CHAPTER 24

LAWS OF WAR

JEFF MCMAHAN*

I. Introduction

Doctrines of the just war predate formulations of the law of war by many centuries. Yet classical accounts of the just war are presented as matters of law—not positive law or law devised by human beings, but natural law, or law that is inherent in the nature of things. War, like other human activities that raise moral issues, was held by the classical just war theorists to be governed by immutable moral laws that were part of the natural order, no less real or objective than the laws of nature. This early presentation of morality as a matter of law prefigured, or perhaps inaugurated, the recurring tendency to blur the distinction between the morality of war and the law of war, a tendency that persists to this day.

In this essay I will offer a brief sketch of the evolution of thought about the morality of war and the law of war, noting the reciprocal influence of each upon the other.[1] I will argue that despite our tendency to conflate them, the laws of war are quite distinct from the moral principles governing war, and that what these laws permit and prohibit must at present diverge in fundamental ways from what is permitted and prohibited by morality. I will also argue, however, that our ultimate aim should be to achieve the greatest possible congruence between law and morality

FN:1

* I have benefited in writing this paper from comments by the editors and discussions with Thomas Hurka, David Rodin, and, especially, Henry Shue.

[1] My historical understanding is much indebted to Stephen C. Neff's illuminating and insightful history of moral and legal thought about war, *War and the Law of Nations: A General History* (Cambridge: Cambridge University Press, 2005).

in this area, and that this will require both rigorous moral analysis and innovations in the design of new international legal institutions.

II. A Brief History

Classical accounts of the just war were individualist in character, in that they applied principles that were thought to govern moral relations among individuals outside the context of war to individual action in war. War was seen as continuous with other human activities rather than as an altogether different domain of action governed by altogether different principles. The classical just war theorists assumed that although the individual combatant's relation to the sovereign might mitigate his responsibility for his action in war, individuals and their acts were nevertheless the basic units of evaluation rather than collectives and collective action.

Because much of the classical writing on the just war was the work of philosophically sophisticated theologians, it is unsurprising that it was concerned primarily with the rightness or wrongness of individual action. But as the power of states and their secular political leaders increased, it is natural that the influence of political and juridical thinkers increased as well and that the focus of concern gradually shifted from the acts of individual combatants to the large-scale acts of states and their rulers. War gradually came to be understood as a condition obtaining among states, in which individual combatants had little significance other than as the instruments of states.

Although in general philosophers have had little to say about war, the arguments of Hobbes had a transformative effect on the way that many theorists thought about the normative dimensions of war. While Hobbes retained a belief in natural law, it was not a natural law the classical theorists would have recognized, in that it dictates egoism rather than anything recognizable as morality. Morality arises, according to Hobbes, only when people, acting wholly from self-interest, agree to submit themselves to a sovereign whom they invest with the power to enforce compliance with rules of constraint that it is in their interests to have, provided that the rules are rigidly enforced. On this view, morality is an artefact, a product of agreement. There is little to distinguish it from law. Hobbes thus provided a foundation for the idea that the rules we live by are not given by God or discovered in the nature of things. Morality is something we create; law, therefore, cannot coherently be formulated to conform to an independently-given conception of morality. Law, like morality itself, consists of principles that we devise and enforce to facilitate the pursuit of our interests and the achievement of our purposes.

The idea that law can be a product of agreement and need not be modelled on natural law is one of two Hobbesian views that profoundly influenced the subsequent development of the law of war. The other is that because morality itself derives from the sovereign, there can be no moral limit to the prerogatives of the sovereign. This laid the philosophical foundations for the doctrine of the sovereign equality of states. Each state was conceived as a political community with a sovereign at its head. But in the absence of a super-sovereign to enforce agreements among them, states could not be morally constrained in their relations with each other. The most important implication of this view is that states have a sovereign prerogative to resort to war whenever it is in their interest to do so—an implication that was eventually recognized in law and practice during the 19th century.

The body of doctrine about the regulation of war that gradually supplanted medieval doctrines of the just war was known as the law of nations. The earliest juridical writers on the law of nations were deeply imbued with traditional natural law theory but sought to supplement it with principles that could be understood as the products of agreement between or among states. As legal and, in particular, political theorists became increasingly enchanted with the idea of states as agents in international affairs, the law of nations became correspondingly more collectivist and pragmatic in character. At the same time, the increasingly influential Hobbesian conception of sovereignty restricted what the law of nations might say about the permissibility of the resort to war. Medieval just war doctrines had insisted on various conditions for the permissibility of resorting to war. These conditions, the most important of which was that there must be a just cause for war, constituted the doctrine of *jus ad bellum*. This doctrine gradually declined in importance, however, until by the 19th century, the resort to war came to be regarded as a legally acceptable means of pursuing state policy: 'politics by other means', in the depraved words of Clausewitz.

The decline of *jus ad bellum* began relatively early and was recognized even by Grotius, though he himself advanced an unusually detailed and sophisticated account of the requirement of just cause. He observed that peace treaties tended not to stigmatize the vanquished side as the wrongdoer or to demand that the vanquished compensate the victor for costs incurred during the fighting of the war.[2] FN:2 These practices suggest that even in the early phases of the development of the law of nations, there was comparatively little concern with the determination of which party was in the right and which was in the wrong. The focus shifted to *jus in bello*, or the principles governing the conduct of war, which ultimately came to be regarded as entirely independent of *jus ad bellum*. Eventually, as I noted earlier, *jus ad bellum* faded into insignificance and by the 19th century, states were recognized as having

[2] Grotius, H., *De Jure Belli Ac Pacis Libris Tres*, Kelsey, F. W. (trans.), (Oxford: Clarendon Press, 1925), repr. by William S. Hein & Co. (Buffalo, NY, 1995), 809–10. Also see Neff, S. C., *War and the Law of Nations* (above, n. 1), 118.

FN:3 a legal permission to resort to war as a matter of national policy.[3] As Amos Hershey 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
FN:4 which affect the rights and duties of neutrals and belligerents during that continuance.[4]

The idea that war is a sovereign prerogative of states that cannot be subject to legal restriction could hardly survive the First World War unscathed, and by the end of the Second World War it had become clear that the most important goal of the international law of war had become the prevention of war rather than the mere regulation of the way that wars are conducted. This led, however, to an extreme oversimplification in the direction opposite to that in which the law of war had been developing over the preceding three or four centuries. The UN Charter, written in the aftermath of the Second World War, recognized only two conditions in which it could be legally permissible for a state to use military force against another state: first, when the use of force has been authorized by the UN Security Council and,
FN:5 second, in 'individual or collective self-defence if an armed attack occurs'.[5] So even though the law of *jus ad bellum* was radically revised over the course of the 20th century, it remains crude and simplistic, and the focus of the international law of war remains on *jus in bello*. Thus, in her comprehensive survey of the law of war, revised in 2000, Ingrid Detter writes:

> Distinguishable from the thus largely obsolete jus ad bellum are the rules on warfare and the humanitarian rules that apply within a war, the jus in bello. It may appear that since the right to war has been abolished there would not be any need for rules in war. However, it is clear that given the number of and intensity of present-day conflicts, both international and
FN:6 internal, there is a great need for the regulation of the humanitarian issues.[6]

Detter describes *jus ad bellum* as 'largely obsolete' because in law it has now been reduced to a single simple rule: in the absence of authorization by the UN, a state may go to war against another state only in individual or collective self-defence against aggression.

Despite the efforts of the classical just war theorists, and of the theorists, such as Grotius, who straddled the transition between the classical theory of the just war and the law of nations, our understanding of the morality of the resort to war has never been very advanced. In part this is because philosophers have never paid serious attention to the morality of war. It is true that during the last quarter of the 20th century, there was a stirring of interest in the morality of war among philosophers that has persisted and even increased. The irony is that, at least until just recently,

[3] See Neff, S. C., *War and the Law of Nations* (above, n. 1), 163–4, 189, and 201.

[4] Hershey, A. S., *The International Law and Diplomacy of the Russo-Japanese War* (New York: Macmillan, 1906), 67, cited in Neff, S. C., *War and the Law of Nations* (above, n. 1), 167.

[5] See UN Charter, articles 2(4) and 51.

[6] Detter, I., *The Law of War* (2nd edn., Cambridge: Cambridge University Press, 2000), 157–8.

the understanding of the just war that has dominated the revival of this tradition of thought has been closely modelled, not on the classical theory, but on the law of war as it developed over the 20th century, thus reversing the original direction of derivation, when the law of nations slowly emerged through the gradual revision of the theory of the just war. Thus the work that is widely and correctly recognized as the most substantial contribution to the revival of just war theory—Michael Walzer's *Just and Unjust Wars*—follows international law in claiming that the only general and non-contentious just cause for war is defence against aggression, though he concedes that there are rare exceptions to the principle that 'nothing but aggression can justify war', the most important of which is one that customary international law has also begun to recognize—namely, that a war may permissibly be initiated 'to rescue peoples threatened with massacre'.[7] Walzer also argues that the principles of *jus in bello* are logically independent of *jus ad bellum* and thus that combatants on both sides in a war have the same rights and liabilities, including, in particular, the 'equal right to kill'.[8]

FN:7

FN:8

III. Morality, Domestic Law, and International Law

Throughout the history of thought about war that I have traced, morality and law have been repeatedly conflated. As I noted, the classical just war theorists presented an account of the morality of war that was also an account of natural law. During the long transition from natural law accounts of the just war to fully positivist accounts of the law of nations, it was often unclear whether writers on the normative regulation of war understood themselves to be advancing ideas about morality, ideal law, or actual law. These ambiguities have continued to infect discussions of the normative dimensions of war since the revival of just war theory during the Vietnam war, as readers of Walzer's *Just and Unjust Wars*, with its various references to just war, the law of war, and 'the war convention', will recognize.

I believe that the morality of war and the law of war are utterly different, just as morality and law in domestic society are utterly different. This is not to say, of course, that the *content* of morality and law must be utterly different. For the most part, the prohibitions of domestic criminal law track corresponding moral prohibitions. But law is an artefact, consciously designed to serve certain purposes, whereas morality is not. I believe that morality is for the most part discovered, not made: it is what it is, whether it 'works' for us or not. But even if one thinks that morality is ultimately a human creation, it was certainly never consciously

[7] Walzer, M., *Just and Unjust Wars* (New York: Basic Books, 1977), 62 and 108.

[8] Ibid. 41.

formulated, agreed on, and enacted in the way that law now is. Its origins, sources, and status are of course the subject of much debate, but almost no one thinks that morality is exactly like law, either in origin, form, or content.

To avoid the confusions that plague much of the moral and legal literature on war, it is important to keep the morality of war and the law of war conceptually distinct. Yet ultimately we should seek to bring the content of the law into congruence with the permissions and prohibitions of morality, just as we have sought to do, with considerable success, in domestic law—especially in criminal law but to a significant degree in civil law as well. There are at present substantial obstacles to reforming the law of war in the image of morality, but we can begin to overcome them once we have a clearer understanding of what we are aiming to achieve. To do this we must investigate the morality of war in abstraction from various pragmatic considerations that require compromises of moral principles in the formulation of the law.

Common sense morality and domestic law share a common structure of justification for the infliction of harm. While they both recognize that the intentional infliction of harm on a person can sometimes be justified as the lesser evil, or by reference to the informed consent of the victim, the principal form of justification to which they both appeal involves the claim that the victim of the harm has acted in a way that now makes him morally vulnerable to that harm. Because of something the victim has done, he has no right not to be harmed—at least not in a certain way, for a certain reason, and, perhaps, by certain persons (that is, he may still have a right not to be harmed in certain ways, for certain reasons, or by certain people). Another way of making this point is to say that according to common sense morality and domestic law, the most common and least controversial justification for intentionally harming another person is that the person *deserves* to be harmed, or is *liable* to be harmed, because of something he has done—usually an act of wrongdoing, or an act that has inflicted, or may otherwise inflict, a wrongful harm.

In cases of conflict, the moral positions of the protagonists are usually asymmetrical. Both domestic law and morality, for example, recognize that in most cases of justified self-defence, the initial defender is justified in acting in self-defence while the aggressor or wrongdoer is not justified in defending himself against the victim's defensive action. This moral asymmetry between wrongdoer and victim, or potential victim, is often a matter of justice. The morality of self-defence is a matter of *preventive justice*. Justified self-defence—and justified defence of others—normally involves the *ex ante* redistribution of inevitable harm away from those who are innocent and toward those who are responsible for a threat of wrongful harm. If it is inevitable that someone will suffer a harm, those who are morally responsible for that fact are the ones who, as a matter of justice, should suffer it. It would be unjust to allow the harm to befall the innocent instead.

While preventive justice is concerned with the *ex ante* redistribution of harm in accordance with liability, *corrective justice*, which is the goal of the law of torts, is concerned with the *ex post* redistribution of harm, or loss. In corrective justice, losses are transferred from those who have suffered them but were not responsible for them to those who were responsible. In contrast to the law of torts, criminal law is generally understood as aiming at *retributive justice*, though to the extent that preventive defence and deterrence are among the legitimate aims of punishment, it may also be said to be concerned with preventive justice. To the extent that criminal sanctions are a matter of retribution, the justification for punishment must appeal to the claim that the defender *deserves* to be harmed. But if criminal sanctions are intended only to prevent the offender from being able to cause further harm, or to deter him or others from committing similar offences in the future, the justification may appeal only to the claim that the offender is *liable* to be harmed.[9] FN:9

The international law of war does not so obviously aim at justice in the way that domestic law does. Some legal theorists, such as George Fletcher, deny that war has anything to do with justice.[10] FN:10 Others think that while the legal doctrine of *jus ad bellum* does distinguish between just and unjust wars, considerations of justice do not extend into the law of *jus in bello*, since the rules of *jus in bello* are neutral between those who fight in a just war ('just combatants') and those who fight in the absence of a just cause ('unjust combatants'). While the law of *jus ad bellum* gives an asymmetrical account of justification—the defender is justified in fighting but the aggressor is not—the law of *jus in bello* is symmetrical, in that the justification that just combatants have for fighting applies equally to unjust combatants.

It is curious that the law of *jus in bello* should be symmetrical, and thus apparently at variance with considerations of justice, when the morality of individual conflict, the domestic law, and the international law of *jus ad bellum* are all largely asymmetrical. Why are the legal rules governing the conduct of war symmetrical, or neutral between just and unjust combatants? Why, that is, do these rules take no account of the considerations of justice that are recognized in the law of *jus ad bellum*? There are various possible answers, of which I will review five. Each of the first four has many adherents, though I think none of them offers a plausible justification for the neutrality of the laws of *jus in bello*—that is, for

[9] The distinction between desert and liability, as I understand it, is this. If a person deserves to be harmed, there is a reason for harming him that is independent of the further consequences of harming him. Giving him what he deserves is an end in itself. But a person is liable to be harmed only if harming him will serve some further purpose—for example, if it will prevent him from unjustly harming someone, or will compensate a victim of his prior wrongdoing. For a person to be liable to be harmed, a condition of instrumental efficacy must be satisfied; but no such condition applies to desert.

[10] Fletcher, G. P., *Romantics at War: Glory and Guilt in the Age of Terrorism* (Princeton: Princeton University Press, 2002), 3–9.

the absence of any relation between the laws of *jus in bello* and the law of *jus ad bellum*.

IV. Consent

According to one view, the same morality that governs relations among individuals outside the context of war also governs the conduct of war, so the symmetry in the law of *jus in bello* does not reflect a corresponding symmetry in some set of moral principles that apply only in war and are different from those that govern relations among individuals in other contexts. Rather, the symmetry is traceable to a way in which war itself is importantly different from other kinds of conflict. In most instances of violent conflict, at least one party is an entirely unwilling participant. And even in cases in which the initial victim of an aggressive attack responds with enthusiasm, clearly relishing the prospect of a fight, there is no suggestion that he thereby grants his adversary permission to attack him. Some people claim, however, that war is different, in that all those who fight as members of a military force in war consent, at least implicitly, to be attacked by their adversaries.[11] Participation in war is, on this view, relevantly like boxing, or duelling. The moral justification that each combatant has for fighting is that his adversaries have consented to fight and therefore to be attacked. The law of *jus in bello* simply reflects this moral reality. So law and morality actually coincide in recognizing that all combatants in war are subject to the same rules and have the same rights and status.

FN:11

I think, however, that it is a mistake to suppose that all, or even most, combatants consent to be attacked. It seems absurd to suppose, for example, that a young Polish man who learns that the Nazis have invaded his country and rushes to enlist in order to fight them thereby consents to be killed by the Nazis. Yet it can be argued that when he puts on the uniform, he is consciously identifying himself as a legitimate target. Wearing the uniform certainly makes him a conspicuous target and is therefore in an important sense highly imprudent, so he must have an important reason for wearing it. The reason given by convention is that the uniform functions as a marker of a legitimate target of attack. That to identify oneself conspicuously as a legitimate target of attack just *is* to consent to be attacked.

This, however, conflates consenting with upholding a convention. The Polish soldier might reason as follows; 'There is a convention that says that combatants should attack only other combatants, who are identified as such by their uniform. It is crucial to uphold this convention because it limits the killing that occurs on

[11] The most sophisticated defense of this view of which I am aware is Hurka, T., 'Liability and Just Cause', *Ethics and International Affairs*, 20 (2007), 199.

both sides in war. I therefore wear the uniform to signal that I am someone the convention identifies as a legitimate target. In doing this I am not consenting to be attacked or giving the enemy permission to attack me; rather, I am attempting to draw the enemy's fire toward myself and away from others, in much the way a parent might attempt to draw the attention of a predatory animal toward herself and thus away from her child, whom she hopes thereby to enable to escape—though of course in this case the drawing of attention is mediated by convention.'

One way to see that this is correct is to suppose that wearing the uniform did signify consent. And suppose that the Polish patriot refuses, on principle, to consent to be attacked by the Nazis. The Nazi invasion is unjust and one cannot, he thinks, consent to any of the evil that is done in the course of it. But if wearing the uniform involves consenting to be unjustly attacked and not fighting is tantamount to capitulation, his only honourable option seems to be to fight without joining the army or wearing the uniform. If he and others were to adopt this option, their private defensive action would not violate the moral rights of the Nazis. It would be morally justified. And assuming that their consent is what would justify the Nazis in attacking them, it seems that in this case the Nazis would have no moral right to kill them, even in self-defence.

The law is obviously not modelled on any view of this sort. According to the law, Poles who carried out military operations against the Nazis without distinguishing themselves as combatants would be unlawful combatants whose action would be perfidious and might, indeed, count as murder. Yet it would be odd if the law were to condemn the only morally honourable course open to victims of aggression. Something is wrong with the reasoning we have been following and it is clear that the mistake is to assume that enlisting and wearing the uniform involve consenting to be attacked in the way that stepping into the boxing ring involves consenting to be hit. Acceptance of combatant status does not involve consent but only recognition of the convention that permits attacks on combatants but forbids attacks on non-combatants.

Even if just combatants did consent to be attacked, it would not follow that unjust combatants would not wrong them by attacking them. Consent does not always effectively waive a right. Suppose, for example, that a villain has wronged a man and wants to harm and humiliate him further. He therefore makes a false accusation and challenges the man he has wronged to a duel. (Assume this example occurs in 19th century Europe.) The wronged man accepts the challenge from a sense of honour, refuses to fire his weapon, and is killed by the villain. His consenting to the duel may make this killing morally different from murder, but it does not *justify* it.

Finally, even if combatants consent to be attacked and are not wronged by being attacked by enemy combatants, it does not follow that unjust combatants have the same justification for fighting that just combatants have. For the action of unjust combatants supports an unjust cause and therefore injures and wrongs people

other than the just combatants who are its immediate victims, including innocent people who are harmed as a side effect of attacks against military targets. It is, therefore, untenable to suppose that consent establishes a special moral symmetry between just and unjust combatants that is absent in most other forms of conflict and that the symmetry in the law of *jus in bello* reflects this underlying moral symmetry.

V. Killing in War as Individual Defence

There are three other attempts to justify the symmetry in the law of *jus in bello* that all claim that this legal symmetry corresponds to an underlying moral symmetry, though this moral symmetry is found, not in the familiar morality that governs relations among individuals outside of war, but only in a separate, distinct morality that applies only in and to the state of war. The first such view holds that this distinct morality of war has the same structure as ordinary morality but a different content. It accepts that the strongest and most widely applicable form of justification for harming and killing an individual appeals to the claim that the individual is liable to be harmed or killed, but it offers a criterion of liability to attack in war that is different from the criteria of liability that govern other forms of conflict. On this view, what makes a person morally liable to attack in war is simply that he poses a threat to others. Defenders of this view sometimes note that the original meaning of 'innocent' is 'unthreatening', so that, understood in this way, the innocent in war are non-combatants, while combatants are non-innocent. If, as is customary, we also take 'innocent' to refer to those who are not liable, then combatants, who are threatening, are liable to attack in war, while non-combatants are not.

This view offers a symmetry account of the justification for defensive killing in war. Combatants on each side threaten those on the other and thus are liable to be killed in self-defence. On this view, necessary and proportionate self-defence is always self-justifying—a claim that is radically at odds with the strongly asymmetrical morality of self-defence outside the context of war, which holds that there can be no justified defence against an attack to which one is morally liable.

Among the many problems with this view, which I have criticized at length elsewhere, is that there is no reason why this essentially Hobbesian account of self-defence should be thought to apply in war but not in any other conditions.[12] Indeed, it does not apply consistently even in war, since both morality and law recognize that *jus ad bellum* is governed by an asymmetrical account of self-defence, according to which the victim of aggression has a right of defence while the initial

FN:12

[12] See McMahan, J., 'The Ethics of Killing in War', *Ethics*, 114 (2004), 693, and 'On the Moral Equality of Combatants', *Journal of Political Philosophy*, 14 (2006), 377.

aggressor does not. Why should an asymmetrical account of self-defence apply to states, while a symmetrical account applies to the agents of those states in the same context?

VI. Collectivism

Many moral and political theorists continue to adhere to the collectivist conception of war that I briefly described earlier. They believe that there is a distinct collectivist morality that applies to war. At the level of *jus ad bellum*, this morality parallels the morality that governs relations among individuals, with this difference: the agents to whom it applies are states, not persons. Its principles of self-defence, for example, are asymmetrical; thus only the initial victim state, and not the aggressor, has a right of self-defence, as in the case of individuals. Yet the impermissibility of a state's action in fighting an aggressive war is not transmitted to the action of the unjust combatants who do the actual fighting. They act permissibly provided they obey the moral principles governing the conduct of war, which are, like the laws of *jus in bello* that are modelled on them, neutral in character.

How does the collectivist view explain the neutrality of these principles? One suggestion is that when people act collectively under the aegis of the state, it can be permissible for them to act in ways that would be impermissible if they were acting as private individuals.[13] It has not, however, been satisfactorily explained how, by establishing political relations *among themselves*, people could confer on themselves permissions to treat *others* in ways that would be impermissible in the absence of those relations. And even if this moral alchemy could be explained and justified, it would remain mysterious why the permissions are restricted to *jus in bello*. If the political relations among individuals that make them citizens of the same state create special permissions, those permissions should extend to the political leaders and thus to the acts of the state itself, making *jus ad bellum* permissive in the way that *jus in bello* supposedly is.

Another suggestion is that the collectivist view implies that the moral principles of *jus ad bellum* apply to the acts of states, and therefore to the acts of political leaders that determine what states do, but not to the acts of individual combatants, who are merely the instruments of states. But this itself requires explanation. One explanation is that combatants cannot be responsible for *jus ad bellum* because they lack the knowledge necessary to judge whether a war is just as well as the power either to initiate or to prevent war. But if combatants cannot be responsible for *jus*

[13] See Kutz, C., 'The Difference Uniforms Make: Collective Violence in Criminal Law and War', *Philosophy and Public Affairs*, 33 (2005), 148. For a critique of the collectivist view, see McMahan, J., 'Collectivist Defenses of the Moral Equality of Combatants', *Journal of Military Ethics*, 6 (2007), 50.

ad bellum, the principles that govern their action cannot refer to judgments of *jus ad bellum*, but must be neutral.

This cannot be right. By engaging in various acts of unjust aggression, Nazi Germany initiated a war in which many millions of innocent people were killed. Among them were millions of combatants who fought against the Nazis. These were morally wrongful killings even though they may have involved no violation of the laws of *jus in bello*. It is absurd to suppose that sole responsibility for these killings lies either with an abstract collective, the German State, or with a handful of political and military leaders, most of whom only gave orders and never killed a single person. The claim that Nazi combatants cannot have acted wrongly in killing enemy soldiers because they could not be responsible for judging whether their war was just or unjust is false. Morality often requires people to make difficult judgments, and to accept responsibility if they get it wrong—a demand that is particularly exigent when what is at issue is killing.

VII. Consequentialism

The fourth and final possibility I will mention is that while both common sense morality and domestic law are deontological in character, there is a distinct morality of war that is rule-consequentialist. Perhaps because the stakes are so high, the morality of war, both *jus ad bellum* and *jus in bello*, is just a matter of which rules work best in practice. And the rules that work best—and that we would all agree to be guided by if we were rational—are unambiguous and easily applicable rules that prohibit aggression, forbid attacks on civilians, require humane treatment of prisoners, permit all combatants to attack enemy combatants rather than making unjust combatants liable to legal sanctions, and so on. The law and morality of war thus coincide because their aims are the same: to minimize the occasions for war and the harms involved in warfare.

This view invites a number of questions, such as how the consequences of war are to be evaluated in determining what the correct rules are. Ought the rules to permit a certain degree of national partiality? Ought they to aim at the minimization of harm overall or ought they attribute greater weight to harm to the innocent than to harm to the non-innocent? If the latter, how exactly are innocence and non-innocence to be understood? A more fundamental question is why we should abandon the central elements of common sense morality, including ordinary principles of liability, in the context of war. These principles may, of course, become difficult or even, in some instances, impossible to apply in the confused circumstances of war, but that is different from their having no application at all. Principles of liability are important because they tell us when people have forfeited certain rights. If we assume that outside the context of war people have a right not to be unjustly

attacked or killed, we have to be able to explain what happens to that right in war, when rule-consequentialism supposedly takes over.

In order for a different morality to apply in conditions of war, war must be different in some fundamental way from other kinds of conflict. But it seems to differ primarily only in scale. There is, of course, a political dimension—states are usually involved—and there is therefore greater coordination among people on all sides to the conflict. But otherwise it is hard to see why an entirely different morality should apply in conditions of war. If, moreover, war really were governed by a quite different set of moral principles, it would be essential to be able to determine precisely when a condition of war obtains and when it does not. In order to determine, for example, whether a killing is permissible or is instead an instance of murder, one may, on this view, need to know whether the perpetrator and victim are combatants in a war. This could make sense as a matter of legal doctrine but as a claim about basic morality it is hard to believe.

These general doubts about whether there is a special morality that is specific to war also apply, of course, to the view that war is governed by symmetrical liability rules, and to the view that it is governed by a special collectivist morality.

VIII. The Divergence between Morality and the Law of War

There is really only one morality. There is no special morality that supplants ordinary morality whenever conditions of war obtain. War is, moreover, continuous with other areas of human activity. It differs from other conflicts, including individual self- and other-defence, only in scale and complexity. The morality of killing in war is therefore asymmetrical, just as killing in individual self-defence is. Since the law of *jus in bello* is fully symmetrical, or neutral between just and unjust combatants, the law diverges from morality.

Perhaps the main reason for this divergence is that the requirements of morality are particularly difficult to discern in conditions of war. The most important of our epistemic disabilities in this area lies in determining whether there is just cause for war. For a variety of reasons, most combatants believe that the war in which they are fighting is just. This is almost as likely to be true of unjust combatants as it is of just combatants. And most unjust combatants who perceive or suspect that their cause is unjust are more likely to *assert* that it is just and fight anyway than to admit that their side is in the wrong and then have to decide whether to fight or to refuse to fight. As long as states that fight unjust wars can continue to declare their war to be just and legal without authoritative correction, whatever rights can be claimed by just combatants will be claimed by unjust combatants as well.

Whatever is legally permitted to the just will be done by the unjust as well; therefore an asymmetrical law of *jus in bello* that followed morality in granting permissions to just combatants that it denied to unjust combatants would be ineffective in constraining the latter.

One possible way to establish symmetrical laws of *jus in bello* would be to grant legal permissions to just and unjust combatants to do whatever it is morally permissible for just combatants to do, and to prohibit in law whatever just combatants are morally forbidden to do. This would exempt unjust combatants from legal liability for many serious moral wrongs, but if we assume that morality forbids just combatants to attack civilians intentionally, or to torture or kill prisoners, then such laws may in practice be restrictive enough. Indeed, it might be thought that the laws we have now could for the most part be explained and defended in just this way.

But this is false. It cannot be ruled out, for example, that justice could permit, or even favour, the killing of certain civilians, if they bore heavy responsibility for an unjust war and killing them could somehow make a more significant contribution to the achievement of their adversaries' just cause than an attack on combatants. It is, in fact, doubtful that the idea of universal civilian immunity has any foundation in basic, non-conventional morality. Rather, this idea has various sources. These include the interest of each belligerent in preserving its society from destruction, the fact that civilians in general pose no threat, so that killing them usually serves no military purpose, and the view that combatants are professionals who, like police and fire-fighters, consent to the risks involved in their work and are restricted by their professional code to fighting only against others like themselves. But even if it can be morally permissible, on occasion, for just combatants to attack civilians who are not innocent in the relevant sense, it would be disastrous to have a legal rule that permitted attacks against civilians, even if only in highly restricted circumstances. For, as I noted, unjust combatants would inevitably claim the right to act on this permission, probably more frequently than just combatants would, and just combatants would be tempted to avail themselves of the permission more often than they would be entitled to. And it is more important to deny this legal permission to the unjust, and to prevent its being abused by the just, than it is to offer it to the just on those rare occasions when they would be morally justified in acting on it. At least at present, therefore, the laws of *jus in bello* must deny to both just and unjust combatants certain options that would on occasion be morally permitted to the just.

The suggestion that the laws of war must diverge from morality raises a number of questions. What, for example, should the aim of the law be? It might be to minimize overall harm, to mitigate the destructiveness of war in general while giving priority to the prevention of harm to the innocent, or to induce people to act in ways that would best protect rights and promote justice. Doubtless there are other possibilities.

Another question is whether it could be acceptable, as a means of achieving one of these ends, for the law to deliberately permit forms of action that are seriously wrong—for example, acts that violate rights. I believe, for example, that just combatants do nothing to lose their moral right not to be attacked, but that the consequences of holding unjust combatants criminally liable for killing just combatants in war would be worse than those of legally permitting these killings and that the law ought therefore to permit them, at least at present. But this seems to involve the intentional creation, as a means of preventing bad consequences, of conditions in which people will predictably violate the rights of others. Suppose for the sake of argument—I do not claim that this is true—that for an unjust combatant to kill a just combatant in war is murder. The challenge here is to explain how a non-consequentialist morality could endorse a law that permits this form of murder, and do so as a means of preventing bad consequences.[14] I think the explanation is that legally permitting a form of murder is morally quite unlike committing a murder as a means of preventing others from committing a greater number of murders. It is simply to create legal conditions in which there will be less wrongdoing of a serious nature—for example, in which people will predictably violate fewer rights rather than more. But doubtless more needs to be said about this.

FN:14

IX. Narrowing the Gap

Many people think that the laws of war have been designed to reduce both the frequency and the destructiveness of war. Most of these same people also believe that these are the proper goals of the law. But, while the factual claim may be correct, the normative claim is mistaken. The analogous normative claim about the law of self-defence is that it should aim to deter conflicts and to minimize harm to all concerned. But it would be a mistake for the law of self-defence to assume that harm to wrongful aggressors matters in exactly the same way that harm to innocent victims does. The principal aim of the law of self-defence should be justice: the deterrence of wrongful attacks and the prevention of harm to the innocent via the necessary and proportionate harming of those who have made themselves morally liable to be harmed. The aim of the laws of war should ideally be the same. (Sometimes, of course, considerations of justice are outweighed by the necessity of avoiding great harm. Justice is not the whole of the morality of war. But it is the dominant part.)

At present, however, it is simply not feasible for the laws of war—particularly the laws of *jus in bello*—to track considerations of justice closely. The most significant

[14] I am indebted to David Rodin for pressing me to address this challenge.

impediment is epistemic. As I noted earlier, it is difficult for people in general, and for active-duty military personnel in particular, to determine whether a war is just. In part because of this, there are good reasons to believe that war would involve more rather than less injustice if the laws of *jus in bello* were at present to become asymmetrical between just and unjust combatants. It may be that the existing symmetrical laws of *jus in bello* work at least as well as any laws could in present conditions to achieve just outcomes in war.

Yet we could do considerably better in bringing the law into conformity with the demands of justice if we could change the conditions in which the laws would operate.[15] We could, for example, begin to overcome the epistemic obstacles by achieving a better understanding of *jus ad bellum*, understood in moral terms. The relevant issues received serious attention only during the classical and transitional phases of the just war tradition. After that, as we have seen, the law gradually abdicated control over the resort to war, then suddenly reversed itself by adopting a crude, highly restrictive doctrine that is clearly at variance with morality. The work of the classical theorists, though suggestive, is deficient in at least two important respects. First, the discussions of such matters as just cause are quite brief and therefore lack the sustained, rigorous analysis and argument necessary to understand these matters well. Second, the classical discussions are contaminated by religious presuppositions. A defensible understanding of *jus ad bellum* will have to be purged of appeals to sacred texts and church dogmas. Although secular moral philosophy is still in its infancy, it has made extraordinary progress over the past forty years and is now poised, with the analytical tools it has developed, to provide an understanding of *jus ad bellum*, and of the morality of war in general, that is deeper, more rigorous, and better grounded than any previous work in the just war tradition.[16]

An enhanced understanding of *jus ad bellum* will not, of course, mitigate the epistemic problems faced by military personnel, political leaders, and others if it remains an arcane doctrine found only in philosophy books. Once the moral dimensions of *jus ad bellum* are better understood, the knowledge must be disseminated. Part of this process will involve education. Because participation in war is not only physically but morally perilous, we owe it to those who fight on our behalf to train them not only for combat but also for the competent exercise of moral judgment in matters concerning war. But even this would leave an unfair burden on soldiers if they were going to be legally liable for matters of *jus ad bellum*. What is ultimately needed is for an enhanced moral understanding of *jus ad bellum* to find expression in a detailed, nuanced law of *jus ad bellum* that could then be interpreted by an impartial, neutral international court charged with the responsibility for

[15] See Buchanan, A., 'Institutionalizing the Just War', *Philosophy and Public Affairs* 34 (2006), 2.

[16] The observation that secular moral philosophy is still in its infancy is made by Derek Parfit at the end of his magisterial *Reasons and Persons* (Oxford: Oxford University Press, 1984), itself perhaps the best evidence of the progress that has recently been achieved.

making authoritative judgments about this body of law, preferably while wars are in progress, or even prior to their initiation.[17] If combatants or potential combatants could look to the determinations of such a court for guidance concerning the legal status of a war in which they were fighting, or were about to fight, this could substantially mitigate the epistemic constraints that are at present the greatest obstacle to rewriting the laws of *jus in bello* in asymmetrical form, thereby bringing them into greater harmony with considerations of justice.

FN:17

[17] I explore this possibility in greater detail in 'Individual Responsibility and the Law of *Jus ad Bellum*', *Journal of Political Philosophy* (forthcoming).