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KILLING IN WAR AND THE MORAL EQUALITY THESIS

By Claire Finkelstein

Abstract: *In his famous book* Just and Unjust Wars, *Michael Walzer articulates a thesis he calls the "Moral Equality of Soldiers," namely, the principle that combatants have an equal right to kill other combatants in war, regardless of the justice of the cause for which they are fighting. The Moral Equality Thesis, as I shall call it, is an essential component of traditional Just War Theory, in that it provides the basis for distinguishing the* jus in bello *from the* jus ad bellum. *It also plays a crucial role in identifying the nature of the difference between combatants and civilians. The Moral Equality Thesis has recently come under attack by scholars of Just War Theory, notably philosopher Jeff McMahan, on the grounds that killing for immoral purposes cannot be justified, and so it cannot be true that combatants all have an equal right to kill, regardless of the justice of their cause. In this essay, I defend the Moral Equality Thesis in its traditional formulation. Without it, I argue, the rule of law would not apply in war. The failure to recognize the equal right of combatants to kill in war, I suggest, creates an inconsistency between the rules of war and basic concepts in the law and morality of self-defense, an inconsistency that McMahan himself would think undesirable. I argue that McMahan's argument applies more compellingly to armed conflict in asymmetrical warfare. Arguably, the Moral Equality Thesis does not apply in an armed conflict between combatants and unlawful combatants. In that context, the divergence from the law and morality of self-defense is less of a concern.*

"Unaccommodated man is no more but a poor, bare, forked animal that thou art."

King Lear (3.4.105-7)

I. Introduction

Recent philosophical writings have seen a resurgence of interest in Just War Theory — a return to the Vietnam era focus on the legitimacy of killing in war. Michael Walzer's book, *Just and Unjust Wars*,[1] was the most influential work to shed philosophical light on war of this period. Now a classic, Walzer's text brought what had traditionally been theological reflection into secular moral philosophy. Since the 9/11 attacks, the interest in Just War Theory among philosophers has revived, and *Just and Unjust Wars* has reclaimed its former influential place in philosophical debates about war. This time, however, philosophers and political

[1] Michael Walzer, *Just and Unjust Wars* (New York: Basic Books, 1977; reprint 1992); all page references are to the second edition.

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theorists address these questions from a standpoint of greater theoretical sophistication, given that the template Walzer's work provided, and the debates surrounding his work, had already prompted significant philosophical interest in the theory of war.

Traditional Just War Theory, which Walzer's book attempts to articulate and defend, has at its core a principle Walzer calls the "Moral Equality of Soldiers," or as I will call it, the "Moral Equality Thesis." According to the Moral Equality Thesis, combatants on various sides of a war possess the same right to kill, regardless of the justice of the cause for which they are fighting. A German soldier fighting for Hitler's army during the Second World War has the same right to kill a French soldier that the latter has to kill him. This is so despite the fact that the Frenchman, whose country is under unlawful occupation, is fighting a just war, and the German, whose country is unlawfully occupying another sovereign nation, is not. The fact that Germany is in violation of international law does not mean that the German soldier is *himself* violating the laws of war. In invading France, the German soldier participates in an action that is illegal under international law, yet he himself, as part of the state machinery for carrying out this illegal plan, is exempt from sanctions. He is no more responsible for the perfidies of his state than is the tank in which he rides or the rifle he shoots. Like the state executioner, the soldier is not a locus of responsibility in his own right when he acts on behalf of the state. As long as he is acting according to orders, or within the discretion he has been accorded, responsibility for the acts he performs lies with the political leaders above him, and with the state itself, in whose name all acts of war are performed.

To be sure, there are exceptions. One clear circumstance in which a soldier *may* be responsible for acts performed in a combat setting is that in which he acts outside the purview of his orders, and his acts either contravene his government's policies, or they are grossly immoral. In some such cases, the soldier has stepped outside the protections inherent in his role and acts not as a representative of his government, but as a private individual. He is then no longer protected by the mantle of state authority according to which combatants normally act, but is subject instead to general principles of responsibility by which individuals are typically assessed. In other cases, he may be responsible despite following orders, if the acts he performed in the name of the state were of gross and obvious illegality or immorality. In these cases, though he acts as an agent of his state, he had reason to reject the orders of his commanders as they were patently illegal. This is the concept captured by the notion of Crimes Against Humanity, and was the basis for the prosecutions of Nazi war criminals at Nuremberg, for example. Such instances constitute exceptions to the general principle that individual soldiers are not responsible for acts they perform in their official capacity as combatants.

The framework set out above captures what has traditionally been the distinctive logic of Just War Theory. It is not only engrained in our way of

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thinking about war, but is also reflected in the treaties and other formal instruments as well as long-standing practices that make up international law. In recent work, philosopher Jeff McMahan has disagreed both with the idea that the law of war is premised on a distinctive moral logic, and with the implicit suggestion that morality contains "pockets" in which separate normative systems can coexist. His writing on Just War Theory has sparked a robust debate about the traditional approach to combatant responsibility, based on an objection to the Moral Equality Thesis. McMahan thinks that whether it is justifiable to kill depends on the background justifiability of the killing, and that, in turn, depends on general moral facts about the larger purposes the killing is intended to serve. Rejecting the Moral Equality Thesis, McMahan insists that opposing sides in a military conflict cannot have equal moral entitlement to use force, any more than it would be possible for a person using force in self-defense and the person against whom force is used to be equally entitled to attack one another.

The comparison to the law and morality of self-defense plays an important role in McMahan's argument. McMahan believes that the basic principles of responsibility embodied in the rules of the substantive criminal law are more or less congruent with general principles of ordinary morality. Given that McMahan also thinks that the moral principles on which the law of war depends are continuous with principles of everyday morality, he concludes that there is great continuity between the individual rights and duties expressed in the criminal law and the principles that establish the permission to kill in war. In this sense, Just War Theory for McMahan is just part of the broader moral logic with which we address moral questions pertaining to individual responsibility.

In what follows, I will attempt to defend the traditional logic, including the Moral Equality Thesis, against McMahan's objections. However, I will also attempt to identify an application of McMahan's intuitions that places them in the correct context. As a thesis about the nature of armed conflict generally, I will argue that McMahan's moralized account does not succeed. As a thesis about certain types of armed conflict, specifically contemporary, asymmetric warfare, the thesis partially succeeds.

II. Combatancy and the Moral Equality of Soldiers

Michael Walzer tries to motivate the Moral Equality Thesis by appealing to a sense of common humanity with enemy combatants, as well as the soldier's place in a larger political structure:

> [T]he enemy soldier, though his war may well be criminal, is nevertheless as blameless as oneself. Armed, he is an enemy; but he isn't my enemy in any specific sense; the war itself isn't a relation between

> persons but between political entities and their human instruments. These human instruments are not comrades-in-arms in the old style, members of the fellowship of warriors; they are "poor sods, just like me," trapped in a war they didn't make. I find in them my moral equals. That is not to say simply that I acknowledge their humanity. For it is not the recognition of fellow men that explains the rules of war; criminals are men too. It is precisely the recognition of men who are not criminals.[2]

Combatants occupy symmetrical positions relative to one another: they do not face each other as individuals acting on their own beliefs, but as representatives of their respective countries. Within that role, combatants face one another as reciprocal bearers of risk. Whether they are German combatants carrying out a policy of territorial expansion, or French, British, or American soldiers defending against wrongful aggression, they enjoy equal and identical positions. This is why, as Walzer suggests, it is crucial to distinguish a combatant fighting an unjust cause from a criminal, whose wrongful acts of aggression are his own. In the case of a soldier fighting an unjust war, it is not *his* decision to kill that is wrongful. That decision is made by the leaders of the country he defends. The combatant's decision is whether to follow orders or reject the orders he has been given. Disobeying orders, however, is a desperate measure, one he would only undertake under the most extreme circumstances and with the clearest awareness of the illegality of those orders. The soldier, in short, is expected to select his actions not on the basis of his own direct reflection about what would be best to do, but on the basis of someone else's decision about what to do. Since soldiers on both sides of a conflict are expected to reason according to this same two-tiered approach, it makes sense to regard them as equally situated relative to the rules of war.

Several significant aspects of the Moral Equality Thesis are important to note. First, the thesis applies only to combatants killing enemy combatants; it does not apply to combatants killing civilians or to combatants killing other combatants from their own side. Second, the permission to kill in war that this principle reflects only extends to unjust or unlawful killing to the extent that the combatant himself believes the killing is lawful. As suggested above, a soldier has a right to ignore an order by a superior if the order is unlawful and the soldier is himself aware of that fact. It follows that if a combatant believes his *own* act to be unlawful, the combatant's right to kill in war will not immunize him. A combatant might never have thought about the lawfulness of the killing and so might be entirely agnostic on the subject. But if he is actually aware of the unlawfulness of an order, he cannot avoid responsibility for his actions

[2] Walzer, *Just and Unjust Wars*, 36.

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based on the fact that he was acting under orders.[3] Third, the Moral Equality Thesis does not extend to the killing of noncombatants, not even when the killing is an accidental and unintended consequence of the justified killing of a combatant.[4] The Moral Equality Thesis pertains only to killing that takes place between combatants. A given instance of killing in war can be rendered prima facie permissible merely because it involves killing an enemy combatant. By the same token, the act that produced the death can ultimately constitute a violation of the laws of war if it turns out to involve extensive collateral damage.

Killing an enemy combatant does not require any kind of specific justification under the rules of war, and this is because the permission to kill in war attaches directly to the role of the combatant. This is consistent with the traditional approach to combatancy in Just War Theory, according to which combatants are identified by their status, not their activity or function.[5] There are various indicia of combatant status. Traditional ones include the wearing of a uniform, carrying arms openly, and the wearing of governmental insignia.[6] These are signs or expressions of combatancy; an individual's actual status as a combatant is established in other ways, without which wearing a uniform or carrying arms openly would not establish his identity as a combatant. The basic concept of combatancy in Just War Theory is based on membership in the armed forces of a sovereign state.[7] Individuals who are not so designated by their governments are civilians. According to the traditional Principle of Distinction in Just War Theory, these

[3] Model Penal Code § 2.10 provides: "It is an affirmative defense that the actor, in engaging in the conduct charged to constitute an offense, does no more than execute an order of his superior in the armed services which he does not know to be unlawful." This appears to contradict the general approach to war crimes such as was recognized at Nuremberg, for example, according to which following orders is no defense. The two are not, in fact, in contradiction, since the crimes at issue in Nuremberg, which were war crimes and crimes against humanity, were of manifest illegality.

[4] In action theoretic terms we would say that the justification for killing an enemy combatant in war does not apply to an act of killing a combatant *under a description under which the act was killing a noncombatant*. Justification is description-relative, and the status-based privilege of killing combatants simply does not justify collateral damage all by itself.

[5] But see Jens Ohlin, "Targeting Co-Belligerents" in Claire Finkelstein, Jens Ohlin, and Andrew Altman, eds. *Targeted Killings: Law and Morality in an Asymmetrical World* (Oxford: Oxford University Press, 2012), 60–89 (defending a functionalist account of combatancy).

[6] See Chris Kutz, "The Difference Uniforms Make," *Philosophy and Public Affairs* 33, no. 2 (2005): 148–80.

[7] The International Committee of the Red Cross, however, attenuates this definition by identifying a combatant as follows: "*Rule 3. All members of the armed forces of a party to the conflict are combatants, except medical and religious personnel.*" While this is still a status-based definition, it has a functional component insofar as it identifies a combatant as someone engaged in armed conflict. Given that "armed conflict" need not imply actual fighting, the definition remains status-based, but on the traditional conception a person need not be actually engaged in armed conflict to be considered a combatant.

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categories are mutually exclusive: there are only two categories, civilians and combatants, and everyone is a civilian except those who have combatant status.[8] Traditional Just War Theory does not recognize any nuances in the middle.

However combatancy is defined, and whatever its manifestations, the implications of identifying someone as a combatant are significant. A combatant is targetable twenty-four hours a day and seven days a week, whether he is in the process of actively attacking, taking a nap, or playing cards. A noncombatant is never targetable as such, except to the extent he has turned himself into a temporary combatant by assisting in the war effort. If he is attacking outside the context of war, the nonmilitary privileges of self-defense or defense of others are the relevant concepts, and he is subject to the standards of the criminal law. The concept of a combatant, therefore, is defined by a formal set of rules that identifies a highly specific role.

Walzer sees the Moral Equality Thesis, and with it the reliance on the status of combatancy, as the lynchpin of the concept of the rule of law in war. He believes that in the absence of the Moral Equality Thesis, there would be no law, and hence, no constraint in war at all. At first blush the association between these two ideas is not apparent. What is the relationship between the principle that every soldier at war has an equal entitlement to kill and the idea that war is morally constrained? Walzer's articulation of the connection is vague, but upon reflection his thought is compelling. The Moral Equality Thesis is the flip side of the traditional distinction in Just War Theory between the *jus in bello* and the *jus ad bellum* — the division between the way war is conducted and the purpose for which it is waged. Were these two sets of norms to be collapsed, there could be no code of conduct for war, no generalizable rules that applied to the activity of doing battle with an enemy. The "rules" of war would not be rules of conduct of any sort, but instead a set of background moral principles that apply in virtue of the intentions of the warring parties. Let us consider more concretely what the logic of war would look like under these circumstances.

Imagine that the principles of justification for killing in war depended on whether a soldier was fighting a just war. First, consider the position of a combatant on the unjust side: could any act of war he committed be justified? As Jeff McMahan likes to point out, it is hard to see how an act committed in the service of an immoral goal could itself be morally justified in the absence of a division between *in bello* and *ad bellum* principles. The unjust party would then be barred from all acts of war, with

[8] This is an oversimplification. Civilians can acquire combatant status simply by assisting the military forces. However, unlike true combatants, their status as combatants is dependent on their performing certain actions that assist the war efforts, and that status will disappear as soon as the threatening activity ceases.

the possible exception of acts of self-defense that did not stem from the actor's own wrongful aims.[9] This result seems intuitive enough, but the framework makes less sense once we consider the position of the justified party. Would there be limits on the acts it is permissible for the just side to perform in this case? In the absence of *in bello* rules, any such limits must stem from the aim itself. But if the aim is good, what would be the source of limits on its pursuit? Limits on the pursuit of a worthy goal must always function as *side constraints*; this means they must stem from a set of independent moral or legal rules. In the absence of such independence, there could be no side constraints, and hence no limits on the pursuit of morally worthy aims.

To understand the departure from current Just War Theory that the absence of *in bello* rules would produce, consider the fact that the concept of proportionality depends on the existence of side constraints. The principle of proportionality maintains that the pursuit of a justified aim in war is constrained by a limit on the means one can adopt to pursue that aim. A means that is disproportionate to the aim is objectionable precisely because there are independent objections to the act that do not relate to the value of the military aim. These objections function as side constraints on the pursuit of the military aim. Proportionality is a principle, then, that relates *jus in bello* principles to *jus ad bellum* assessments. Without an independent *jus in bello,* there would be no such thing as the principle of proportionality.

Thus, in the absence of equal justification for both parties in the conduct of war, the idea of distinct conduct rules that are separate from the overall justification for waging war becomes difficult to maintain. Rules read off the aims of war, or the *jus ad bellum,* would only be rules of thumb, and would lack the bright lines needed to establish a code of conduct in war. Walzer writes, "[w]ar is distinguishable from murder and massacre only when restrictions are established on the reach of battle."[10] For this reason, abandonment of the Moral Equality Thesis would be a turn toward Karl von Clausewitz's view that war is necessarily a form of absolute and unlimited brutality.[11] The moral equality of soldiers provides the hedge against Clausewitz's vision of unlimited warfare, and with it, his view that acts of war are fundamentally unjustified and hence, in effect, they are no better than criminal acts.

[9] It is difficult to identify such instances, other than possibly self-defensive acts responsive to excessive use of force. However, in the domain of war, where offensive uses of force are not forbidden, excessive force means only force that is outside the rules of war (*in bello* rules). Since we are contemplating a world without separate *in bello* rules, however, it is not clear how we could define force as excessive. Excess would necessarily be relativized to the party's underlying moral position. For the combatant fighting on the just side, it may be that no force is excessive.

[10] Walzer, *Just and Unjust Wars*, 42.

[11] See Walzer's discussion of Clausewitz at *Just and Unjust Wars*, 22–25.

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Jeff McMahan has spent many years working out the details of a challenge to the Walzerian framework, and his rejection of the Moral Equality Principle is at the heart of his disenchantment with the traditional view.[12] McMahan emphatically rejects the moral equality of combatants, yet he also denies that adherence to the Moral Equality Thesis is necessary for acts of war to be rule-governed. He suggests that it is more natural to suppose that the soldier fighting a just war and the soldier fighting an unjust war are governed by different rules entirely. He maintains, however, that the former is nevertheless subject to rules. According to the traditional conception of rights and duties as correlative, if *A* is justified in attacking *B*, *B* is not justified in opposing *A* or attempting to interfere with his acts.[13] That would be a curtailment of *A's* right, and would imply that *A* does not, in fact, have the right he thinks he does. If we are concerned with justification, then, *B* has no right to return fire with fire, since the need to use force in the first place stems from *B*'s own wrongful conduct. If *B* would only desist from that conduct, *A's* right to attack *B* would also disappear. So why give *B* the entitlement to attack *A?* Indeed, on McMahan's view, it is not strictly speaking permissible for *B* to do anything other than stand there and allow himself to be killed by *A.*

McMahan readily admits, however, that it is unrealistic to suppose that anyone would in fact passively allow himself to be killed.[14] This basic fact of human nature suggests to McMahan that although *B* is not justified in attacking *A,* he might be *excused.* Does this mean it is permissible for *B* to attack *A* in return? McMahan thinks not. An act that is excused is not necessarily permissible. It only means that if he does what is not permissible, we will not blame him or hold him responsible for it. So although *A* holds an uncontested justification in such contexts, *B* would not be subject to punishment if he defended himself against an attack of this sort, even if it would be preferable for him to sacrifice himself to *A*.

What about the case in which *B* is an innocent victim rather than a wrongful actor, and hence has done nothing to justify *A's* attack against him? Suppose that *A* has innocently but mistakenly come to the conclusion that *B* is about to attack him, and that is why he has attacked first. In this case *A* acts wrongfully, but he is not at fault for having done so. Is *A* entitled to rebuff *B's* attack with force? Was *B* entitled to defend himself against *A* in the first place?

[12] Jeff McMahan, *Killing in War* (New York: Oxford University Press, 2009), 1 (arguing "against the view that unjust combatants act permissibly when they fight within the constraints of the traditional rules of *jus in bello*").

[13] See ibid., 35 ("In contexts other than war, the morality of conflict is invariably asymmetric: those who are in the right may be permitted to use force and violence but those who are in the wrong are not").

[14] On this topic see Claire Finkelstein, "A Puzzle About Hobbes on Self-Defense," *Pacific Philosophical Quarterly* 82 (2001): 332–61.

Cases with this shape are extremely difficult to analyze, and there is pressure from all sides to deny that they occur. The commitment to the correlativity of rights and duties plays a major role in the usual thinking that it is impossible for more than one individual or group in a conflict to be justified. The importance of the Correlativity Thesis is not hard to see: If *A* has a right to defend himself with force against *B*, then no one (including *B*) has a right to interfere with *A*'s exercise of his self-defensive rights. If *B*'s actions are contrary to *A*'s, either *B*'s actions are not justified, or the original premise that *A* has a right to defend himself in such contexts was not correct. Of course there is a third option, namely that the correlativity of rights and duties does not always hold, but this thesis is not usually seriously entertained. Once we allow that there may be many cases of conflict of rights, we will be forced to reconsider the nature of the relationship between rights and duties and the constraints that have been thought to operate in situations such as those we are considering.

McMahan, however, is not willing to reject the correlativity of rights and duties in favor of a conflictual morality. On the contrary, it is his reliance on correlativity that leads him to reject the idea that self-defense exercised against someone who is morally blameless cannot be based on a *right,* since a blameless attacker does not forfeit his right not to be attacked, for McMahan, in the way that a culpable attacker does. One way to understand forfeiture theory is that it is correlativity writ large: culpability implies that the actor is violating another person's rights, and that entails the right on the part of the victim to take action opposing such violations. The traditional core of self-defense, however, is the right to protect one's own survival, regardless of the nature of the threat. From the perspective of the victim of an attack, it matters little whether the attack was culpable. It is the magnitude of the threat that interests him, and that normally grounds, or ought to ground, the criminal law as well as the moral right to self-defense.

In the next section of the essay, I will turn to the criminal law justification of self-defense and its relation to the debate over the Moral Equality Thesis. For this section, however, the important point is that the Correlativity Thesis and the Moral Equality Thesis are incompatible: If we truly accept the Moral Equality Thesis, we would have to reject the idea that soldiers on opposite sides of a conflict have an equal right to kill. And this implies that the Correlativity Thesis does not hold in this context, since each solider justifiably interferes with the other's exercise of his rights.

It is now possible to understand the claim Walzer makes more clearly– his suggestion that rejecting the Moral Equality Thesis will result in an ever-deepening Clausewitzian infinite regress into progressive levels of conflict. Against the background of the moral "absurdity" of allowing combatants with opposing rights to coexist, no consistent set of moral rules can be established. The irony, however, is that in order to defend the Moral Equality Thesis, we need a way of making sense of conflicts of

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rights that allows us to preserve the idea of the rule of law, even in the face of an absence of correlativity of rights and duties. In the following section, we will consider whether examination of the criminal law can help us to identify the normative framework we require to make sense of the Moral Equality Thesis without embracing Clausewitzian unlimited warfare. This remains a challenge, despite Walzer's suggestion that the Thesis precisely avoids the lawlessness Clausewitz identified.

III. Criminal Law, the Law of War, and the Domestic Analogy

For many authors writing in the area of criminal law theory, the rules of the substantive criminal law reflect norms of ordinary morality that lie outside the criminal law. In particular, criminal law theory relating to justification defenses appears to capture commonly held moral intuitions about the logic of prohibition and the justifying norms that can override those prohibitions.[15] It is a question, however, just how closely criminal law doctrine tracks moral norms — for example, whether the law of self-defense and the moral concept of self-defense are isomorphic or only highly similar. The rules of prohibition in war reflect a possible third and distinctive normative system, and these are contained within the rules that relate to conduct norms, or the *jus in bello.* The question then arises: What is the relationship among the conduct rules of the criminal law, the *jus in bello* rules of war, and the rules of morality? Do we in fact have three distinct normative systems, or are there possibly only two or even one system at base? These are questions that cannot be addressed in the short span of this essay, but they must be borne in mind as the unresolved background to our inquiry into the Moral Equality Thesis.

That there is a relationship between the criminal law and ordinary morality is not uniformly accepted by scholars. In particular, the assimilation of the central rules of substantive criminal law to morality is something that some criminal law scholars would reject, particularly given the positivistic orientation of most legal theorists at the present time.[16] On the

[15] Excuses are less useful in this regard, both because they do not override criminal prohibitions, and also because they are individualized and cannot therefore be thought of as normative generalizations.

[16] There are two sources of objection to this approach. The first are criminal law scholars who see criminal law as having little to do with ordinary morality. Deterrence theorists like Bentham or those in the economic tradition would see it this way. The second are what one might call "legal-moral relativists," namely those who see so-called moral intuitions as illusory, insofar as such intuitions rely on a kind of realism about moral norms. Nevertheless, many scholars have noted the commonality of intuitions concerning justice across a broad array of peoples and cultures. *See* Paul H. Robinson and John M. Darley, "Intuitions of Justice: Implications for Criminal Law and Justice Policy," *Southern California Law Review* 81, no. 1(2007): 9 ("[A] variety of studies have shown that subjects share both the intuition that actors who engage in serious wrongdoing should be punished and a broad consensus about the relative blameworthiness of different types of transgression").

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one hand, there are many parts of ordinary morality that are not captured by substantive criminal law doctrine, such as more minor immoralities like lying or infidelity. Not everything immoral is illegal. On the other hand, there are many rules of the criminal law that do not appear to be based on immoral conduct. Not everything illegal is immoral. In general, however, the overlap between ordinary morality and the rules of the substantive criminal law is sufficiently great that at least for the most significant special rules — rules pertaining to crimes of common law origin like murder, robbery, rape, assault, and so on — we find a common moral sentiment consistently expressed across different approaches in reaction to the central elements of substantive criminal law. Arguably, both ordinary morality and substantive criminal law derive from common principles of responsibility that find expression in various aspects of our normative practices. If this view is accepted, I will argue, it would help to clarify questions of military law that currently remain unresolved. Further exploration of this point, however, is beyond the scope of this essay.

Instead, I wish to focus on the relationship between the rules of war and the rules of the substantive criminal law. The rules for waging war (the *jus in bello)* have multiple points of resemblance to the basic imputation rules of the criminal law, especially where the justifications of self-defense, other-defense, and necessity are concerned. If this overlap is significant, and if, as I have suggested, the general principles of the criminal law may be reflective of general moral principles, then a further benefit of the comparison is that we would have a systematic way of comparing the law of war to the principles of ordinary morality. Michael Walzer was so impressed by the relationship between the criminal law and the rules of war that he gave the strategy of comparing one to the other a distinct name: the "domestic analogy." Walzer's articulation of the concept of the domestic analogy has had significant impact on Just War Theory in recent years. The concept has also, ironically, been adopted by writers who reject the entire Walzerian framework, such as McMahan, and is used to different ends in the latter's account.

McMahan's view is that all three normative systems should be thought of as cut from the same cloth, and that both the rules of the criminal law and the law of war should be established by moral norms.[17] He believes accordingly that traditional Just War Theory is wrong to reject the link in ordinary morality between the justification of an agent's underlying cause and the entitlement he has to attack his enemy.[18] He also adheres to the Domestic Analogy, namely the symmetry or correspondence of Just War Theory with the central doctrines of the substantive criminal law. Walzer and McMahan appear to agree about the Domestic Analogy. Their accounts come apart when we consider what substantive rules

[17] See generally, McMahan, *Killing in War*.

[18] Ibid., 36 ("[T]here are moral principles that are not restricted to war but are such that the situations to which they apply are extremely rare outside the context of war").

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and principles each author ascribes to each of the two domains. Complicating matters further, McMahan takes a significantly different view of the central doctrines of the criminal law than is prevalent among most criminal law scholars. He therefore agrees that Just War Theory reflects the central tenets of ordinary morality, because he too sees the criminal law as a useful mirror of morality and believes that the central doctrines of the criminal law are consistent with Just War Theory. But his picture of the nature of these moral claims presents a radical departure from the usual intuitions of everyday morality, as well as of the core doctrines of the criminal law. The question is whether the connection between the traditional rules of war and the doctrines of ordinary morality (as seen through the lens of the criminal law) can be defended without bringing undue distortion to our moral and legal intuitions.

Let us imagine, once again, that we are operating in the domain of war in the absence of the Moral Equality Thesis. If Country A is fighting a just war and Country B is fighting an unjust war, it might be permissible for soldiers of A to do things to soldiers of B that it is not permissible for the latter to do to the former. It might be permissible, for example, for A's military to launch an offensive attack against B but not permissible for B's military to launch an offensive attack against A. Once country A attacks country B, however, it would be odd to say that the soldiers of B do not have a right to defend themselves against country A's attack, but that the soldiers of B would be *excused* for doing so. Moreover, a race to the bottom seems the most likely outcome. For the more the soldiers of A attack, the more the forces of B will need to counter the attack, and consequently the more country A will need to use force to deflect country B from its immoral purpose. Moreover, soldiers of A acquire a right of self-defense against soldiers of B if B is using force to stop A's attack. Walzer seems correct in thinking that lack of symmetry degenerates into Clausewitz's scenario of unlimited aggression, because the principles on which each party acts are unstable.

There is reason, however, to resist the Clausewitzian perspective. The point can be demonstrated by supposing that A and B are individual civilians rather than warring countries. Suppose that B's intended acts are wrongful, and that A acts rightly in preemptively attacking B to forestall B's wrongful actions. It would seem to follow that B does not in fact have a right of self-defense against A, given that this would imply that A acts wrongly when he attacks B. By hypothesis, however, we have said that A does not act wrongly when he attacks B. (Even McMahan allows that there are nonculpable attackers. He just denies that it is permissible to defend one's life with force against them.) It cannot be the case, therefore, that B has a right of self-defense against A's preemptive action, assuming the Correlativity Thesis holds. The better answer is thus that B has a duty to desist from his wrongful conduct, which duty correlates with A's right to attack B preemptively in

order to cause B to desist. To say otherwise would be to suggest that B's wrongful action indirectly generates its own protective right, so that once B starts to attack, he may continue, as long as his intended victim defends himself or herself.

This argument can be directly translated into the context of war. If someone tried to stop an evil nation from pursuing an immoral military course against another country, in the absence of moral or legal limits, the evil nation would acquire a right to protect itself and its autonomy to pursue wrongful courses of action. If that country's intended course of action were truly wrongful, however, morality could not countenance such a result. Wrongful action cannot bootstrap itself into a right to engage in further wrongful action. The logic of self-defense illustrates a general principle, namely that morality contains inherent limitations on the use of force, and that these limitations are formal and generalizable features of the situations to which they apply. The particular form such limitations take depends on the context. This does not mean the general idea that aggression is limited by moral side constraints is a context-dependent principle. Since the criminal law analysis does not rest on any role-specific logic of combatancy, and since there is no reason to suppose that the logic of self-defense would not apply in war, we have found a way of establishing a piece of the argument against Clausewitzian unlimited warfare on the basis of general principles of morality.

It bears noting on Walzer's behalf that the descent into unlimited warfare that Walzer thinks results from the abandonment of the moral equality of combatants is more likely in the context of a multiagent body like an army than among individual agents facing one another's personal aggression. If A and B are individual agents, and if B is acting wrongly, A may acquire a right to attack B *to the extent necessary to cause B to desist from his immoral attack.* When B responds to A's attack, he is in the classic position of a self-defender who faces a choice between returning force with force or retreating to a place of safety in order to avoid bodily injury. In general, if B can retreat to a place of safety and thus avoid the need to use force, he is obligated to do so.[19] Similarly, one might suppose, if B can stop the attack against him by desisting from his own wrongful action, there is even more reason than in the case in which retreat is available to think that he ought to do *that*. Once again, B cannot leverage his way into a right of aggression against A by first committing a wrongful action that rightfully induces A to attack him, and then using that as a basis for attacking A in self-defense, while continuing to pursue the action that first generated A's justified basis for attacking B. This would be immoral bootstrapping.

The point is even more striking when we return once more to the collective context of war. If the government of B has sent one group of soldiers

[19] See Model Penal Code § 3.04 (2)(b)(ii) (excluding self-defense where "the actor knows that he can avoid the necessity of using such force with complete safety by retreating . . . ").

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to occupy C on its eastern front, and another group to hold the line on its western front against A, then the soldiers of B are not in fact acting wrongfully by occupying C; it is not, after all, *those* soldiers who are occupying C. To say that the soldiers of B on the western front lose their right to defend against the attack waged by the soldiers of A just because they are under the same command as other soldiers who are wrongfully occupying C would seem to unjustly deprive them of their right to self-defense. What have they done, after all, that now requires them to stand there and allow the soldiers of A to kill them? The soldiers on the western front surely retain their right to self-defense, even though they may be justifiably attacked for the strategic role they play in protecting the larger political entity that wrongfully occupies C.

A final problem with McMahan's thesis is worth noting. In order to make McMahan's conclusion compelling — the conclusion that the soldiers of country A are *all* permitted to attack the soldiers of country B, but that *none* of the soldiers of country B are entitled to attack the soldiers of country A — it must be the case that all of the members of A's military are justified in holding all of the members of B's military personally responsible for the unjust occupation of C. This, however, is manifestly an impossible condition to meet. For if we *were* able to draw such fine distinctions between the morally culpable and the morally innocent, we would find the guilty scattered in some pattern across both militaries A and B. We would lack the consistent identification of soldiers of A with those who are justified and soldiers of B with those who are lacking in justification. It would be chaos, and any soldier would be permitted to do anything to any other soldier, because the moral calculus of justification and culpability would have completely broken down.

The detractors of the Moral Equality Thesis might now say that I have confused matters by thinking of the situation in terms of individual justification and culpability. There was never any question of regarding the soldiers of B as *personally* responsible for the occupation of C. In fact, even the soldiers of B who actually invaded and continued to occupy C were not fully responsible for their actions. These military decisions were made by their political superiors, and their responsibility for the unjustified occupation extends to individual soldiers only insofar as they are part of what comprises the existence of military B. So it is not that we are holding the soldiers of B responsible for the acts of other individuals, albeit other individuals within B. It is as though we are holding country B, taken as a whole, responsible for its own acts, a responsibility that we then impute to any individual member of B for his participation in the aims of the group. It is on this basis that we treat individual members of B's military as responsible for the acts of B. It is, however, a significant and complicated question whether this kind of imputation from group to individual is both fair and philosophically accurate, and in particular, whether it supplies adequate grounds for denying a person the right

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to his own defense.[20] If, as I claim, imputation from state to individual does not make sense in this context, the right to self-defense should remain intact.

We have, then, two possible approaches to responsibility in a group setting: The first treats group identity as compatible with personal responsibility and does not eliminate that responsibility when one considers acts done in the name of the group. The second treats membership in a group as effacing personal responsibility. Individuals are held personally "liable" in the sense that it is only against some other individual that force can be used. But a person's susceptibility to harsh treatment for the acts of others is dependent on nothing other than that individual's membership in the group. I have suggested that the second form of responsibility is problematic, and that it is most compelling to allow individuals to remain personally responsible for acts they commit in a military context. But personal liability makes little sense in the absence of an awareness on the part of a military actor that he is playing a certain role. A combatant is justified in killing when he is acting according to the privileges of combatants to kill in war, at the same time he is observing the obligations that attach to those in his position. Individual responsibility requires reference to the role the agent occupies, and the role in turn cannot be defined without reference to the relation to the wider entity of which his enterprise is a part. This is, in short, the notion of Role Morality.

In her book *Moral Combat*, Heidi Hurd argues against the idea that an individual's moral responsibility may be a function of the role he or she occupies. The motivation for rejecting the idea of role morality is high, she suggests, because a distinct morality of roles would make morality "perspectival," as she puts it.[21] Having a perspectival morality means that morality is different depending on whose perspective one takes, and that would result in what Hurd calls "moral combat" — namely, it may make it necessary for one person to do something that another person must oppose or resist. It might be the case, for example, that a judge must punish a person whose violation of the law was morally justified, and who, therefore, does not deserve to be punished. If a judge has an obligation to punish what morality does not condemn, however, there is a violation of the Correlativity Thesis, and this results in a person having an obligation to do something that morality requires, and another person having a moral obligation to oppose the first person's action. When correlativity does not hold, morality becomes "gladiatorial," in which case morality cannot give guidance, because it cannot speak with a clear and consistent voice.

[20] I discuss this question at length in my article on the case of Paul Touvier. See Claire Finkelstein, "Changing Notions of State Agency in International Law: The Case of Paul Touvier," *Texas International Law Journal* 30 (1995): 261.

[21] Heidi Hurd, *Moral Combat* (New York: Cambridge University Press, 1999), xii.

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Elsewhere I have argued against this monolithic commitment to the Correlativity Thesis. I have suggested that a certain amount of moral combat is integral to moral norms.[22] While it is beyond the scope of this essay to defend these more general metaethical claims in any detail, I also believe it is not necessary to embrace moral combat and the "gladiatorial" conception of morality to defend the view that some moral obligations are role-relative. Role-relative, or "perspectival" moral duties are part of the general fabric of morality. A parent has obligations to her children that others do not have; a doctor has obligations to her patients that others lack; a lawyer has obligations to his client that others do not have, and so forth. Indeed, it is only pure act-utilitarians who do not believe that morality imposes different duties on individuals depending on the roles they occupy. Indeed, deontological ethics is usually defensive of the possibility of differentiated roles, as compared with a utilitarian ethics that rejects agent-relative obligations. If perspectivalism can be defended in ordinary morality, it makes sense to suppose that it can be defended in war as well. The *jus in bello* is no more than a particularly robust ethical system premised on differentiation of soldiers from civilians. It is for this reason that the concept of combatant status, and its associated Principle of Distinction in Just War Theory, supplies the foundation for the theory of war. On this basis, the distinction between the *jus in bello* and the *jus ad bellum* becomes another key attribute of the theory of war, along with the Moral Equality Thesis.

IV. Reciprocity and the Challenge of Modern Asymmetrical Warfare

Traditional Just War Theory is of crucial foundational importance for the law of war, but collective study of that tradition has not adequately prepared scholars and military lawyers for the moral complexities of modern warfare. As the core notion of moral equality makes clear, the rules of war are organized around the notion of reciprocity and equality at the level of the *in bello* rules. The heart of the Moral Equality Thesis is equality of vulnerability to attack by virtue of recognition of the concept of combatancy. In response to mutual vulnerability, co-belligerents extend to one another mutual protections, such as the right of the enemy combatant to surrender, and respect for the rules for the treatment of prisoners of war. Such protections have traditionally been understood to apply equally to combatants on all sides of a conflict.

Modern warfare, however, is fundamentally asymmetrical: We no longer have members of sovereign states fighting co-belligerents from other states. Instead we have members of a sovereign military fighting what would

[22] Claire Finkelstein,"Two Men on a Plank," in *Legal Theory*, 7 (2001): 279.

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have traditionally been considered aggressive *civilians,* namely individuals whose violent intentions are organized in conjunction with others in an organization of non-state actors. To the extent that members of the U.S. military are entitled to target members of al-Qaeda or ISIS as combatants without violating the Principle of Distinction, the permission to do so is asymmetrical: we are entitled to target them, as though they were traditional combatants, but we do not accept the legitimacy of al-Qaeda's targeting of members of the American military on a combatancy basis. As lawyers from the Office of Legal Counsel established in a now infamous memorandum from 2002, the concept of "unlawful combatancy" divorces the traditional protections for combatants, such as prisoner of war status, from the targeting privilege that forms the core of the concept of combatancy in the Just War tradition. While we assert that we may use methods of enhanced interrogation on suspected terrorists because they are combatants, not civilians, we do not accept that this permission inflicts related protections for non-state actors.

The concept of "unlawful combatancy" thus captures the asymmetry of modern warfare, and with it rejects fundamental principles in the Just War tradition: the Principle of Distinction (between combatants and soldiers), the right to POW status, the moral equality of combatants, and finally the distinction between the *jus in bello* and the *jus ad bellum.* The structure of so-called "asymmetrical warfare" places all such concepts under attack. Similarly, traditional notions of sovereignty, the requirement that soldiers be visibly identifiable by the uniform they wear, and even core notions such as the concept of a *battlefield* or *zone of war*, have become difficult to sustain in the face of the changing nature of war.

The asymmetry of modern warfare raises a crucial question: How do we distinguish between law-enforcement efforts and military action? Where should we draw the line between the two? Traditionally, even highly organized aggressive action on the part of civilians fell within the domain of law enforcement: if members of al-Qaeda were considered militant civilians, then the correct approach to handling the threat they pose would be based on law-enforcement techniques and authority. Comparable to the "war on drugs," the "war on terror" might be handled under the auspices of coordinated international and domestic police action. Once again, however, if we think of enforcement efforts against international terrorists as properly falling within the domain of law enforcement, we should also see terror suspects as entitled to the guarantees of domestic criminals: rules of evidence would apply to bar the legitimacy of coercive interrogation techniques; the guarantees of trial and representation would apply; and limitations on the use of preemptive force would in all likelihood render "kill or capture" raids morally and legally impermissible.

One can frame the questions the opposite way: If we are correct in thinking of terrorists as engaged in military attacks against the United States,

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in keeping with an evolving conception of war as asymmetrical, what is to restrict our taking such a view of the appropriateness of military conduct in fighting terrorists on U.S. soil? Insofar as the targeted killing of al-Awlaki, an American born member of al-Qaeda, can be justified in military terms, could we not extend such justification to a comparable killing of a suspected terrorist in the United States? And if so, why not extend such treatment to individuals we target in the war on drugs as well? What has happened to the distinction between law enforcement and military action? Or between what should be fundamentally defensive uses of the coercive power of the state and fundamentally offensive instances of that same power?

Jeff McMahan's argument against the Moral Equality Thesis, and his claim that the permission to kill in war should be dependent solely on the *jus ad bellum*, appears unconvincing with respect to traditional war between nation-states. In such conflicts, the concept of combatancy, and the formal role of government actors carrying out a policy of national defense that they did not author, suggest a distinction between the *jus in bello* and the *jus ad bellum.* The principles of responsibility for acts of war are distinct from the principles by which we gauge the justice of a decision to go to war in practice as well as in conception. Military conflict with non-state actors is a different matter. For unlawful combatants, the basis for justifying military action cannot be status-based, as it is with lawful, governmental actors, because there is no official function or role on which to base the identification of such status. The United States has been in the vanguard of selectively extending the status-based reasoning of traditional Just War Theory to non-state actors, but this has been done by *fiat* and reasoning by analogy, not because it was compelled by the logic of the situation. For this reason, there has also been backward revision of the concept of combatancy itself — a distortion based on the felt need to include individuals within its scope who cannot be easily identified according to their role. Such efforts have added more confusion to the discussion than clarity.

If the foregoing point were clearly understood, and lawful and unlawful combatants were not conflated, McMahan's arguments would be more attractive as applied to the latter. In the absence of status, the treatment of aggressors throws us back to general moral principles, such as those that figure prominently in the theory of self-defense and defense of others, in law enforcement, and so forth. As we saw in our discussion of self-defense, the concepts that govern in this arena are reflected in the general principles of the substantive criminal law, as well as in ordinary morality. For ordinary moral concepts, the larger purpose for which a person acts *does* make a difference to how we assess his or her actions. It is true that the criminal law does not distinguish between the self-defender protecting himself from a culpable aggressor and the self-defender protecting himself from an innocent threat. But this is not because the criminal law

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is indifferent to intentions. Rather, it is the intention of the self-defender that takes priority, rather than the intention of the initial assailant.

McMahan's focus on principles of general morality, and his rejection of the concept of combatancy as a unique role with distinctive norms that attach to it, is more intuitive in application to the war against terror and the fight against non-state actors than as a framework for understanding traditional conflicts between sovereign states. The appeal to general moral norms indeed helps to explain the differential treatment we accord to drug dealers and members of politically motivated groups like al-Qaeda and ISIS. It is difficult to conceive of the latter as mere criminals, rather than military threats, in part because their aims are to supplant governmental leadership in favor of their own political rule. Their intentions are thus militaristic rather than merely criminal, and because they do not possess a status that would obviate individual responsibility in favor of the responsibility of the State, they remain personally responsible for their violent acts. This conclusion is consistent with McMahan's views of responsibility for acts of war.

V. Conclusion

I have argued that the core of traditional Just War Theory is accurately reflected in Walzer's idea of the Moral Equality Thesis. That thesis presupposes a sharp distinction between the *jus in bello* and the *jus ad bellum*. Walzer's intuition, not fully articulated, is that this distinction is a crucial part of the ability to see war as a rule-governed activity, and that in the absence of the Moral Equality Thesis, and the separation between the *jus in bello* and the *jus ad bellum,* war would be fundamentally a Clausewitzian descent into hell. Conceptually it is hard to understand how war could have its own distinctive logic — how it could make sense for the logic of war to be so discretely hived off from the rest of morality that we can speak of a killing being justified when it is done in the name of unlawful territorial expansion or adherence to an immoral purpose or ideology. To many, this seems like a perverse logic: it either suggests that evil can be our guide in war, or that the justification for an act has nothing to do with the purpose for which one acts, neither of which makes much sense. But the organization of the *jus in bello* around the concept of the combatant explains how it is possible for the morality of war to be part and parcel of ordinary morality at the same time that it is distinctive and uniquely its own.

What is it about someone's role or status that might make a difference in our thinking about responsibility? What theory in morality could distinguish between an actor occupying a certain role and an individual acting according to general moral dictates? As discussed above, Hurd thinks it is obvious that occupying a certain role could not make a

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difference to a person's moral obligations, on pain of falling prey to moral relativism.[23]

The possibility of role-relative obligations should be no more puzzling than the idea that a game can have rules that do not generalize outside the context of the game. When we are playing chess, the rules of chess are binding. They have no application, and indeed would make no sense, outside that arena. The logic of roles, or pockets of morality in which roles matter, is similar to the logic of games: By agreeing to conduct war according to the normative constraints of traditional just war principles, warring states are agreeing to self-limit in the hope of achieving a bounded and reasonably fair outcome. Just as the logic of a game is encapsulated in the rules that are particular to that game, including rules that set out roles for participants in the game, so the logic of war exists in a pocket within ordinary morality. The logic in that pocket is distinct relative to the rest of morality.

The rules of war are part and parcel of the logic of morality because moral norms accept differentiation according to roles. Morality is not monolithic. It is filled with nooks and crannies in which different and distinctive norms apply. The principles on which rules are based may be various, and this is nothing to lament. Morality is lumpy, differentiated, and potentially conflictual. It is governed by principles that are sometimes only locally significant, and which may not be generalized to any other principle or set of principles. Outside of such nooks and crannies, there are principles of general applicability. The right to kill in self-defense, both in law and in morality, is linked to no specific role for its assertion. It is a general right, one that applies in any role, despite the particular nature of the rights and obligations roles may furnish participants. Thus, the right to self-defense applies even to combatants, side-by-side with other rules governing the right to kill to which they are subject. Soldiers who must avail themselves of the more general norms of self-defense are, in the moment, acting not as combatants and representatives of a State, but as that "poor, bare, forked animal" we are when we strip away, as King Lear did, the roles we occupy in the central occupations of our lives.[24]

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[23] Hurd, *Moral Combat*, chap. 2.

[24] William Shakespeare, *King Lear*, ed. Barbara A. Mowat and Paul Werstine (New York: Washington Square Press, 1993), Act III, Scene IV.