appears to answer Rodin's critique of Just War Theory and its paradigm of national-defense. Rodin's critique began with spelling out how the current understanding of national-defense does not set limits on force that are analogous with the normative limits of self-defense. From this he drew out the underlying conceptual problems with the end founding the right to national-defense in Just War theory. Taking the A/W position and reversing this argument we can see that AWS can carry the conceptual load of the analogical argument from self-defense to national-defense. This is because it provides a normative foundation for the right of political self-determination. This foundation seems apposite to the other problems attending the Just War Theory: the provision of an objective good or end, a concept that can give us clear indications of who or what may hold a right to that good, and how that end may serve to adjudicate between legitimate and illegitimate states. Moreover, the Altman/Wellman conception of sovereignty gives us clear limits to the steps we can take to protect the right.

Inculpation, Exculpation, and Mediated Symmetry

It appears that the right to national-defense, as a right of legitimate political groups to defend their political self-determination with defensive force, can vindicate national-defense as a just cause for war. So far, I have only examined the viability of this right in the light of *jus ad bellum*. But, if we are to take seriously the dependence of *jus in bello* on *ad bellum* considerations, then the right to defend political self-determination should offer some light on the moral reality of war and the extent to which any fair statement of individual liability will support or undermine the remaining *jus in bello* theses of Just War Theory. It is at this point that

Christopher Kutz can offer some help to the discussion. Kutz's conception of war as privileged sort of collective violence and what responsibility an individual in that collective could bear, combined with the Altman/Wellman conception of political legitimacy, can do the conceptual and normative work required to give us a wartime account of liability.

Privileged Groups and Impunible Violence

Kutz's account of what counts for inculpation and exculpation in collective violence gives us a clear picture of the normative relationship between combatants, noncombatants, the just and the unjust. His argument is fundamentally about normative relationships created by political sovereignty: the relation between citizen and state, the relation between states in war, and the relationship between citizens of different states at war with one another. The groundwork of the argument is the stipulation that war is one type of collective violence, and collective violence evokes in us two disparate moral responses. Kutz calls these "themes of *inculpation* and *exculpation*."[23] These themes, according to Kutz, turn on our answer to why "certain forms of collective action privilege violence, while the other serves as the basis for punishing it."[24] For Kutz our moral reactions to collective criminal violence, either street crime or larger syndicate based crime, occur in the theme of inculpation. That is, we do not privilege such violence and hold all members of the gang of thieves or international crime syndicate equally responsible and liable for any and all actions of the group. The work-a-day Mafioso whose only job is to reliably run information from one location to another is as culpable in a murder as the hit man who uses the information to successfully kill his target. Conversely, our moral reaction to collective political violence is much different. Kutz contends that the political character of a collective "changes the normative valence" of the actions of its members "even to the point of rendering impunible what would otherwise be criminal."[25] The application of this is

clear enough. So long as the group is sufficiently "political," any individual contribution to the group's action–even those actions resulting in death, destruction, and mayhem–is excused and not subject to punishment. The key at this point is what counts as political a political group.

Kutz's position is that a group is political if it involves "any forms of social action oriented around state or institutional formation, where power may … rest at the level of individual commitment to the shared project."[26] However, there is a problem. So far, this conception of the political cannot justify why the realm of political violence should be a domain of impunity. Here we can see the force of Rodin's familiar charge above recast against Kutz's arguments, namely, that "there must be something normatively rich about the domain of politics"[27] that can tell us why political groups and their actions should enjoy exculpation. Kutz does have three criteria for how we might *classify* a collective action as sufficiently political. These are: (1) "internal ordering", (2) "the character of its aims", and its (3) "degree of success on the ground."[28] There are two ways to read these criteria. Kutz intends the criteria to clarify when a violent act of a collective counts as political and not criminal violence. But these criteria lead us very quickly back to the problem of why political violence is normatively different than criminal action. As Rodin further points out, Kutz criteria relate in "some way to the standard *ad bellum* conditions for the justification of war."[29] What we need is an explanation of why political violence is exculpated, not an account of what violence is political.

However, we can re-interpret Kutz's criteria, with the help of AWS, and come up with a view of why political violence is exculpated. If we take Kutz's criteria to be not about how an act counts as a political act but how a political group counts as a *legitimate* political group, then things shake out much differently. Recall that what confers legitimacy, and thereby a right to political self-determination, in AWS, was that the group "adequately protects its constituents'

human rights and respects the human rights of all others." Kutz's three criteria look like necessary conditions to satisfying the legitimacy threshold of AWS. That is, to perform the "requisite political functions" of legitimacy certainly a state must be able to: Order its own internal affairs in a law-governed manner–(1) above. It must have in the character of its institutions the goal of basic quality of life for its constituents and pursue this in a manner not offensive to the rights of others–(2) above. Finally, it must actually succeed at, or be reasonably ready to succeed at attaining the first two criteria–(3) above. If we take the criteria of Kutz to be related to AWS in this way, then the criteria not only help to classify which acts of collective violence are permissible because they are political, viz., acts of collective self-defense of a legitimate state. They also establish which groups can rightfully undertake collective political violence in the first place.

Individual Liability for Group Actions

If we are to take war as essentially a conflict between political groups and these political groups can take up certain justified violent acts, then the political group is the normative space wherein we mediate things like responsibility, blame, and praise for collective violence. As Kutz states, "the general combat privilege" to impunible acts of violence "is grounded in the relation of individual combatants to a collective decision to go to war."[30] That is, in assessing acts of violence or groups acting violently, we have a binary distinction. On one side is individual exculpation; on the other is individual inculpation. What throws the switch, so to speak, is the degree to which the group and act will count as sufficiently political vis-à-vis the group's legitimacy. If a group is a legitimate political group and its collective violence does not undermine this status, it will serve to exculpate its members. If a group is not a legitimate political group or its collective violence is the act whereby it loses this status, then it will

inculpate its members. The degree of liability in the latter case is a "matter of individual commitments to the collective."[31]

Collectives that are legitimate political groups and act according to Kutz's criteria act permissibly and therefore create a "logical space"[32] in which its individuals are exonerated for what would otherwise be impermissible. Conversely, those collectives that lack legitimacy or whose violent actions undermine its legitimacy close this logical space to its members. In this manner individuals in the latter group are inculpated and liable for the results of the act. This gives us a tack on individual liability for the collective violence that constitutes war. In the case of the legitimate group we grant a presumptive right to violence in defense of its political self-determination. We must then determine if the violent act is also sufficiently political so as not to forfeit the right. In the case of the illegitimate group we assert that there is no presumptive right. Then we must look to the character of the act to see if it could redeem its constituent members.

The Moral Reality of War and the *Jus in Bello* Tenets

Kutz's account of group liability and AWS can now offer a normative framework in which to explore the viability of the three tenets of Just War Theory above. In this framework, we seem to have three states of conflict that bear on the discussion: a conflict between two just groups, a conflict between a just group and an unjust group, and a conflict between two unjust groups. Testing the three tenets in each of these cases we can explore the results of the position I have outlined above. I will take each tenet in turn.

The first tenet, holding *jus in bello* to be independent of *jus ad bellum*, does not hold in any respect. Indeed, the relationship is even more complicated than a simple hierarchical structure. That is, *jus in bello* privileges do depend on *jus ad bellum* considerations, and these considerations are logically and morally prior. However, the relationship is not one way. The *in*

bello dependence on *ad bellum* seems clear enough considering our options above. In so far as a group is a legitimate political group and its action is a legitimate instance of collective political violence, then its members enjoy the "combat privilege" of impunible violence. Put another way, a group that has a right to political self-determination and acts to defend that right through defensive violence satisfies the requirements of *jus ad bellum*. This satisfaction confers the rights and prohibitions of *jus in bello* on the group's members. When a group does not possess the right of political self-determination, there are no *ad bellum* rights and therefore no *in bello* privileges. But this is only half the case. There is, after the line of departure, an important way in which adherence to *jus in bello* requirements acts as a normative feedback loop on the status of a group or the character of its act. The prosecution of a just war must fall within the normative limits of *jus in bello* or a group runs the risk of criminalizing the entire act or group. If the pursuit of a just goal takes a criminal tone and character in execution, then the group loses the right of political self-determination and thereby loses the right that grounded its just cause in the first place. The effect is a heavily normative account, and, far from holding them to be independent, strengthens the relationship between *jus in bello* and *jus ad bellum*.

The symmetry thesis fares a bit better. If we take the first type of conflict from above, the just versus the just,[33] we can see a bit of logical space open for combatants on both sides to enjoy the same moral status. In the case of two groups whose status as legitimate political groups gives them the presumptive right to political violence both antagonist states would enjoy *in bello* privileges. This would remain the case so long as both sides operated within the restrictions of *jus in bello*, and both states retained *jus ad bellum* justification. There is, however, still logical space for asymmetry. Those who fight for illegitimate groups or fight for legitimate groups in a manner that might undermine legitimacy do not have the same moral status as those

who fight for legitimate groups in a way that is compatible with maintaining that legitimacy. To put the point succinctly, one is exculpated–afforded the rights and under the restrictions of *jus in bello*–insofar as the group for which one is proxy is legitimate and the action one participates in is a legitimate act of political violence. Conversely, one is inculpated–denied the rights and restrictions of *jus in bello*–insofar as one acts as proxy for an illegitimate group, or participates in an action that would render the group illegitimate. The UJC would then not have a right to kill the JC. This does not mean that she would hold no moral status at all. Rather, her moral status would be similar to the moral status of a criminal. The UJC is, in some manner, culpable for her actions; however, her treatment in the hands of her enemy is still subject to the requirement in AWS to respect human rights.

The final tenet, strict noncombatant immunity, may be best seen as an open question. While there seems to be logical space for the strict expression of the principle in the case of the just versus the just, there also seems to be room for noncombatant liability in the other cases. In the first case, both sides are engaged in just causes. So long as their activity and actions do nothing to threaten their legitimacy, the members of their group hold rights according to their role and participation in the collective activity of the group. From this perspective, one might follow Kutz's argument for a standard of combatant status depending on the bearing of arms. That is, those who bear arms openly while in the execution of the group's activities are the only permissible targets of military force.

In the case of an illegitimate group the status of noncombatants appears a little muddier. There is a sense in which members of an illegitimate group beyond the traditional combatant bear responsibility and culpability for that group's actions. With that said, within this normative framework there is a heavy price to pay for rights violation. Namely, the legitimacy of one's

own political group depends on one's treatment of non-members. Moreover, it would seem that the quickest way to illegitimacy would be to visit war upon those whom you should not. So we have two normative forces at work: culpability and the legitimacy threshold. It appears that what will determine the case is the degree of culpability for the action or actions that render the group illegitimate or criminal. What seems reasonable is a modified version of Rodin's objection to McMahan's arguments above. That is, directed lethal military force should always and only be intentionally targeted at combatants. Here, the combatant's role as the proximate cause of any threat to life renders them the permissible targets of such force. However, noncombatants in illegitimate groups hold no rights that can protect what I will call "ill-gotten goods" or protect them from the force required to dismantle the moral and causal impetus they bear to the group's wrongful action. Here some examples might be helpful. The "ill-gotten goods" are those goods, services, and means that an illegitimate group gains through its criminal activity. For example, the aristocracy of the antebellum southern United States enjoyed a wide range of goods–property, riches, and social prestige–from chattel slavery. While I think it is clear that those noncombatants retain their right to life, I can see no way that can justify their retention of such goods. This seems especially so if the goods in question stand in some relation to the just cause for the war. But there are many more questions at work here than I can introduce and answer. For now, the revision of the strict immunity of noncombatants seems at least a conceptual possibility, and therefore an open normative question.

Conclusion

Just War Theory has enjoyed enormous philosophical and legal success. This success has stemmed almost exclusively from the intuitive legitimacy given to Just War Theory by the norms of permissive defensive force. Michael Walzer's philosophical defense of the Just War Theory

rests on the assumption that states have a right to national-defense and that this is the paradigm case for a just war according to *jus ad bellum*. Moreover, an equitable application of the norms of permissive defensive force to the moral reality of war is the center of his defense of the "war convention" and the tenets of *jus in bello*. We have seen that the presumptive right of national-defense needs a normative end; otherwise it cannot hold its normative relationship with self-defense. Also, we have seen that the loss of the independence thesis leaves us with a morality of war in need of a normative end as well. The extent to which the remaining tenets of *jus in bello* are consistent with the norms of permissive defensive force depends on an account of individual liability for group actions consistent with an end that can justify war.

The Altman/Wellman conception of the right to political self-determination is the normative end that can ground national-defense. It is sufficiently normative, objective and particular; moreover, it can generate normative limits on the operation of national-defense. Taking an account of liability from Christopher Kutz and applying it to the right of political self-determination we have seen that the *jus in bello* tenets of Just War Theory stand in need of revision. The independence thesis remains straightforwardly untenable. The symmetry thesis remains only as a strict conceptual possibility with dubious application. Finally, the strict immunity of noncombatants, a bedrock of Just War Theory, stands as an open normative question.

Notes

[1] Altman (2009), 13.

[2] Ibid., 13.

[3] Altman and Wellman, far from touting the deontological superiority of democracy or any other political form, argue specifically that democracy is *not* a human right.

[4] Ibid., 13.

[5] Ibid., 13.

[6] Ibid., 22.

[7] Ibid., 38.

[8] Ibid., 38.

[9] Ibid., 39.

[10] Ibid., 3.

[11] Ibid., 55.

[12] Rodin (2002) 119.

[13] Ibid., 120.

[14] Raz, J. Quoted in Rodin (2002), 144.

[15] Ibid., 156.

[16] Altman (2009), 26.

[17] Rodin (2002), 159.

[18] Ibid., 148.

[19] Altman (2002), 13.

[20] Ibid., 15.

[21] Ibid., 195.

[22] Rodin (2002), 115.

[23] Kutz (2005), 148.

[24] Ibid., 153.

[25] Ibid., 156.

[26] Ibid., 156.

[27] Rodin (2008), 66.

[28] Kutz (2005), 176.

[29] Rodin (2008), 66

[30] Kutz (2005), 176.

[31] Ibid., 176.

[32] Ibid., 160.

[33] This case may be only a conceptual possibility. I offer no discussion of how this might obtain or an example in which it has arguably obtained in history.

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