

EVALUATING THE REVISIONIST CRITIQUE OF JUST WAR THEORY¹

Seth Lazar, RISSS Philosophy, ANU

Some find the very idea of just war theory laughable. Of those, some deny that morality applies at all once the guns strike up; for others, morality always applies, everywhere, and it could never license the exceptional horrors of war. The first group are sometimes called realists. The second group are pacifists. The task of just war theory is to strike a middle path between them: to justify war, but also to limit it (Ramsey [1961]).

Wherever there have been wars—which is everywhere, in every age—lawyers, theologians, philosophers and others have sought to walk this line, to explain how war can sometimes be justified, but that it must always be restrained. Though most commonly associated with the Christian tradition, discussion of the ethics of war can be found in every culture.² But in this essay I will focus on contemporary just war theory, in the work of Anglophone analytical philosophers. I'll call this analytical just war theory. And I will focus on the debate between the most prominent contemporary just war theorist, Michael Walzer, and his revisionist critics. Narrower still, I will focus on one question raised in that debate: how ought we to fight?

The 'ought' in that question is unqualified. Our topic is not merely 'what say the laws of war'? Nor is it an exposition of rules of engagement. Our focus instead is on the categorical moral ought—the one that admits of no exceptions. How, *morally*, ought we to fight?

Some will struggle, again, to make sense of this question. They might be sceptical about the very idea of a categorical moral ought, denying that there are any moral truths, or else arguing that morality itself is conventional, or culturally relative. But war is a tough arena for sceptics and relativists. For is there any judgement of which we are as certain, as the one that it is wrong to intentionally kill children to coerce their government into political or territorial concessions? Although we can't make much progress by focusing on easy cases alone, we cannot vindicate the deep moral revulsion that such scenarios inspire without acknowledging objective facts about the morality of war.³

Of course, there is a further question of just *how* we can argue about the morality of war. The standard tools of scientific enquiry are of little use here; nor can we hope to make much progress by focusing only on internal logical consistency. Instead, most analytical just war theorists adopt the method, made famous by John Rawls [1999: 42-5], of 'reflective equilibrium'. On this approach, we develop moral arguments by taking our considered judgements about the permissibility of action in particular cases, and trying to identify the underlying principles that unify them.⁴ We then take those principles and test how they apply to other cases—real or hypothetical. If the principles generate conclusions that conflict with our considered judgements of what one ought to do in those cases, then we must either revise the principles, or revise our judgements. As our project evolves, and we revise our principles in light of our judgements, and our judgements in light of our principles, we

¹ Many thanks to the American Academy of Arts and Sciences and the MacArthur Foundation for sponsoring this project, and to my colleagues at the Academy's workshops for their many helpful suggestions. Thanks in particular to Nancy Sherman, and to Scott Sagan.

² For comprehensive historical sources, see Reichberg et al. [2006]; Reichberg and Syse [2014].

³ Not much hangs on whether you agree with this point. Most of what follows could be rephrased to fit with some alternative metaethical stance.

⁴ Whose considered judgements matter? As I understand reflective equilibrium, each of us needs to make use of his or her own judgements about cases, rather than conduct surveys etc. Of course, if you find that your considered judgements are radically out of step with everyone else's, then that gives you *some* reason to revise them.

approach reflective equilibrium. The underlying standard of epistemic justification is *coherentist*: what justifies my confidence in my judgement about a particular case is that it coheres with my judgements across a range of cases, as well as with an underlying principle that explains them all at once; likewise I am justified in believing in a particular moral principle because of its coherence with other plausible principles, as well as its tendency to deliver reflectively acceptable verdicts across a range of actual and hypothetical cases.

The question of what we may do in war contrasts with that of when we may fight wars in the first place. In this paper I focus only on how we may fight, not on when. Narrower still, I will focus on three candidate principles, which purport to govern the conduct of hostilities:

Noncombatant Immunity: Intentionally killing noncombatants is impermissible.⁵

Proportionality: Unintentionally killing noncombatants is permissible only if it is proportionate to the goals the attack is intended to achieve.

Combatant Equality: These principles and others governing conduct in war apply identically to all combatants, regardless of what they are fighting for.

These three principles do not exhaust the question of how to fight.⁶ But they are at its core. They divide the possible victims of war into two classes—combatants and noncombatants. They place no constraints on killing combatants.⁷ But noncombatants may be killed only unintentionally, and even then, only if the harm that they suffer is proportionate to the intended goals of the attack.⁸ Obviously, then, little is more crucial for understanding these principles than knowing what makes one a combatant. For this paper, however, I will not dwell on that question. Combatants are members of the armed forces of a group that is at war, and non-members who directly participate in hostilities. Noncombatants are not combatants. These are deceptively simple categories. Hard cases abound. But these principles raise challenging enough philosophical problems when considering only the clear-cut cases.

Each of *Noncombatant Immunity*, *Proportionality*, and *Combatant Equality* has deep philosophical roots. In one form or another, each has always had its proponents in the various branches of the just war tradition.⁹ But they have been most clearly articulated and espoused not in theological or philosophical work, but in twentieth century international law. In particular, each achieved definitive expression in the first additional protocol to the Geneva conventions, 1977.¹⁰ For *Noncombatant Immunity*, see, for example, the *Basic Rule*, article 48, which states:

In order to ensure respect for and protection of the civilian population and civilian objects, the Parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only

⁵ For simplicity, throughout I focus on killing, but everything I say applies to other harms as well.

⁶ The most important omission is the principle of *necessity*, which constrains intentional and unintentional killing of combatants and noncombatants alike (some call this the principle of due care, or precautions in attack). In its most straightforward form, it prohibits unnecessary harms—harms that need not be inflicted for one's goal to be achieved. I leave necessity aside in this paper, because it is not in dispute between revisionist and Walzerian just war theorists. For more on necessity, see Lazar [2012].

⁷ Other principles prohibit harming combatants in particular ways—for example with poisonous gas.

⁸ Notice that *Proportionality* is a necessary, but not a sufficient condition for permissibility.

⁹ Though see Reichberg [2013].

¹⁰ This, in turn, drew on a tradition of international law going back at least to the St Petersburg Declaration of 1868.

against military objectives.¹¹

Proportionality corresponds to the part of article 51(4) which prohibits indiscriminate attacks, then includes within that definition

an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.¹²

Combatant Equality is more obliquely provided for in international law, and yet it is there. Article 43 (among other locations) gives sufficient conditions for one's counting as a combatant—that one is a member of the armed forces of a Party to a conflict, other than medical personnel and chaplains—and states explicitly that 'combatants... have the right to participate directly in hostilities'.¹³ The Preamble, meanwhile, makes clear that these principles apply

without any adverse distinction based on the nature or origin of the armed conflict or on the causes espoused by or attributed to the Parties to the conflict.

Analytical just war theory owes much more to these legal instruments than it does to the historical just war tradition. These laws, of course, were themselves shaped by that tradition. But the contemporary just war debate began not with an exposition of classical doctrine, but with an attempt to vindicate these legal and customary norms. And it began, serendipitously, with a book that was published the same year as was the first additional protocol.¹⁴

Michael Walzer's *Just and Unjust Wars* (1977) had a profound influence in numerous academic disciplines, as well as in public policy and military education. Its uptake in analytical just war theory is only one dimension of that influence. The book is wide-ranging, taking on realists and pacifists, addressing questions of resort, conduct, and aftermath, and focusing on topics that have since been largely (and inexplicably) neglected, such as the ethics of sieges, reprisals, and maintaining a stance of neutrality while other states make war. *Noncombatant Immunity*, *Proportionality*, and *Combatant Equality* are just one part of his theory. And yet, they are at the heart of the 'war convention' that Walzer sought to vindicate, 'the set of articulated norms, customs, professional codes, legal precepts, religious and philosophical principles, and reciprocal arrangements that shape our judgements of military conduct' [2006b: 44].¹⁵

The chief virtue of Walzer's core argument for these three principles is its simplicity: a single argument underpins *Noncombatant Immunity* and *Combatant Equality*, and lays the foundations for *Proportionality*. The basic idea is simple. Individual human beings enjoy fundamental rights to life and liberty, which prohibit others from using or harming them in certain ways. Since fighting wars obviously involves depriving others of life and liberty,

¹¹ Article 48, first additional protocol to the Geneva Conventions. This basic principle is reiterated at a number of sites in international law.

¹² Article 51(4b), first additional protocol to the Geneva Conventions.

¹³ Article 43(2), first additional protocol to the Geneva Conventions.

¹⁴ Of course, this was no mere coincidence. Both the protocol and Walzer's book emerged in response to the Vietnam war, and the turmoil of anticolonial warfare. Thanks to Scott Sagan for pointing this out.

¹⁵ Some would deny that Walzer is an *analytical* just war theorist. This strikes me as tendentious. His method is more conventionalist than others in the discipline, but still has the same coherentist form: he draws considered judgements about particular cases from the war convention, then attempts to identify principles that will vindicate those judgements. Most significantly, he was one of the first just war theorists (perhaps after Grotius) to ground an account of the ethics of war in a universal theory of individual human rights.

it can be permissible only if each of the victims has, ‘through some act of his own... surrendered or lost his rights’ [2006b: 135]. This point is general: Walzer claims that ‘a legitimate act of war is one that does not violate the rights of the people against whom it is directed’ [2006b: 135].

Walzer then claims that ‘simply by fighting,’ all combatants, ‘have lost their title to life and liberty’ [2006b: 136]. He suggests two arguments for this conclusion. The first is that simply by posing a threat to me, a person alienates himself from me, and from our common humanity, and so himself becomes a legitimate target of lethal force [Walzer [2006b: 142]. The second has more to do with consent: by participating in the armed forces, a combatant has ‘allowed himself to be made into a dangerous man’ [2006b: 145], and thus surrenders his rights. But the crucial point is this: besides combatants, ‘everyone else retains his rights’ [2006b: 136]. Noncombatants are ‘men and women with rights, and... they cannot be used for some military purpose, even if it is a legitimate purpose’ [2006b: 137].¹⁶

These simple building-blocks give us both *Noncombatant Immunity* and *Combatant Equality*. The former, because noncombatants, in virtue of retaining their rights, are not legitimate objects of attack. The latter, because all combatants lose their rights, regardless of what they are fighting for, so as long as they confine their attacks to enemy combatants, they will fight legitimately, because they will not violate anyone’s rights.

Proportionality requires a little more work. Walzer says that individual noncombatants have rights not to be *used* to advance military goals. He later argues that their rights do not protect them—or at least not to the same degree—against being harmed *in the course of* achieving military objectives. Rather than in a detailed account of the difference between harming someone incidentally, and harming them as a means, his argument for *Proportionality* is grounded in compromise: wars cannot be fought without unintentionally killing noncombatants, so if we are to deny pacifism, we must allow some unintended killing of noncombatants, provided it is proportionate to the objective aimed at. Indeed, besides merely being proportionate, it must also minimise risk to the noncombatants, at least when that is weighed against the objective aimed at, and against additional risks undertaken by the combatants to reduce the risk to noncombatants.

In *Just and Unjust Wars*, as well as elsewhere, Walzer provides various supplementary arguments for these core principles of just conduct in war. In particular, he argues that the similarity between the experiences and motivations of combatants on both sides of most conflicts underpins *Combatant Equality*. They tend to believe that they are justified in fighting, and indeed fight for good reasons—for example, loyalty, a belief that their country is under threat, and trust in their leaders [2006b: 127]. Where these reasons are absent, they often fight under duress. In either case, they fight because they think they have to. The argument is somewhat opaque, but perhaps best understood in this way: it would be hypocritical of either side’s soldiers to blame the other’s for fighting, when they are all so similar, and act out of such similar motivations. Additionally, since from each soldier’s perspective it is really just luck that determines whether his war is just, we might think it unfair to make unjust combatants alone bear the costs of their bad luck (Lazar [2009: 723]). In later work, Walzer also argues that the distinctly collective nature of participation in the military knits combatants together; regardless of what they do as individuals, the mere fact of their membership in the collective that is actively engaged in hostilities makes them liable to harm in a way that is not true for non-members (Walzer [2006a]).

In *Just and Unjust Wars*, Walzer aimed both to interpret and to justify the war convention. It would therefore be misleading to reduce his contribution to a series of arguments that

¹⁶ Controversially, Walzer thought that *Noncombatant Immunity* could not be absolute—in ‘supreme emergencies’ it might be permissible intentionally to attack noncombatants. I set that exception aside here, but see Walzer [2006b: 251ff].

stand or fall on their merits. If those arguments fail, then his attempt to justify the war convention fails. But his *interpretation* of that convention might still ring true, such that even if his arguments do not vindicate that convention, we had better find some argument that does, lest our theory be radically out of step with most people's considered judgments about war.

And yet, Walzer did not just interpret; he also made arguments. And those arguments must be tested like any others.¹⁷ And analytical just war theorists have developed powerful objections to Walzer's core arguments for *Noncombatant Immunity* and *Combatant Equality*. *Proportionality* is also controversial, though less so. The most influential proponent of the 'revisionist' critique of Walzer has been Jeff McMahan [1994, 2004, 2009], but similar arguments have been advanced by others such as Robert Holmes [1989], Richard Norman [1995], David Rodin [2002], Lionel McPherson [2004], Tony Coady [2008], Cécile Fabre [2012], and Helen Frowe [2014], among many others.

The simplest, and I think most telling objection against *Combatant Equality* brings it into conflict with *Proportionality* (McMahan [1994]; Rodin [2002]; Hurka [2005]). Unintended noncombatant deaths are permissible only if proportionate to the military objective sought. That means that the objective is *worth* that much innocent suffering. But what is a 'military objective' worth? Grant for the moment that the 2003 invasion of Iraq was unjust. How many innocent deaths would its successful completion have been worth? How many innocent deaths were proportionate to Assad's forces regaining control of Homs? How many would be proportionate to Joseph Kony's LRA driving African Union forces out of South Sudan?

In each case the answer is obvious: none. Proportionality is about weighing evils: the evil inflicted against the evil averted (Lee [2012]).¹⁸ But the military success of unjust combatants does not *avert* evil, it is itself evil. Evil intentionally inflicted can only add to, not counterbalance, unintended evils.

It is important to see the force of this argument. *Combatant Equality* simply cannot be true.¹⁹ All war involves unintended innocent deaths—most uncontroversially, the deaths of children. If these deaths cannot be justified, then fighting is wrong. And if all you do is advance wrongful aims, then you achieve no good that can outweigh these additional unintended wrongs. So these unintended deaths cannot be justified, so fighting is wrong. The laws of war, applying as they do 'without any adverse distinction based on the nature or origin of the armed conflict', cannot be directly grounded in objective moral norms.²⁰

The revisionists, however, did not stop there. They developed further arguments against *Combatant Equality*, which also wound up undermining *Noncombatant Immunity*. The first move is to accept Walzer's premise that permissible killing in war does not violate the rights of those against whom it is directed. These revisionists agree with Walzer that, in war, combatants may intentionally kill all *and only* those who have 'surrendered or lost' their rights to life and liberty.

But here is the problem. Our rights to life and liberty are a big deal. They are directly connected to our possession of moral status, indeed, might even be constitutive of it. We cannot surrender or lose these rights except when we do something that warrants such a

¹⁷ By this I mean: verify whether the underlying principles have tenable implications when extended to other actual and hypothetical cases besides those Walzer considers.

¹⁸ Or you might say, the good achieved against the evil inflicted (but the good achieved would invariably be the evil averted).

¹⁹ In rejecting *Combatant Equality*, we are also rejecting Walzer's 'independence thesis', that the rules for just conduct in war are independent of those for just resort to war.

²⁰ They might still be indirectly grounded, since these might be the rules that, for example, minimise wrongful killing overall. I lack the space to consider this option in detail, but it is one natural recourse for those who would defend broadly Walzerian conclusions. See, especially, Shue [2008]; Dill and Shue [2012]; Shue [2013].

severe fate.²¹ And Walzer's account of how these rights are lost is simply not plausible. He argues that combatants lose their rights to life and liberty because they themselves threaten the lives of others. Their dangerousness grounds their liability. But merely posing a threat to others—even a lethal threat—is not sufficient to warrant surrender of one's fundamental rights, because sometimes one threatens others' lives for very good reasons.

Allied soldiers landing on the shores of Normandy during the Second World War were fighting against genocide and imperialist expansion; their adversaries were defending those iniquitous ends.²² How could the Allies lose their rights to life and liberty by threatening the lives of those who are defending genocide and bloody imperialism? Returning to the present, why would the soldiers of the Kurdish Peshmerga, heroically fighting to rescue Yazidi Christians from Daesh's genocidal attacks, lose their rights not to be killed by their fascist adversaries? In no other sphere of human activity would we think that posing threats to others in the pursuit of a just aim, *where those others are actively trying to thwart that just aim*, would void or vitiate one's rights against being harmed *by those very people*. Merely posing a threat to another's life cannot justify the loss of one's rights. Combatants fighting for just aims are not permissible targets in war. So *Combatant Equality* must be false: just combatants are permitted to kill unjust combatants, but not vice versa.

Posing a threat oneself is not sufficient for one to be liable to be killed. Nor is it necessary. This is more controversial, but revisionists have long argued that what grounds liability to be killed, in war as elsewhere, is not that one poses a threat to another's life, but that one is *responsible* for such a threat, and that the threat is *wrongful*. One can be responsible for a threat without posing it, as the United States President is responsible for a drone strike which he orders to go ahead, even though he does not himself fire the weapon. Similarly, from his villa in Abbottabad, Osama Bin Laden could not plausibly pose any threats himself. But that does not prevent one mounting a self- or other-defence-based justification for the US having killed him, since from that building he would at least have inspired, and perhaps directed, many other attacks.

As many have noted, this argument undermines *Noncombatant Immunity* (McMahan [1994]; Frowe [2014]). In at least some states, noncombatants play an important role in the resort to military force. In modern industrialized countries, as much as 25 per cent of the population works in war-related industries (Downes [2006: 157-8], see also Gross [2010: 159]; Valentino et al. [2010: 351]); we provide the belligerents with crucial financial and other services; we support and sustain the soldiers who do the fighting; we pay our taxes and in democracies we vote, providing the economic and political resources without which war would be impossible. Our contributions to the state's capacity over time give it the strength and support to concentrate on war. If the state's war is unjust, then many noncombatants are responsible for contributing to wrongful threats. They are therefore permissible targets. So, by these lights, *Noncombatant Immunity* too is false.²³

Most revisionists accept *Proportionality*. But the same techniques used against *Combatant Equality* and *Noncombatant Immunity* place its application to war in doubt. First, note that the licence to unintentionally kill innocent people in war is *far* more permissive than would ever be plausible outside of war. Outside of war we almost never contemplate knowingly killing innocent people as a side-effect of pursuing our legitimate objectives.²⁴

²¹ One might understand our rights to life and liberty as instead having these exceptions built into their specification. But then there would be something that grounds the right, which must be overridden for the exception to be built in. This would just be a terminological change, not a substantive one.

²² Of course they also had other reasons to fight—for example, to defend their comrades-in-arms. I discuss the possible justificatory force of such reasons in Lazar [2013].

²³ Some think that noncombatants' responsibilities are especially salient in asymmetric conflicts, in which are often crucial to the combatants' ability to fight. See, for example, Gross [2010].

²⁴ We often permit practices that will predictably lead to accidents, but that's different from knowingly inflicting such casualties. Mass vaccination programmes might be another example, though in those we run

What, then, explains the additional leeway granted in war?

Moreover, many philosophers think that the purported moral distinction between intended and unintended killing is illusory (e.g. McIntyre [2001]). Even supposing we set their worries aside, *whose* intentions matter in war? The trigger-puller's? His immediate superior, who ordered him to fire? The commander who ordered the attack? The politician who ordered the advance? Does it really make sense to speak of intentions when war-making is such a corporate effort?

Perhaps even these questions have answers. Still, Walzer's argument for *Proportionality* is very quick. If *Proportionality* were not true, we could never fight justified wars. But why treat that as an argument for *Proportionality*, rather than the first step towards pacifism? We need some other argument against pacifism than that it would make war impermissible!

So, *Combatant Equality* is doubly false. Combatants who unintentionally kill noncombatants in the pursuit of unjust aims cannot satisfy *Proportionality*. But their intentional killing is also wrongful, as long as they target combatants fighting for just aims, who retain their rights to life—in the relevant sense, those just combatants are *innocent*. *Noncombatant Immunity* is false because noncombatants, like combatants, can be responsible for contributing to wrongful threats to others' lives, and so can themselves become liable to be killed. *Proportionality* is more widely endorsed, but many think it rests on a spurious distinction between intended and unintended killing, and certainly Walzer's argument for it begs the question against pacifism.

Thus far the revisionist critique of Walzer appears successful. So we have two options: argue that the war convention is mistaken, and *Combatant Equality*, *Noncombatant Immunity*, and perhaps *Proportionality* are all false, at the level of objective morality—that is, be truly revisionist. Or we can advance new arguments in those principles' support. I think that we should devote all our intellectual resources to the latter goal, accepting the former only if all else fails.

For consider what we would be giving up. *Combatant Equality* one can take or leave; it is already pragmatically justified by the fact that combatants will almost always believe that they are fighting for just aims, so any constraints applied to those fighting unjustly would simply be ignored. But giving up on *Noncombatant Immunity* and *Proportionality* is giving up on *a lot*.

If we reject these two principles, then we could go one of two ways. We could argue that intentional and unintentional killing of noncombatants is no worse than killing combatants, or that killing combatants is no better than killing noncombatants. The first path leads to unrestrained warfare, the second to pacifism.

But can we really believe that it is wrong for the Peshmerga to fight against Daesh, defending Yazidis against genocide, just because they will inevitably kill some innocent people along the way? And can we really accept that when the Daesh kill Yazidi noncombatants, their actions are no worse than when they kill the Peshmerga fighters? Can we endorse the reasoning behind arguments that there is no such thing as an 'innocent civilian' in Gaza, because the Palestinians elected Hamas (Eiland [2014])? Or the terrorists' parallel arguments for the permissibility of targeting citizens of western countries because they are responsible for their governments' foreign policies (bin Laden [2002])? These costs are too great to bear. We cannot simply accede to aggression. And we must not fight without restraint.

In what remains of this paper, I cannot hope to decisively vindicate the war convention.

risks, rather than knowingly killing innocent people, the number risked is almost always very small relative to those benefited, and vaccinations are in the *ex ante* interest of all those who receive them, even those who end up, *ex post*, being harmed. Thanks again to Scott Sagan here.

But I can sketch an account, and indicate the most promising direction of travel.

We can start with what should be a truism. Every person's innocent happiness makes the world a better place. More generally, our flourishing contributes value to the universe. And we always have some reason to make the world a better place. But that is not all we have reason to do. To see this, let us briefly contrast moral value with economic value.

Imagine you are an executive, running a business—a factory. You have a number of different machines on your assembly line. Each contributes to your overall productivity, and each generates expenses. You care about each machine only insofar as it affects your profits. If one becomes a net cost, then you will shut it off without compunction. If you can realise more profit by taking one machine apart, and using it as spares for another, then you will do so.

If ethics were like business, then we would maximise value just as the executive maximises profits. We would treat people like the executive treats her machines. We would harm one person just in case doing so would deliver a marginally greater benefit to another. This treats her as a mere *site* of value, because her weight in our deliberations is exhausted by the value that is instantiated in her life. We would even *use* people to benefit others—for example, harvesting an unwilling victim's organs to save the lives of others. This treats him as a *tool* for realising value, breaking him down for spare parts like a machine.²⁵

Ethics is not like business. People are not mere sites or tools for the realisation of value. Recognising this amounts to recognising that people have *moral status*. Why do we have moral status? As Walzer concedes in *Just and Unjust Wars* Walzer [2006b: 54], explaining this is no easy task. My own view is that it is grounded in our fundamental freedom—our capacity as rational agents to make our own choices, for our own reasons. But even if you disagree about what grounds moral status, you can, I think, agree with my account of its normative implications. And, like Walzer, I think we can most fruitfully understand those in terms of individual rights.

Our fundamental human rights to life and liberty protect us against being treated as mere sites or tools for the realisation of value. To sacrifice my interests for the greater good, or to use me as a means to advance the greater good, is not merely to harm me (subtracting that much value from the world) but to infringe my rights. That your action infringes my rights constitutes an additional reason against harming me, over and above the disvalue realised by doing so. This means you cannot justify harming me, just in case you could thereby do marginally more good. This is the difference between people and machines in an assembly line: machines do not have rights, so the executive can shut them down or use them for spare parts just in case doing so will maximise her profits.

Different ethical theories will understand these rights in different ways. I want to insist only on three points. First, our fundamental rights should have neither trivial nor absolute weight. They are not mere tie-breakers. But nor must we respect them though the heavens should fall. Their weight should be somewhere between those two extremes.

Second, the weight of a right can vary depending on how it is infringed. Here the site/tool distinction is important again. It is harder to justify infringing people's rights as a *means* to advance your goals, than to justify harming them incidentally, in the course of pursuing your goals. In the former case, you *use* the victim, like the executive breaking up the machine for parts. You treat your victim as a tool. In the latter case, you are no better off for the victim's presence than you would have been had he not been there. His death (for example) is a regrettable, but unavoidable, side-effect of achieving your goals. In this case, you treat him as a mere site for the realisation of value.

²⁵ The central idea here is obviously Kantian, but it finds its clearest modern expression in Quinn [1989]; Tadros [2011].

Just as it is worse to use someone than to harm them incidentally when you are aiming at the good, the same is true when aiming at the bad. All the killing done by Daesh fighters is deeply morally odious. But publicly beheading a victim to coerce his government is worse than, for example, killing a passer-by in the blast when an improvised explosive device is triggered by an enemy vehicle.

Third, even one's most fundamental rights can be lost. Most analytical just war theorists agree that if you are sufficiently responsible for an unjustified threat that is serious enough to make killing proportionate, and if killing you is necessary, then you can be *liable* to be killed—that is, you 'lose or surrender', in Walzer's terms, your right not to be killed. In such cases, sacrificing you or using you as a tool to advance the good of others can be permissible.

One can be responsible for a threat in virtue of posing it oneself, or contributing to it, or even failing to prevent it. As we saw above, this means that liability can potentially extend not only to the soldier who pulls the trigger, but to the commander who orders him to do so, and to the politicians who give the commanders their orders, and perhaps even to the citizens who elect the politicians.

Unlike some other analytical just war theorists, however, I think that for you to be liable to be killed, you have to have done, or failed to do, something significant—something to which the loss of your fundamental rights is in some way *proportionate*. This might mean that your causal contribution was itself significant (for example, but for your order, the threat would not have occurred). Or it might mean that you are blameworthy for contributing as you did. The details are tricky, and need not detain us here.²⁶ I mean simply to note that liability to be killed is a very serious derogation from your moral status, and it must fit your conduct.

So, what does this all mean for the ethics of war? In essence, it shows us that not all killings are equally seriously wrong. This is the key element in *any* attempt to walk the line between realism and pacifism. When killing for just aims, killing those with rights is worse than killing those who have lost them; killing people as a means is worse than killing them as a side-effect. When killing for unjust aims, all the killing one does is wrong, but still, some wrongful killing is worse than others.

But how do these categories map onto the combatant/noncombatant divide so essential to the war convention? Imperfectly, we must admit. Walzer was right, I think, that almost all noncombatants retain their rights to life. Here I disagree with the revisionists, who think that one can be liable to be killed in virtue of a very low degree of responsibility for a wrongful threat.²⁷ If that were right, then all the noncombatants whose voluntary actions foreseeably contribute to their state's capacity to wage unjust wars would be liable to be killed. As already noted, few adults would escape liability on these grounds.²⁸

This is not the place for a detailed investigation into responsibility and liability. But nor is one necessary. I doubt whether any theoretical account, or any intuitions about hypothetical cases, could be as robust as my intuitions about the actual case of war. Ordinary voters and taxpayers are *not* liable to be killed, even when their militaries foreseeably fight unjust wars. Killing them intentionally *does* wrong them—egregiously. For example, British and American citizens who voted for the governments that fought an unjust war in Iraq in 2003, and paid the taxes that funded that war, were not liable to be killed in order to avert the unjust threats that the war involved.

The best theoretical explanation for this judgement is the one alluded to above: that

²⁶ For my views on liability, see Lazar [2009, 2010, 2012, 2015].

²⁷ McMahan [2004, 2005, 2009].

²⁸ Few of them now accept that their view entails this, but I think most of their arguments to the contrary illegitimately apply a double standard. See McMahan [2011]; Lazar [Forthcoming].

there must be some kind of *fit* between one's behaviour and the fate of becoming liable to be killed. But once we concede that point, then we must also concede that for many combatants in war, even those fighting for the unjust side, this fit is absent.²⁹ This is obviously true of combatants on the just side—those fighting for just aims do nothing to lose or surrender their rights. But, against both Walzer and the revisionists, it is true also for many combatants on the unjust side. Many of them neither pose threats themselves, nor contribute to threats posed by their comrades. Many make no difference at all; some are a positive hindrance. As Walzer notes, many serve for good reasons—out of loyalty, and a belief that their cause is just. A grisly death no more fits their behaviour than it does that of many noncombatants. What's more, in all actual conflicts this clean division between the 'just side' and the 'unjust side' will fall apart. Many combatants fighting for the ostensibly just side will be contributing to subsidiary unjust aims and operations and so lose their rights to life; many fighting for the ostensibly unjust side will be contributing to subsidiary just aims and operations, and so retain those rights.

In a nutshell: if almost all noncombatants retain their rights to life in war, then many combatants, even on the unjust side, will keep the same rights. So, if we are to deny pacifism, we must reject Walzer's dictum that legitimate acts of war respect the rights of those against whom they are directed. In passing, I think this makes perfect sense. The contrary idea is one of a 'morally pure' war, in which nobody's rights are intentionally violated. I think such an ideal is unattainable in the real world. If just wars could be fought in which we intentionally killed only those who are liable to be killed, then wars would not be such tragic affairs.

So, noncombatants may not be intentionally attacked, because they retain their rights to life. My basis for *Noncombatant Immunity* is therefore the same as Walzer's. And the reason killing them unintentionally can be permissible when intentional killing is not, is because we enjoy stronger protections against being harmed as a means, than against being harmed incidentally in the course of achieving some end. Walzer's pragmatic argument for *Proportionality* is unnecessary: this distinction is central to plausible theories of normative ethics.

Combatant Equality is a little trickier. *Noncombatant Immunity* applies to soldiers on both sides. But *Proportionality* does not apply in quite the same way, since it gives a sufficient condition for unintentional killing being permissible. But unjust combatants cannot kill permissibly in the pursuit of unjust aims, whether unintentionally or otherwise. Still, the basic distinction that *Proportionality* describes applies to unjust combatants as well, and it's certainly true that if they are going to fight, then it is somewhat better that they kill noncombatants unintentionally than that they do so as a means. This means that something close to *Combatant Equality* is true: just combatants should respect the rules of war because only by doing so can they fight justly; unjust combatants should respect those rules because they thereby minimise the wrongfulness of their actions.³⁰

However, there is more work still to do. As just argued, many combatants, even on the unjust side, retain their rights not to be killed. So if my justification for *Noncombatant Immunity* is not to lead to pacifism, we must explain how attacking nonliable combatants can be permissible, without thereby justifying attacks on nonliable noncombatants. We need to show that killing innocent noncombatants is worse than killing innocent combatants. I defend this principle at length elsewhere.³¹ Here I will just allude to three arguments in its favour.

First, the very fact that noncombatants are so much likelier than combatants to retain their rights to life itself makes killing innocent noncombatants worse than killing innocent

²⁹ I argue for this point at length in Lazar [2010].

³⁰ For a similar approach to vindicating *Combatant Equality*, see Haque [Forthcoming].

³¹ Lazar [2015].

combatants, because it is other things equal worse to kill someone more riskily than less riskily. Intentionally killing civilians amounts to taking a very great risk of killing an innocent person; intentionally killing combatants takes a somewhat lesser risk. Riskier killings are worse than less risky ones, because they display a greater readiness to treat one's target as a site or tool for the realisation of one's ends, and because they more seriously undermine our interest in security.

Second, noncombatants are more vulnerable and defenceless than are combatants. They are likelier to suffer more severe harm from any given threat that they face; and they are less able to remediate the risks imposed on them. We have basic duties to protect those who are most vulnerable (as long as they are not liable to suffer some harm), and attacking the vulnerable not only violates their ordinary rights to life and liberty, but breaches these additional duties of care. Additionally, when we attack the defenceless, we deprive them of control over some of their most important interests. We render them dependent on us or on their defenders. This additional harm compounds the wrongfulness of killing them: whenever you kill a defenceless person, you have not merely killed her, but disempowered her as well.

Third, even combatants who pose only justified threats typically enjoy weaker protections against intentional harm than do noncombatants, even though neither are liable to be killed. This is because most combatants have no control over whether the threats they pose are just. Everything from their perspective could have been identical, but they would have been killing unjustly. So, it's true that they are not liable to be killed, because they contribute only to just threats. But that is a matter of luck. And we owe more to those who respect our rights robustly (such as noncombatants who do not pose threats), than we do to those who respect our rights just as a matter of luck.

These are just sketches of arguments that I make in detail elsewhere (Lazar [2015]). But they should give an idea of the necessary direction of travel. The basic strategy is to show that, even though Walzer was wrong to think that *only* noncombatants retain their rights to life in war, nonetheless Walzer's revisionist critics are wrong when they argue that just combatants enjoy undiminished moral protections against harm, and that all unjust combatants are liable to be killed. Matters are much messier than either side supposed. Interestingly, the real challenge is not to explain why noncombatants are immune from intentional attack in war—that part is relatively easy: because they retain their rights to life. Instead, it is to explain why killing unjust combatants is permissible, given that many of them also are not liable to be killed. The task is less one of explaining noncombatant immunity, but of explaining combatant non-immunity. If we cannot do this, then there is ultimately no stopping point short of endorsing pacifism.

REFERENCES

- bin Laden, O. 2002. 'Letter to America,' *The Guardian*:
<http://www.theguardian.com/world/2002/nov/24/theobserver>.
- Coady, T. 2008. *Morality and Political Violence*, Cambridge: Cambridge University Press.
- Dill, J. and H. Shue 2012. 'Limiting the Killing in War: Military Necessity and the St. Petersburg Assumption,' *Ethics & International Affairs* 26/03: 311-33.
- Downes, A. 2006. 'Desperate Times, Desperate Measures: The Causes of Civilian Victimization in War,' *International Security* 30/4: 152-95.
- Eiland, G. 2014. 'In Gaza, There Is No Such Thing as 'Innocent Civilians',' *Ynetnews.com*:
<http://www.ynetnews.com/articles/0,7340,L-4554583,00.html>.
- Fabre, C. 2012. *Cosmopolitan War*, Oxford: Oxford University Press.
- Frowe, H. 2014. *Defensive Killing*, Oxford: Oxford University Press.
- Gross, M. 2010. *Moral Dilemmas of Modern War: Torture, Assassination and Blackmail in an Age of Asymmetric Conflict*, Cambridge: Cambridge University Press.

- Haque, A. A. Forthcoming. *Law and Morality at War*, Oxford: Oxford University Press.
- Holmes, R. 1989. *On War and Morality*, Princeton: Princeton University Press.
- Hurka, T. 2005. 'Proportionality in the Morality of War,' *Philosophy & Public Affairs* 33/1: 34-66.
- Lazar, S. 2009. 'Responsibility, Risk, and Killing in Self-Defense,' *Ethics* 119/4: 699-728.
- Lazar, S. 2010. 'The Responsibility Dilemma for *Killing in War*: A Review Essay,' *Philosophy & Public Affairs* 38/2: 180-213.
- Lazar, S. 2012. 'Necessity in Self-Defense and War,' *Philosophy & Public Affairs* 40/1: 3-44.
- Lazar, S. 2013. 'Associative Duties and the Ethics of Killing in War,' *Journal of Practical Ethics* 1/1: 3-48.
- Lazar, S. 2015. *Sparing Civilians*, Oxford: Oxford University Press.
- Lazar, S. Forthcoming. 'Liability and the Ethics of War: A Reply to Strawser and McMahan' in *Self-Defence* ed. Michael Weber, Oxford: Oxford University Press.
- Lee, S. 2012. *Ethics and War: An Introduction*, Cambridge ; New York: Cambridge University Press.
- McIntyre, A. 2001. 'Doing Away with Double Effect,' *Ethics* 111/2: 219-55.
- McMahan, J. 1994. 'Innocence, Self-Defense and Killing in War,' *Journal of Political Philosophy* 2/3: 193-221.
- McMahan, J. 2004. 'The Ethics of Killing in War,' *Ethics* 114/1: 693-732.
- McMahan, J. 2005. 'The Basis of Moral Liability to Defensive Killing,' *Philosophical Issues* 15/1: 386-405.
- McMahan, J. 2009. *Killing in War*, Oxford: Oxford University Press.
- McMahan, J. 2011. 'Who Is Morally Liable to Be Killed in War?,' *Analysis* 71/3: 544-59.
- McPherson, L. 2004. 'Innocence and Responsibility in War,' *Canadian Journal of Philosophy* 34/4: 485-506.
- Norman, R. 1995. *Ethics, Killing and War*, Cambridge: Cambridge University Press.
- Quinn, W. S. 1989. 'Actions, Intentions, and Consequences: The Doctrine of Doing and Allowing,' *Philosophical Review* 89: 287-312.
- Ramsey, P. 1961. *War and the Christian Conscience: How Shall Modern War Be Conducted Justly?*, Durham, N.C: Duke University Press.
- Rawls, J. 1999. *A Theory of Justice*, Oxford: Oxford University Press.
- Reichberg, G. M. 2013. 'The Moral Equality of Combatants – a Doctrine in Classical Just War Theory? A Response to Graham Parsons,' *Journal of Military Ethics* 12/2: 181 - 94.
- Reichberg, G. M. and H. Syse 2014. *Religion, War, and Ethics: A Sourcebook of Textual Traditions*, New York City: Cambridge University Press.
- Reichberg, G. M., H. Syse, and E. Begby 2006. *The Ethics of War: Classic and Contemporary Readings*, Oxford: Blackwell.
- Rodin, D. 2002. *War and Self-Defense*, Oxford: Clarendon Press.
- Shue, H. 2008. 'Do We Need a Morality of War?,' in *Just and Unjust Warriors: The Moral and Legal Status of Soldiers*, ed. David Rodin and Henry Shue, Oxford: Oxford University Press: 87-111.
- Shue, H. 2013. 'Laws of War, Morality, and International Politics: Compliance, Stringency, and Limits,' *Leiden Journal of International Law* 26/02: 271-92.
- Tadros, V. 2011. *The Ends of Harm: The Moral Foundations of Criminal Law*, Oxford: Oxford University Press.
- Valentino, B., P. Huth, and S. Croco 2010. 'Bear Any Burden? How Democracies Minimize the Costs of War,' *The Journal of Politics* 72/2: 528-44.
- Walzer, M. 2006a. 'Terrorism and Just War,' *Philosophia* 34/1: 3-12.
- Walzer, M. 2006b. *Just and Unjust Wars: A Moral Argument with Historical Illustrations*, New York: Basic Books.