CHAPTER 16

WAR

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Much of what might be called the "classical" theory of the just war was formulated prior to the advent of modern states and the emergence of doctrines of state sovereignty. The classical writers understood the morality of war to be only one dimension of a unified body of natural law that governs individual human action in much the same way that the laws of nature govern the nonhuman world, except that the human subjects of natural law were thought to enjoy free will, which enabled them, unlike natural objects, to violate at least some of the laws to which they were subject. Natural law was thought to be addressed primarily to the conscience of the individual person and was only derivatively concerned with the formation, structure, and functioning of political and legal institutions. The doctrines of the classical just war theorists were therefore largely individualist in character—that is, they were focused on whether or when it was permissible for individuals to go to war and what it was permissible or impermissible for them to do in war.

Working within the natural law tradition, the classical just war theorists understood themselves to be discovering and articulating objective moral truths. In contrast to many later theorists in the just war tradition, they did not, at least for the most part, formulate moral principles by reference to what they believed the likely consequences would be if people were to accept and attempt to follow those principles; nor did they try to determine what principles potential adversaries might realistically be able to agree to, or could rationally accept, for governing their relations with one another. These ways of reasoning about the selection of principles for the governance of war had to await the development of institutional means of regulating relations among actual and potential adversaries. The principles of classical just war theory therefore made few concessions to purely pragmatic concerns.

Just war theory has traditionally been divided into two sets of principles: those governing the resort to war (*jus ad bellum*) and those governing the conduct of war

(*jus in bello*). The classical theorists tended to regard *jus in bello* as dependent on *jus ad bellum*, in the sense that what it is permissible for an individual to do in war depends on whether his war is just and in particular on whether it is being fought for a "just cause"—that is, an aim that is sufficient to justify the resort to war. Writing in the first half of the sixteenth century, Francisco de Vitoria argued that soldiers "*must not go to war*" when "the war seems patently unjust," even when they are ordered to do so by a legitimate authority, for "one may not lawfully kill an innocent man on any authority, and in the case we are speaking of [when soldiers are confident that their war is unjust] the enemy must be innocent" (Vitoria 1991, 307–8). By "innocent" Vitoria meant "having done no wrong" (Vitoria 1991, 303). Francisco Suárez, writing roughly half a century later, reaffirmed Vitoria's view: "No one may be deprived of his life save for reason of his own guilt"; thus it is impermissible in war to kill any of those who "have not shared in the crime nor in the unjust war" (Suárez 1944, 845–46). From this it seems to follow that it is impermissible to kill soldiers who fight in a just war.

The classical theorists did, however, grapple with the problem of uncertainty. How are soldiers to know whether their war is just or unjust when they typically have limited access to empirical information, limited opportunities for deliberation, and little or no education in just war theory, much less in moral theory generally? Some classical theorists concluded that in conditions of factual or normative uncertainty, the duties of soldiers to members of their community, together with their duty of obedience to their ruler, made it permissible or even obligatory for them to fight. Vitoria, for example, argued that "in cases of doubt . . . they had better fight," a view shared by most of his successors to the present day (Vitoria 1991, 311–12). Some of the classical theorists who held this view sought to bolster it with another claim that would also be adopted by later theorists who otherwise held a quite different view—namely, that moral responsibility for the participation of soldiers in an unjust war lies not with the soldiers themselves but with the rulers who order them to fight and that their lack of responsibility affects the permissibility of their fighting. The earliest classical theorist to advance this claim was Augustine, who contended that "he to whom authority is delegated, and who is but the sword in the hand of him who uses it, is not himself responsible for the death he deals" (Augustine 1950, 27). Hobbes, who wrote more than 1,200 years after Augustine, made the same point:

> What I beleeve to be another mans sin, I may sometimes doe that without any sin of mine. For if I be commanded to doe that which is a sin in him who commands me, if I doe it, and he that commands me be by Right, Lord over me, I sinne not; [thus,] if I wage warre at the Commandement of my Prince, conceiving the warre to be unjustly undertaken, I doe not therefore doe unjustly. (1651)

Although Hobbes shared this particular view with Augustine, his work was crucial in overthrowing the classical theory, with its emphasis on the individual, and in introducing many of the essential elements of what I refer to as the "traditional" theory of the just war, particularly its identification of the sovereign state as

the principal agent in war. The canonical statement of this latter view was given later by Rousseau, who wrote that "war . . . is something that occurs not between man and man, but between States. The individuals who become involved in it are enemies only by accident . . . A State can have as its enemies only other States, not men at all" (Rousseau 1947, 249–50).

According to Hobbes, there can be no morality in the absence of a sovereign capable of enforcing the moral rules he imposes on his subjects. Because states are themselves sovereigns, they are not subject to any higher power that could coerce them to comply with a moral code imposed on them. On Hobbes's view, then, the idea that it could be *morally* impermissible for a state to go to war verges on incoherence. And states could not bind themselves to a contract that would restrict the occasions for the resort to war, for their self-interested reasons for compliance would be outweighed whenever they perceived an opportunity for an easy victory over another state, with all the rewards that would bring. All states would therefore know in advance that such a contract could not be effective. It could, however, be in the interest of each state to reach agreement with other states on a set of rules that, if generally observed, would limit the violence and destructiveness of war when it occurred. Provided that initial noncompliance with the rules by one state would not be fatal to its adversary, and given that no state would long endure noncompliance by an adversary without retaliating in kind, such a contract could be robustly self-enforcing. This is because violations of the *in bello* rules rarely offer a decisive advantage yet almost invariably provoke one's adversary to commit atrocities in return; therefore, in general, they increase both the costs of the war and the probability of vicious reprisals if one loses without substantially increasing the probability of victory. Thus, while compliance with *ad bellum* constraints would be against the interests of many individual states, so that there could be no reasonable expectation of reciprocity, compliance with *in bello* rules could be in the interest of each state, because it would normally have less to gain from violating the rules than it would from its adversary's continued compliance. Reciprocal restraint in matters of *jus in bello* can, therefore, often be rational for both parties.

Hobbesian moral and political theory, along with the pragmatic considerations to which it appealed, was instrumental in shifting the attention of just war theorists away from *jus ad bellum* to *jus in bello*. By the nineteenth century, less than two centuries after Hobbes wrote, it had come to be commonly accepted that the resort to war was a sovereign prerogative of states. States could legitimately go to war for any reason. This view was reflected in international law, which confined itself to the attempt to restrain the conduct of war. As one commentator wrote in 1906, "International Law . . . does not consider the justice or injustice of a war. From a purely legal standpoint, all wars . . . are neither just nor unjust. International Law merely takes cognizance of the existence of war as a fact, and prescribes certain rules and regulations which affect the rights and duties of neutrals and belligerents during that continuance" (Hershey 1906, 67). By this time, the classical view that the permissibility of participation in a war could depend on whether the war was just had largely been abandoned. When theorists had ceased to recognize

moral or legal constraints on the resort to war, the *in bello* rules were necessarily held to be independent of *jus ad bellum*.

The principles of *jus in bello* were then formulated with practical considerations in mind. On the assumption that general observance of the rules must serve the interests of all, aggressors as well as victims, the guiding aim of the rules had to be one on which all could agree. That aim was to reduce the overall level of violence, particularly by insulating ordinary life among civilians to the greatest possible degree from the destructive effects of warfare. This led to the general acceptance, in principle if not always in practice, of the traditional interpretation of the requirement of discrimination. In its generic form, this is the requirement to discriminate between legitimate and illegitimate targets by directing intentional attacks against the former only. According to traditional just war theory, the distinction between legitimate and illegitimate targets coincides with the distinction between combatants and noncombatants. The traditional requirement of discrimination thus seeks to confine the effects of combat to the combatants themselves, shielding civilians and their collective life to the maximum extent possible, and it does this without reference to matters of *jus ad bellum*. It does not identify combatants on either side as wrongdoers or as innocent victims. The rules of *jus in bello* are neutral between the belligerents and are equally satisfiable by all. That the principles of *jus in bello* are independent of *ad bellum* considerations became a central pillar of the traditional theory of the just war. It is also a foundational assumption of the international law of war, which has often guided the development of our thought about the morality of war rather than being guided by it.

The neglect or even repudiation of *jus ad bellum* together with the development of moral and legal doctrines of *jus in bello* that were neutral between wrongdoers and innocent victims may well have had an unforeseen but tragic effect. In a world that recognizes no significant moral or legal constraints on the resort to war, doctrines of *jus in bello* that actually succeed in mitigating the terrible effects of war can also weaken whatever prudential or moral inhibitions political leaders may have about the initiation of war. The more the expected costs of war are reduced by the expectation of general conformity with the rules, the more attractive the option of war may seem. This is particularly dangerous when the rules are designed to limit the costs to wrongdoers no less than the costs to their victims.

It is arguable that these moral and legal doctrines and the expectations they created were among the conditions that facilitated the outbreak of the First World War and, to a lesser extent, the Second as well. After those two cataclysmic wars, it was no longer possible to think of the resort to war as a sovereign prerogative of states that cannot be restricted either morally or legally. Legal and moral doctrines of *jus ad bellum* were resurrected but in radically simplified forms. The response in international law was an extreme shift from the recognition during the nineteenth century of an unrestricted right of resort to war to a sweeping prohibition of war, with only two exceptions, both stated in the UN Charter. War could be legally permissible only if authorized by the Security Council or in "individual or collective self-defense if an armed attack occurs." Just war theorists tended to follow the

international lawyers, arguing that the only just cause for war is defense against aggression. Both international law and the theory of the just war retained their state-centered and pragmatic character. What changed was that the aim of regulating and moderating the conduct of war became no longer had priority over the aim of preventing war from occurring at all. The sovereign right of states to resort to war was replaced by the sovereign right of states against military aggression.

In the traditional theory of the just war, both the principles of *jus ad bellum* and those of *jus in bello* are grounded in doctrines of self-defense. Interestingly, however, the understanding of the morality of self-defense that informs the principles of *jus ad bellum* is quite different from that found in the traditional principles of *jus in bello*. In keeping with the traditional theory's collectivist or statist character, its doctrine of *jus ad bellum* is generally understood as deriving from what Michael Walzer, the theory's most eminent proponent for at least the last hundred years, calls the "domestic analogy." This is the claim that the principles governing the resort to war are the same as those that govern the morality of self- and other-defense among individual persons. One such principle is that if Attacker wrongfully and culpably attacks Victim, both Victim and Third Party have a right to take necessary and proportionate defensive action against Attacker, while Attacker has no right of self-defense against them. What the domestic analogy asserts is that this principle is equally true whether Attacker, Victim, and Third Party are individual persons or states (Walzer 1977).

This account of self-defense is *asymmetrical* between the wrongful attacker and the innocent victim. Yet the understanding of the morality of self-defense that informs the traditional principles of *jus in bello* is *symmetrical*, extending the same rights and liabilities to combatants on all sides in a war. Even after the emergence of a newly invigorated doctrine of *jus ad bellum* in the twentieth century, the independence and thus the moral neutrality of the principles of *jus in bello* were preserved. This was accomplished by restricting the application of the principles of *jus ad bellum* to states and their governments. No individual combatant—indeed, no individual at all other than those directly involved in decision making about the resort to war—could be held accountable for matters of *jus ad bellum*, according to the traditional theory. Combatants are answerable only for their conformity with the principles of *jus in bello*, which also constrain the commands that states may give their combatants. We see here the lingering influence of the view of Augustine and Hobbes, cited earlier, that it can be permissible for combatants to fight in an unjust war because responsibility for their mere participation lies solely with their rulers, whom they are bound to obey.

This is a curious inversion of the hierarchy of responsibility recognized by common sense morality and, to some extent, domestic criminal law. In these other domains, the perpetrators of wrongful acts are generally thought to bear at least equal and often greater responsibility for those acts than mere accessories, such as instigators. Thus, when John Stuart Mill considered a possible legal arrangement whereby pimps, but not the patrons of prostitutes, would be prosecuted, he observed that this would involve "the moral anomaly of punishing the accessory, when the

principal is (and must be) allowed to go free" (Mill 1961, 301). Yet in traditional just war theory and the law of war, the instigators—that is the officials who give the order to fight an unjust war—bear *all* the responsibility, whereas the perpetrators bear none at all.

Another peculiarity of the traditional theory's doctrine of *jus in bello* is, as noted previously, that the principles of permissible defense it presupposes are quite different from those that govern individual self- and other-defense outside the context of war and, according to the traditional theory, indirectly govern the conduct of states via the domestic analogy. In cases of individual self- and other-defense, the usual situation is that one party is a wrongful aggressor while the other is an innocent victim. According to the familiar understanding of the morality of defensive action, the aggressor acts wrongly and therefore forfeits both his right not to be attacked and his right of defense, while the victim retains both of these rights. According to the traditional doctrine of *jus in bello*, the situation is entirely different with the rights, permissions, and liabilities of combatants in war. Combatants on *both* sides act permissibly in fighting, yet *all* forfeit their right not to be attacked. But, although they forfeit their right against attack, they retain their right of self-defense. This defies the ordinary logic of self-defense. How can each party be morally justified in killing the other?

Most of the accounts of the morality of self-defense that find any support in the literature imply that it is impossible for each party in a conflict to be justified in killing, or trying to kill, the other. There do, however, seem to be such cases. Suppose, for example, that armed Roman guards drag two men into the Colosseum and tell them that unless they fight until one kills the other, both will be killed immediately. Neither, it seems, is obligated to sacrifice himself, because nothing distinguishes one from the other and it makes no sense to suppose that they could both be required to sacrifice themselves, for neither *could* sacrifice himself unless the other were to kill him. Because each would be required to sacrifice himself yet neither could actually do it, both would be killed by the guards. Because it is better for one to survive than for both to die, it seems that each is permitted to try to kill the other. One might call cases in which this is true "symmetrical defense cases."

The coerced gladiators' situations are symmetrical: both are morally innocent, and neither pursues any goal other than survival. In this, however, they are unlike combatants on opposing sides in a war. For the usual situation in war is that one side's aims are unjust—at least in the minimal sense that they are not aims that it is permissible to pursue by means of war—while the other side's aim, or at least its dominant aim, is just—namely, preventing the other side from achieving its unjust aims. How could it be that in these conditions combatants on both sides are morally permitted to kill combatants on the other side?

Defenders of the traditional theory typically offer one or more of three answers. Some defend the principle that all combatants may legitimately kill enemy combatants on the ground that the violence and destruction of war will be kept to a minimum if combatants on both sides believe that they may permissibly kill enemy combatants but not anyone else. According to this reasoning, which is congenial to

rule consequentialists and contractualists, including Hobbesian contractualists, the principle is justified by the effects it would have if people were to act on it. A second justification is often paired with the first: namely, that all combatants are permitted to kill enemy combatants because all combatants *consent* to become legitimate targets when they become soldiers. By wearing a uniform and carrying their arms openly, combatants consciously *identify* themselves as legitimate targets for their enemies. The principle that all combatants may legitimately be killed by their enemies is therefore justified not merely because of its effects but also because combatants have waived their right not to be killed, at least vis-à-vis enemy combatants.

The third answer to the question of how it could be permissible for combatants on both sides to kill their adversaries is more salient in the traditional literature than the other two and is indeed implicit in the language of the traditional theory. When traditional theorists claim that it is impermissible intentionally to kill the innocent in war, they are using the term *innocent* in two ways. First, they use it in accordance with its etymology to mean "those who pose no threat"—that is, noncombatants. They also mean to imply that it is *permissible* to kill those who are in this sense *noninnocent*—that is, those who *do* pose a threat: namely, combatants. But they also use *innocent* to refer to those who, as Michael Walzer puts it, "have done nothing, and are doing nothing, that entails the loss of their rights" (Walzer 1977, 146). The innocent, in short, are those who are not morally liable to be attacked or killed because they pose no threat to others. The noninnocent, by contrast, *are* liable to military attack (that is, have lost their right not to be attacked) precisely because they do pose a threat to others. In Walzer's words, the "right not to be attacked . . . is lost by those who . . . pose a danger to other people" (Walzer 1977, 145). All combatants are assumed to pose a threat to others and are thus legitimate targets; noncombatants pose no threat and are not legitimate targets.

The second defense of the traditional doctrine of *jus in bello* is that all combatants waive their right not to be attacked; the third is that they forfeit it. These defenses may seem incompatible, for how can combatants waive a right they do not have because they have already forfeited it? Perhaps the waiving comes first, which would mean that the permissibility of killing combatants in war is overdetermined. According to this understanding, combatants first grant their adversaries permission to act against their right not to be attacked. Because they retain that right, they could presumably withdraw the permission. But because they then forfeit (that is, lose) the right, the prior waiving or granting of permission becomes irrelevant.

The first of these three defenses, which seeks to justify principles by reference to their utility, has little appeal as an account of the *morality* of *jus in bello* to those who are neither rule consequentialists nor contractualists, in particular those who believe that people have certain rights quite independently of utility or agreement. I cannot here settle the dispute between these different schools of thought about the nature of morality, but it is worth noting that those who believe that people have rights seem to have the option of maintaining their view *and* achieving the practical advantages that consequentialists and contractualists claim that their *in bello* rules provide. Defenders of rights can do this by acknowledging that the principles that

consequentialists claim would have the best consequences and that contractualists claim people could rationally agree to accept can function effectively as *legal rules*. Morality, they can argue, addresses us as competent moral agents and demands that we not violate rights; but when we formulate laws, we must take into account that the people governed by them will often have false factual or moral beliefs, be motivated by self-interest rather than a desire to act rightly, or not know how best to achieve their aims. Because of this, it may be necessary for our legal principles to diverge from the moral principles governing the same area of conduct. If it is true that combatants who are told to follow the traditional *in bello* rules will in general act more morally than combatants who are told to respect people's rights, defenders of a rights-based morality can concede that the law of war ought to be based on the traditional rules.

The second claim—that combatants consent to be legitimate targets—seems false. If aggressors were to attack my country unjustly and I were to enlist in the military to defend my fellow citizens, I would not see myself as thereby consenting to be attacked by the aggressors. Those who claim that soldiers consent may respond that when I don the uniform and carry a weapon openly, I am identifying myself as a legitimate target for enemy combatants, which is the same as consenting to be attacked. To this I would reply that when I wear the uniform I am merely adhering to a convention that serves the useful purpose of drawing the aggressors' fire toward me and away from the people I am defending, which is quite different from giving the aggressors permission to attack me.

Those who claim that soldiers consent will argue that what is involved in my adopting the role of a soldier is not up to me, not a matter of my beliefs or intentions, but is instead determined by the nature of the role itself. Just as I cannot voluntarily become a firefighter and then say that I never consented to take risks to extinguish fires, so I cannot become a soldier and claim I never consented to be a legitimate target for enemy combatants. Just as the role of a firefighter involves a commitment to expose oneself to certain risks, so the role of a soldier involves becoming a legitimate target in conditions of war. It is doubtful, however, that there is any such determinacy about the features of the role of a soldier. No doubt many people, including many soldiers, do conceive of the role in this way. Those who enlist with this understanding of the role arguably do thereby consent to become legitimate targets. But many others do not see this as a necessary feature of the role. Even if it were a socially agreed feature of the role of a soldier that it involves being a legitimate target, a person who enlists without being aware of that would no more consent to be a legitimate target than I would consent to be a soldier if I signed an enlistment form believing that I was joining the Boy Scouts. Perhaps by signing the form I would have legally committed myself to be in the army. Signing might be a matter of strict liability, for it was my responsibility to know what I was signing. But if I did commit myself by signing, it was not because I *consented*.

The third defense of the traditional theory is the least plausible of the three. It is tantamount to the claim that defensive action in war is necessarily self-justifying. It concedes that the defending agent has no right not to be attacked and that his

attacker is justified in attacking him but denies the principle that there can be no right of defense against an attack to which one is liable. Yet this principle is compelling. How could it be permissible to kill a person who acts with moral justification and will not violate one's rights?

Proponents of the traditional theory have not, to my knowledge, explained how merely posing a threat to another could cause a person to lose his rights—or, in particular, how posing a justified threat causes a soldier to lose his rights but does not cause other people (such as police officers or third-party defenders of innocent people) to lose theirs. Traditional just war theorists tend instead to appeal to facts about the defending soldier, such as that he acts under duress or in conditions of factual and moral uncertainty, to explain why he retains a right of defense against a justified threat. But facts of these kinds generally do not provide a moral justification for attacking or killing people but instead provide only an excuse—that is, a reason not to blame people even though they have acted wrongly. They are irrelevant to whether a justified attacker loses or retains his rights.

As these remarks indicate, the symmetrical account of defensive rights found in the traditional doctrine of *jus in bello* has no plausibility in any other context, except, perhaps, in violent games, such as boxing, in which the antagonists consent to be attacked in certain ways and their acts of violence neither wrong nor harm other people. Recognizing this, traditional just war theorists have generally claimed that conditions of war are so different from other conditions in human life that war must have its own special and quite different morality. According to this view, whenever a state of war arises, the familiar constraints on attacking and killing people cease to be binding on combatants in their relations with enemy combatants. Combatants whose acts of war are instrumental to the achievement of unjust goals do no wrong in killing enemy combatants, even though their victims may be doing nothing more than engaging in necessary and proportionate defense of themselves and other innocent people. This is a feature of the special morality of war that does not apply to other forms of conflict.

The traditional theory thus makes it critical to be able to distinguish with precision between war and other forms of conflict, because it is only in war that the familiar asymmetrical principles of defense are supplanted by their symmetrical counterparts. What is it, then, about war that differentiates it so radically from other forms of conflict that it must have its own distinctive morality? The answer, I think, is: *nothing*. Consider one way in which civil wars often arise. The government of a state oppresses a particular group of its citizens, perhaps an ethnic or religious minority (or majority), or the population of a particular region. The oppression provokes morally justified nonviolent protests that are violently suppressed, either by the police or the army. This provokes larger protests in which some of the protesters use force to try to defend themselves. These are suppressed even more bloodily, yet the protests continue, becoming larger, more widespread geographically, and more violent. As the resisters become more numerous, better organized, and better armed (perhaps by capturing weapons from soldiers who have been defeated or have defected), their aim gradually shifts from merely stopping the persecution to

overthrowing the government—an aim that, we may assume, has now become legitimate. They establish hierarchies of political and military authority and begin to exercise control over certain territories, however limited. Eventually there is full-scale civil war, the conduct of which, according to traditional just war theorists, is now governed on both sides by the traditional principles of *jus in bello*. In the early stages, however, the ordinary asymmetrical principles applied. When soldiers attacked nonviolent protesters, they acted wrongly. Protesters then acted permissibly in defending themselves, and the soldiers were guilty of further wrongdoing when they responded with violence to the protesters' defensive action. At each point before the conflict became a civil war, the soldiers acted wrongly in using violence against those who, by hypothesis, acted with moral justification in opposing the government. Yet later, after the violence had escalated to the point of civil war, it became permissible, according to the traditional theory, for soldiers to kill rebel fighters. What happened that could account for this?

This is not a challenge to locate a precise point at which a conflict becomes a war, analogous to the challenge to identify a precise point at which day ends and night begins. The traditional theorist does not have to defend the view that there is some point at which a soldier's killing of a resister ceases to be murder and becomes permissible. The challenge is, rather, to identify any differences between the early stages of the conflict and the later stages that can justify the claim that the moral principles that apply in the later stages are different from those that applied in the earlier stages. But all that seems to have occurred is that the resisters have become more numerous, better coordinated in their action, and more powerful. These considerations seem insufficiently significant to summon wholly different moral principles into effect.

Suppose, however, that traditional just war theorists are able to identify some property of war that justifies their claim that the conduct of war is governed by moral principles different from those that govern other forms of violent conflict. One assumption they then seem committed to is that when one state militarily attacks another, a state of war exists. Only if that is so can it be certain that, as the traditional theory asserts, soldiers on the side that has been attacked will be acting permissibly if they participate in a military counterattack. Suppose, for example, that the government of state A is engaged in a campaign of domestic genocide. State B justifiably invades to stop the genocide. The traditional theory is committed to the view that as soon as B's invasion begins, a state of war exists, for it implies that A's soldiers act permissibly when they counterattack to thwart the justified humanitarian intervention (even though they have acted impermissibly if they have participated in the genocide). The reason they could not permissibly counterattack unless there were a state of war is that their action would be judged wrong by the asymmetrical principles that govern conflicts other than war. It can be permissible for them to counterattack only if the principles that apply in this situation are the symmetrical principles of the special morality of war. Hence the traditional theory presupposes that any military attack by one state against another creates a state of war in which the symmetrical principles apply.

Notice what this means. When the symmetrical principles of the special *in bello* morality come into effect, soldiers on both sides lose their right against enemy soldiers not to be attacked or killed by them. That means that soldiers must be endowed with remarkable powers of moral alchemy. Merely by conducting a surprise military attack against unmobilized soldiers in another state, they can cause those other soldiers' moral rights to *vanish*. This is highly convenient for soldiers who engage in aggression. Their potential adversaries have a right not to be attacked or killed, but whenever they are attacked militarily by soldiers acting as agents of another state, a state of war exists in which their rights simply disappear. A soldier's right not to be attacked thus vanishes the moment he comes under military attack.

The defender of the traditional theory may deny that the theory implies that soldiers' rights against attack vanish when they are attacked in a way that initiates a state of war. Rather, soldiers retain the right, but it is violated not by the enemy soldiers but by those who command them—the enemy state or government. This response, however, does not solve the problem; it shows only that the objection can be stated in either of two ways. If the traditional theorist distinguishes between two rights—a soldier's right *against enemy soldiers* that they not attack him and his right *against the enemy government* that its soldiers not attack him—the objection is that the theory implies that the first of these rights vanishes though the second remains. If the traditional theorist says there is only one right—the right not to be attacked—then the objection is that the theory implies not that enemy soldiers can cause the right to vanish but that they can, merely by conducting an attack, substantially narrow the scope of their enemies' rights. They can make it so that their enemies' rights cease to constrain *them*, even if they continue to constrain their government. That is still a remarkable form of moral alchemy.

Either way, the implication is absurd. And if the government of a state can create a state of war through an official declaration of war, as most people, including most just war theorists, have assumed, then the traditional theory has the even more absurd implication that the government of one state can cause both its own soldiers and those in another state to lose their right not to be killed, or cause its scope to be narrowed, simply by uttering the magical incantation, "We hereby declare war. . . ." Traditional just war theorists will presumably want to disown this alleged implication. Because on their view war is so different from other forms of conflict that it is governed by its own special morality, what they ought to say is that a state of war cannot be conjured into existence by mere declaration. They are committed to defending a morally substantive concept of war.

Let us say that a soldier who fights in a just war is a "just combatant" while a soldier who fights in a war that lacks a just cause is an "unjust combatant." As I noted earlier, there is a different way in which traditional just war theorists might defend their claim that unjust combatants act permissibly when they attack and kill just combatants as a means of achieving their state's unjust aims. They can accept that just combatants retain their right not to be attacked and appeal instead to the claim of Augustine and Hobbes that all responsibility for the killing and wounding of just combatants by unjust combatants lies with the latter's rulers rather than with

the combatants themselves. If the location of responsibility for an act of killing can affect the permissibility of the perpetrator's act, it could be permissible for unjust combatants to kill just combatants even when that would violate the latter's right not to be killed. For if all responsibility lies with the rulers, all the wrongdoing must be theirs as well.

This idea presupposes a different form of moral alchemy whereby a morally autonomous agent is converted by his role as a soldier in a state of war into a mere instrument: "the sword in the hand of him who uses it." This seems mistaken as well, for a variety of reasons. First, it denies the obvious by claiming that soldiers, at least in their role as soldiers, are not the ones who bear moral responsibility for what they themselves do. Second, even if it were true that they were wholly lacking in moral responsibility for their participation in an unjust war because all responsibility lay with their rulers, what would seem to follow is not that their participation was permissible but that it was neither permissible nor impermissible in the way that the action of a robot is neither permissible nor impermissible. Third, what if they had no rulers? Imagine a society in which decisions about the resort to war were made by a vote of all the soldiers in the armed forces. It seems arbitrary to suppose that soldiers from such a society could not permissibly fight in a certain war when soldiers from a different society acting under orders *could* permissibly fight in the exact same war. Fourth, the view that permissibility follows responsibility implies that if a soldier engages in moral deliberation in a time of war and asks whether a certain act or course of action is permissible, the first question he should ask is, "If I do it, who will be responsible?" If he consults the traditional theory of the just war and finds that his rulers will be responsible, he can then conclude that the act would be permissible. He can conclude that even though rights will be violated if he acts, he will not be the violator; rather, his government, acting through him, will be. It is, therefore, permissible for him to act. Yet this is no way to determine whether an act is morally permissible.

Finally, the suggestion that soldiers do not act wrongly because responsibility for their action transfers to their rulers seems incompatible with the view, which all traditional just war theorists accept, that soldiers do act impermissibly if they violate the rules of *jus in bello*, even when they are ordered to by a superior. For their view to be coherent, traditional just war theorists must explain why a combatant can never be morally responsible for his participation in an unjust war—no matter how obvious it is that the war is unjust and irrespective of what his motivating reasons are for participating—but *is* morally responsible for his violations of the rules of *jus in bello*.

In contrast with the traditional theory, the revisionist account of the just war asserts that war is morally continuous with other forms of conflict and is governed by the same principles that apply to other forms of violent conflict. According to revisionism, there is no special morality of war. Like the traditional theory, the revisionist account is based on principles of self- and other-defense. But it does not reason analogically from the principles that govern self-defense at the individual level; rather, it claims that those principles, which are asymmetrical between the wrongful aggressor and the innocent victim, apply uniformly to defensive action

both outside war and in war. Just war is not the exercise by a state of its right of self-defense; it is the coordinated exercise by persons of their individual rights of self- and other-defense.

On this view, the limits of individual self- and other-defense are also the limits of national defense. Traditional theorists often assume otherwise. In accordance with the domestic analogy, they conceive of the state as an individual agent that has not only a right of self-defense but also a duty to defend its citizens. This duty, they assume, makes it permissible for the state to cause more harm to others, including innocent bystanders, in the course of defending its citizens than might otherwise be proportionate. Revisionists whose approach to the morality of war is individualist in character reject this. They argue that just as a third party may not defend an innocent person if doing so would, as a side effect, cause greater harm to innocent people than the person would be permitted to cause in his own defense, so the state and its agents may not cause harm to innocent people in defending its citizens that is greater than that which its citizens would be permitted to cause in their own defense. There is nothing in the relations that people establish among themselves within a state that can extend their permissions to harm people outside the state.

The revisionist account's rejection of the idea that there is a special morality of war that is distinct from the principles that apply outside the context of war is a corollary of what I identified earlier as the fundamental division between the traditional and revisionist accounts—namely, that the revisionist account rejects the traditional claim that the principles of *jus in bello* are independent of the principles of *jus ad bellum*. The special morality of war recognized by the traditional theory, which is different from the moral principles that govern conflicts other than war, is confined to the doctrine of *jus in bello*. It is only in the *in bello* principles that the morality of defensive action is held to be symmetrical between those whose action supports unjust ends and those who oppose that action. When the revisionist theory insists that the same asymmetrical principles of defense that apply at the *ad bellum* level also apply at the *in bello* level, it is rejecting the independence of the principles of *jus in bello* from those of *jus ad bellum*. It claims instead that the moral asymmetry that the traditional theory recognizes at the *ad bellum* level between the wrongful aggressor and the innocent defender extends to the *in bello* level as well. What it is permissible for combatants to do in war thus depends on whether their action supports a just cause. Those who fight without a just cause cannot have the same rights as those who fight for a just cause.

Even for the traditional theory, the requirement of just cause is pivotal. Unless a war satisfies the requirement of just cause, it cannot satisfy various of the other traditional principles of *jus ad bellum*. A war without a just cause cannot, for example, satisfy the principle of right intention, which requires that war be intended to achieve the just cause. Neither can it satisfy the principles of necessity and proportionality, which require, respectively, that war must have a higher probability of achieving the just cause than any less harmful course of action and that the expected bad effects of war not be excessive in relation to the importance of achieving the just cause. The revisionist account goes further, however, by claiming that, except in

certain rare instances, none of the principles of *jus in bello* can be satisfied by combatants who fight without a just cause ("unjust combatants"). According to the revisionist account, if that a war lacks a just cause, those against whom it is fought are in general not morally liable to military attack. But if no one is liable to attack by those who fight without a just cause, it follows that unjust combatants have no legitimate targets; therefore their action is necessarily indiscriminate. Neither can any act of war by unjust combatants be necessary in the sense that it has a higher probability than any alternative act of war of making the greatest contribution to the achievement of the just cause that is possible in the circumstances. Finally, acts of war by unjust combatants can very seldom be proportionate. This is because the ultimate aims of their action are unjust and their means of achieving them involve the infliction of wrongful harms on those who justifiably attempt to defend their rights and the rights of their innocent compatriots. Any good effects of acts of war by unjust combatants are therefore likely to be incidental and wholly insufficient to outweigh the combatants' intended ends and means, which are largely or entirely bad. One might summarize these claims of the revisionist account by saying that while it is implausible to suppose that it could be permissible to pursue aims that are unjust even by means that are benign, it is considerably more implausible to suppose that it could be permissible to pursue such aims by means of killing people who have done nothing to lose or compromise their right not to be killed.

It seems, however, to be a virtue of the traditional theory that because its principles of *jus in bello* must be independent of *jus ad bellum*, they are equally satisfiable by combatants on all sides in a war. This is a virtue because it is important to have *in bello* principles that function in practice to restrain the conduct not only of just combatants but of unjust combatants as well. Yet this apparent advantage comes at a cost, which is that such principles will generally be manifestly implausible as *moral* principles, however useful they might be as rules of *law*. Consider, for example, the requirement of discrimination as traditionally interpreted, which prohibits intentional attacks against noncombatants but permits attacks against combatants. As I have noted, the alleged permission is especially problematic, since combatants who fight for a just cause, and therefore against those who are liable to attack, have done nothing to forfeit their right not to be attacked. Nor can the justification for attacking them be a lesser evil justification, since their defeat would clearly be the greater evil. While the prohibition of killing noncombatants may seem intuitively plausible, even traditional theorists do not understand it literally, as they concede that there are exceptions, such as workers in munitions factories and civilian officials in departments of defense (or departments of war, as they were more accurately called when governments were less sophisticated at "public relations"). But once these exceptions are admitted, it becomes impossible to hold a principled line against the expansion of civilian liability. If noncombatants who work in munitions factories and departments of defense are legitimate targets, why not also scientists in industry or academia whose work is instrumental to the production of improved weapons technologies, or academic strategists who serve as consultants to the military during war?

Next consider the *in bello* requirement of proportionality, which I suggested can seldom be satisfied by unjust combatants. What have the traditional theorists had in mind when they have asserted that this requirement is equally satisfiable by just and unjust combatants alike? When they have addressed this issue at all, they have typically said something similar to what Protocol I to the Geneva Conventions says: namely, that harms caused to noncombatants must not "be excessive in relation to the concrete and direct military advantage anticipated." Yet military advantage is not in itself a good; whether it is instrumentally good depends on the goals the military action serves. If those goals are unjust, military advantage is instrumentally bad and cannot counterbalance or compensate for harm caused to innocent people.

Traditional theorists thus face a dilemma. If the principles of *jus in bello* are formulated to be independent of those of *jus ad bellum* and so are equally satisfiable by just and unjust combatants alike, they will inevitably lack credibility as moral principles, even if they make good law. If, alternatively, the *in bello* principles state genuine moral constraints on action in war, they cannot be satisfied by the action of unjust combatants. Given that the satisfaction of these principles is regarded by the traditional theory as a necessary condition of permissible conduct in war, it follows that soldiers cannot permissibly fight in the absence of a just cause. Since this implication is incompatible with the traditional theory, the theory seems condemned to embrace principles of *jus in bello* that, though perhaps well suited for law and therefore of considerable practical significance, cannot plausibly be regarded as correct moral principles.

Practical considerations do not, however, uniformly favor the traditional theory. The widespread acceptance of the traditional theory's claim that soldiers are not responsible for matters of *jus ad bellum* has had one conspicuously regrettable effect: by reassuring soldiers that they do no wrong by fighting in war provided they obey the traditional *in bello* rules (which, as we have seen, permit action that is morally wrong and arguably prohibit action that is morally permissible), the traditional theory facilitated the participation in unjust wars of countless generations of soldiers. If, by contrast, a society were to teach that it is seriously morally wrong to kill people in pursuit of unjust aims, its soldiers would be more likely to resist the pressure to fight in an unjust war. It is therefore reasonable to believe that if people generally accepted the revisionist account rather than the traditional theory, unjust wars would be less likely to occur or to continue once they had begun.

A defender of the traditional theory might object that if soldiers are encouraged not to fight in wars they believe to be unjust, there will always be a risk that they will mistake a just war for an unjust war, refuse to fight, and thus prevent a just war from being fought or cause it to be lost. But the history of war is reassuring on this point. People have a strong tendency to believe that any war their country fights must be just. For this and other reasons, people are much more likely to believe that an unjust war fought by their country is just than to believe that a just war fought by their country is unjust. Thus, while there has been no shortage of unjust wars in which those who fought believed that they were in the right, it difficult to find even

a single instance in which a government has sought to fight a just war but been impeded by the moral scruples of soldiers (or civilians) who have mistakenly believed it to be unjust.

There are other significant differences between the practical implications of the two approaches to just war. I conclude by briefly discussing two such differences. One concerns the permissibility of preventive war—that is, war that is initiated to address a threat that is neither present nor imminent but is anticipated at some future time. The traditional and revisionist accounts can agree that it may be desirable to prohibit preventive war in law and convention to prevent states from using the prevention of future aggression as a pretext for engaging in present aggression. But the traditional theory has stronger principled—as opposed to practical—reasons for condemning preventive war than the revisionist theory has. The reason usually given in the writings of traditional theorists appeals to the domestic analogy. Just as no individual may attack another merely in anticipation of a future attack, so no state may attack another in the absence of a present or at least imminent threat. There is, however, a deeper reason why the traditional theory must generally condemn preventive war. Recall that the traditional theory claims that the only people who are legitimate targets in war are combatants and that combatants are defined as those who pose a threat. But preventive war involves attacks on unmobilized soldiers on their home bases in what is, at least until the moment of the attack, a time of peace. At the time when they are attacked, these soldiers pose no threat and hence are not combatants in the relevant sense. They are illegitimate targets. Preventive war, therefore, is necessarily indiscriminate.

This does not mean that the traditional theory rules out preventive war absolutely. But it does mean that preventive war necessarily involves the intentional killing of people who are innocent in the sense identified as relevant by the traditional theory. This leaves it open for the theory to offer a necessity or lesser evil justification for the killing of innocent people in a preventive war. A successful justification of this sort would, however, have to show that the expected harm to innocent people that would be averted by preventive war would *greatly* exceed the harm that the war would cause. Because this is seldom the case, the traditional theory can seldom justify preventive war.

The revisionist account, by contrast, can in principle offer a liability-based justification for preventive war. It can take its cue from the fact that in domestic society we accept that people can sometimes make themselves liable to preventive action by actively planning and preparing to engage in serious wrongdoing. In law such people can be liable to arrest and criminal sanction under laws of conspiracy and attempt. The revisionist account—though not the traditional theory—can avail itself of this understanding of liability to argue that potential adversaries can make themselves liable to preventive attack by engaging in active planning and preparation for wrongful aggression. According to the revisionist account, therefore, the prevention of future aggression can in principle be a just cause for war.

The other issue on which the traditional and revisionist accounts diverge is humanitarian intervention—that is, war initiated to defend people in another state

from threats originating within their own state, usually from their own government. The traditional theory is generally inhospitable to humanitarian intervention. This is because it bases its account of *ad bellum* defensive rights on the domestic analogy. A state that persecutes its own population is nonetheless a sovereign individual. To intervene against it to stop the persecution is therefore analogous to coercively harming a person to prevent her from harming herself. It is, according to the domestic analogy, an objectionable form of paternalism. The traditional theory holds that states have a sovereign right against intervention unless they forfeit it by engaging in aggression against another state.

Because the revisionist account is individualist rather than statist, it is more permissive with respect to humanitarian intervention. If individuals in another state are morally responsible for threats to the fundamental human rights of others, they may be liable to be attacked or killed to prevent them from violating those rights. That the violations would occur within a state that has not attacked any other state is morally relevant for various reasons, but it does not mean, as it does on the traditional theory, that intervention to prevent the violations would violate the rights of that state. What is most important according to the revisionist account is that the individuals against whom the humanitarian war would be fought would be liable to military attack to prevent them from violating the rights of others. The defense of fundamental human rights can therefore be a just cause for war according to the revisionist account. Because that account posits *in bello* defensive rights that are asymmetrical between just and unjust combatants, it implies further that soldiers in the offending state have no right of defense against a justified humanitarian intervention.

This review of the two approaches' implications for preventive war and humanitarian intervention may suggest that the traditional theory gives a more restrictive account of morally permissible war. But this is an illusion. It may recognize fewer just causes for war, but overall it is far more permissive than the revisionist account in that it permits soldiers to fight for *any* cause, whether just or unjust. Even if the revisionist account recognizes a greater range of just causes for war, its requirement of just cause applies to both political rulers and individual soldiers alike, so that no one may fight without a just cause. By contrast, the traditional theory's requirement of just cause constrains only political rulers, leaving individual soldiers morally free to fight and kill for whatever aims, just or unjust, their rulers may choose to pursue.

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