

Just War Theory, Legitimate Authority, and Irregular Belligerency

Note: This is a pre-publication draft of a paper forthcoming in *Philosophia*.

Please cite the published version at

<http://link.springer.com/article/10.1007/s11406-014-9577-z>

1.Introduction

The dominant intellectual framework for morally evaluating warfare – the just war tradition – has, since its earliest incarnations, included the requirement that wars be initiated and waged by an entity with the authority to do so. For the founding fathers of the tradition, such as Augustine and Aquinas, the authority requirement was considered the first and most important component.¹ Interestingly however, while recent years have witnessed a huge rise in interest in the ethics of war, the authority criterion receives far less attention in contemporary discussions than other elements of the theory.²

In this paper I aim to show that this is an oversight worth rectifying. With some sympathy for the classical view, I argue that the authority criterion plays a much more significant role within mainstream just war theorising than is commonly supposed. As standardly understood, the authority criterion provides a necessary condition for justifying the resort to war, but has no bearing on the question of permissible conduct in war. In opposition, I argue for an alternative, and more expansive, interpretation of the criterion, which attributes to it a fundamental role in assessing this latter question.

With this revised interpretation in place, I demonstrate its advantages by applying it to the practical issue of armed conflicts that are initiated and fought by non-traditional or ‘irregular’ belligerents. While several theorists have recognised that this common feature of contemporary armed conflict poses a challenge to just war theory in general – and to the authority criterion in particular – I argue that existing discussions frequently misconstrue the nature of the challenge, since they assume the standard interpretation of the authority requirement and its role within the theory. I then show that the revised interpretation provides a clearer

¹ On this point see, among others, John Langan, ‘The Elements of Augustine’s Just War Theory’, *Journal of Religious Ethics* 12, No. 1 (1984), 19-38; Stephen C. Neff, *War and the Law of Nations: A General History*, (Cambridge: Cambridge University Press, 2005), p.50; Frederick Russell, *The Just War in the Middle Ages*, (Cambridge: Cambridge University Press 1975), pp. 68-71; James Turner Johnson, ‘Aquinas and Luther on Sovereign Authority’, *Journal of Religious Ethics*, 31, No. 1 (2003), 3-20; The authority criterion, or something closely analogous to it, was also a central component of Confucian approaches to the morality of warfare. For discussion, see Sumner B. Twiss and Jonathan Chan, ‘The Classical Confucian Position on the Legitimate Use of Military Force’, *Journal of Religious Ethics* 40, No. 3 (2007), 447-472.

² Others who have noted this lacuna include, Anthony Coates, *The Ethics of War*, (Manchester: Manchester University Press, 1997), p.123; Cecile Fabre, ‘Cosmopolitanism, Just War Theory and Legitimate Authority’, *Ethics and International Affairs* 84, No. 5 (2008), 963-976; Anthony F. Lang Jr., Cian O’Driscoll and John Williams, ‘Introduction’ in Anthony F. Lang Jr, Cian O’Driscoll and John Williams (eds), *Just War: Authority, Tradition and Practice* (Washington DC: Georgetown University Press, 2013), 1-19.

account of both the challenge posed by non-traditional belligerency and the kind of response that it requires.

I then show that my arguments for the revised interpretation of the criterion generalise beyond contemporary mainstream just war theory. As I argue, the authority criterion plays a structurally similar role in classical just war theory despite its endorsing a radically different conception of just conduct in war. In doing so, I demonstrate an important continuity within the just war tradition that often goes unnoticed.

The aims of this paper are largely interpretive and clarificatory, aiming to show that the authority criterion expresses a more significant normative claim than is commonly supposed. I conclude by discussing some of the further, evaluative questions that this interpretation raises.

2. The Structure of Orthodox Just War Theory

Just war theory ranges over two main fields of inquiry.³ The first, known as *jus ad bellum*, specifies the conditions that must be satisfied in order for the resort to war to be morally justified. The second, known as *jus in bello*, addresses the moral permissibility of conduct in war by individual participants.

Particular accounts of the content of *jus ad bellum* vary in their specifics, but the following six conditions represent a reasonable consensus.⁴ In order for the resort to war to be morally justified the following individually necessary and jointly sufficient criteria must be satisfied: the war must have a just cause; it must be fought with the right intentions; the harm caused by the war must be proportionate to the good achieved; it must be the last resort; it must have a reasonable prospect of success; lastly, it must be initiated and waged by a legitimate authority.⁵

Discussion of *jus in bello* focuses on two main requirements that individual participants must satisfy in order to act morally permissibly in war. Firstly, they must discriminate between legitimate and illegitimate targets and attack only the former. The legitimate/illegitimate target distinction is typically held to track the distinction between combatants and non-combatants. This does not mean that the discrimination requirement prohibits causing harm to non-combatants in war, merely that *targeting* non-combatants is prohibited. Harming non-combatants collaterally, as a side-effect of attacking military targets, does not violate the discrimination requirement. Such harms are constrained by the second main requirement of *jus in bello*, which holds that harms caused in war must be proportionate to the military advantage gained by doing so.

The relationship between these two domains is highly important. According to what has been termed the *orthodox* account of just war theory – as influentially

³ I leave aside here the more recently emphasised fields of justice in ending wars (*jus ex bello*) and justice following war (*jus post bellum*).

⁴ For a useful survey and comparison of different accounts of *jus ad bellum*, see Christopher Toner, 'The Logical Structure of Just War Theory', *The Journal of Ethics* 14, No.2 (2010), 81-102.

⁵ The criterion is also variously referred to in the literature as the 'right', 'proper', 'competent' or 'sovereign' authority requirement.

defended by Michael Walzer and finding resonance in both the law of armed conflict and in folk judgements about war – *jus ad bellum* and *jus in bello* are “logically independent” of one another.⁶ On this view, the question of whether a war satisfies the criteria of *jus ad bellum* has no bearing on whether individual participants in that war act permissibly or impermissibly when they fight in it, and *vice versa*.⁷

This independence underpins a central aspect of orthodox accounts, concerning how *in bello* permissions and prohibitions are distributed between opposing combatants in war. According to the orthodox view, *in bello* norms apply neutrally to all parties to a war and are equally satisfiable by all combatants, independently of the *ad bellum* status of the wars in which they fight. Term this the *Equality Thesis*.⁸ According to the Equality Thesis, provided that combatants in war target only opposing combatants and proportion the harms they cause to military advantage, they act morally permissibly.

3.The Standard Interpretation of the Authority Criterion

This paper focuses on one of the above just war criteria – the requirement that a war be initiated and waged by a legitimate authority. To begin, it is helpful to distinguish two questions we can ask about the authority criterion. Firstly, we can ask what normative consequences are meant to follow from the possession or non-possession of war-making authority. Term this the question of *normative effect*. Second, we can ask which properties an entity must possess in order to have war-making authority. Term this the question of *relevant properties*.

In terms of its normative effect, the authority criterion is standardly understood to function solely as an *ad bellum* requirement, imposing a necessary condition for the resort to war to be morally justified, but having no bearing on the permissibility of conduct in war.⁹ Christopher Toner usefully suggests that each component of *jus ad bellum* can be interpreted as tracking one of several distinct variables relevant to determining the permissibility of action. In order to morally evaluate any action, we need to know several things: what action has been done; why it was done; how it was done; and who did it. Applied to the particular act of resorting to war, the *ad bellum* criteria of just cause, right intention proportionality, success and last resort can be understood as pertaining to the ‘what’, ‘why’ and ‘how’ questions. The authority criterion, by contrast, addresses the distinct question of ‘who’ is initiating the war and directing its prosecution.¹⁰ The authority criterion thus stands apart

⁶ Michael Walzer, *Just and Unjust Wars: A Moral Argument With Historical Illustrations*, 4th Edition (New York: Basic Books, 2006), p.21.

⁷ Ibid.

⁸ For an overview of the equality thesis and the debate surrounding it, see David Rodin and Henry Shue ‘Introduction’ in David Rodin and Henry Shue (eds), *Just and Unjust Warriors: The Moral and Legal Status of Soldiers* (Oxford: Oxford University Press, 2008), 1-18.

⁹ This interpretation is particularly reinforced on an orthodox approach to just war theory, which hold that these two fields are independent of one another.

¹⁰ Toner, ‘The Logical Structure of Just War Theory’.

from the other *ad bellum* criteria in an important respect. Whereas the others may be characterised as *external* conditions, pertaining to aspects of the interactions between belligerent parties, the authority criterion imposes an *internal* constraint, focusing on the identity and character of a belligerent entity.¹¹

Characterised in the broadest possible terms, the authority criterion is standardly taken to capture the following normative claim:

The Standard Authority Criterion: In order for a war to be morally justified, it must be initiated and fought by an entity that possesses a certain set of properties. Wars fought by entities which lack those properties are morally unjustified.

On the standard view, then, justified warfare is an activity restricted to a certain class of entities. Of course, this still leaves it open which entities qualify. Particular accounts of the relevant properties vary, but on a fairly standard view, a belligerent party must, in order to qualify, constitute a recognised state, or, less stringently, a non-state entity that shares some central features of statehood, such as being an organised political community with *de facto* control over territory and a population. A more precise view requires not only that a belligerent be of a certain state-like type, but also that the resort to war must be deliberated upon and declared through the official procedures of the state (or quasi-state entity) that are entrusted with this important task and which possess the legal authority to enact the various apparatus of war, such as raising the armed forces, instituting conscription, nationalising the means of production, etc.¹²

Restricting war-making in this way seems ethically advantageous in several respects. For example, limiting justified war to entities with certain institutional procedures may have the advantages of making the resort to war less rash, providing a bulwark against private interests within a community gaining disproportionate influence, and may help ensure that the decision to go to war better accords with the will of the citizenry. However, perhaps as a result of its legalistic flavour, the authority criterion is often treated as a rather bureaucratic addendum to the *jus ad bellum* 'checklist', of far less moral significance than requirements like just cause or proportionality.¹³

¹¹ On the distinction between external and internal constraints on the resort to war, see Allen Buchanan, 'The Internal Legitimacy of Humanitarian Intervention', *Journal of Political Philosophy* 7, No.1 (1999), 71-87.

¹² See, for example, Nicholas Fotion, *War and Ethics: A New Just War Theory*, (London: Continuum, 2007), pp.18-20; Michael Quinlan and Charles Guthrie, *Just War*, (New York: Bloomsbury, 2007), p.13; Brian Orend, *Michael Walzer on War and Justice*, p.87; Richard J. Regan, *Just War: Principles and Cases* (Washington DC: Catholic University of America Press, 1996), Ch.2; Henrik Syse and Helene Ingierd, 'What Constitutes a Legitimate Authority?', *Social Alternatives* 24, No.3 (2005), 11-16.

¹³ For example, the few discussions of applying the authority criterion in practice predominantly focus on the extent to which the President of the United States has the legal authority to take the nation to war without congressional approval. Paul Christopher 'The Ethics of War and Peace: An Introduction to Legal and Moral Issues, 3rd Edition (New Jersey: Prentice Hall, 2004), pp.87-88; Orend, *Michael Walzer on War and Justice*, p. 97; Regan, *Just War*, Ch.2.

In what follows, I will argue that the authority criterion plays a much more important role within mainstream just war theory than is standardly assumed. More specifically, I will argue for a different account of the normative effect that is meant to follow from the possession or absence of war-making authority. Against the standard interpretation of the authority criterion – which holds that the authority criterion functions restrictively within *jus ad bellum* – I argue that the authority criterion also plays a crucial *permissive* role within the *jus in bello* component of the theory.

4.The Discontinuity Thesis

The argument proceeds in three steps. The first is generated by comparing an orthodox conception of *jus in bello* with our settled views regarding the permissibility of harming and killing in ordinary, non-war contexts.

Despite their pervasiveness in common-sense thought about war and in the law of armed conflict, there is an obvious and important question here concerning whether these norms can be given a principled grounding. After all, individuals are generally thought to possess basic rights against being killed and maimed, which impose stringent moral constraints on so doing. Yet war involves acts of killing and maiming on a grand scale.

One strategy for grounding an orthodox conception of *jus in bello* is by showing that it can be derived from the same justifications for killing and maiming that we accept circumstances other than war. However, as several theorists have recently pointed out, it is actually very difficult to do so. In particular, the Equality Thesis has proven stubbornly immune to such an explanation.¹⁴ I lack the space to provide a full overview of this important debate.¹⁵ Instead, by way of illustration, I'll outline how two popular attempts to ground the equality thesis in this way are unsuccessful.

The first view, influentially defended by Michael Walzer, appeals to the intuitive permissibility of killing in self-defence.¹⁶ On this view, by threatening their opponents with lethal harm, combatants thereby lose their right not to be killed by their opponents in self-defence, and may therefore be killed by their opponent without their rights being violated. In the relevant terminology, combatants render themselves *liable* to lethal defensive force. Since, all combatants are “dangerous men”, posing lethal threats independently of the *ad bellum* status of the wars in

¹⁴ Jeff McMahan has done most to argue for this. Jeff McMahan, *Killing in War* (Oxford: Oxford University Press, 2009), Chs. 1-2. For discussion, see the exchange between McMahan and Michael Walzer published in *Philosophia*. Jeff McMahan, *The Ethics of Killing in War*, *Philosophia* 34, No.1 (2006); 23-41; Jeff McMahan, 'Killing in War: a reply to Walzer' *Philosophia* 34, No.1 (2006), 47-51; Michael Walzer, 'Response to McMahan's Paper', *Philosophia* 34, No.1 (2006), 43-45.

¹⁵ For a useful collection of papers on this topic, see Rodin and Shue (eds) *Just and Unjust Warriors*.

¹⁶ Walzer, *Just and Unjust Wars*, pp.144-145.

which they fight, all are liable to be killed by their opponents.¹⁷ Given this mutual liability, all combatants possess an “equal right to kill”.¹⁸

However, the problem with this neat defence of the Equality Thesis is that it relies on a conception of liability that seems implausible in circumstances other than war. Theories of self-defence typically treat mere threat-posing as insufficient for liability. This is for good reason. Potential murder victims, for example, do not render themselves liable to defensive force if they defend themselves against their attacker with proportionate and necessary harm. Yet a threat-based account of liability, which supports a neutrally distributed permission to kill in war, would seem to have precisely this implication.

A plausible account of liability then requires, at the very least, the existence of a threat of *unjustified* harm. This addition yields the correct result in the murderer/victim case. Since only the attempted murderer poses an unjustified threat, only the attempted murderer is liable to defensive harm. However, when applied in the context of war, this account of liability cannot support the equality thesis. The reasoning here parallels that in the simple murderer/victim case, the thought being that any plausible account of individuals’ liability in war must be sensitive to whether the wars in which they fight are justified or unjustified. While combatants who fight in unjustified wars may satisfy the revised criterion of liability, it is hard to see how those who fight in justified wars do so. The Equality Thesis thus finds no support in ordinary principles of self-defence.

A different attempt to ground the Equality Thesis appeals to consent-based justifications for harming. On this view, by voluntarily joining the military and participating in wars combatants thereby waive their right against such treatment, regardless of whether they fight in just or unjust wars. Given this mutual consent, combatants may kill their opponents without violating their rights, independently of the justice of their wars.¹⁹

There are, however, several problems with this argument. Most importantly, it is doubtful that the act of freely entering the military and accepting the associated risks entails waiving one’s right not to be killed by one’s opponents in war.²⁰ For example, imagine that Benny is due to testify in court against the Mafia next week and, understandably, fears for his life. He explains his situation to Julie, who then consents to be Benny’s bodyguard in full knowledge of the risks. If Benny is then attacked by a Mafia assassin and Julie takes a bullet for him, it seems wrong to say that Julie is not wronged *by the assassin* when he shoots her, even though she consented to the risk. While Julie’s act of consent may successfully alter her rights

¹⁷ Ibid. p.145.

¹⁸ Ibid. p.41.

¹⁹ Versions of this argument have been put forward, independently, by Michael Walzer and Thomas Hurka. Walzer, *Just and Unjust Wars*, p.37; Thomas Hurka, ‘Liability and Just Cause’, *Ethics and International Affairs* 20 (2007), 199-218.

²⁰ This problem is raised in McMahan, *Killing in War*, p.52.

and duties *vis-à-vis* Benny, it does not affect the normative situation between her and the assassin.²¹

This brief comparison between an orthodox account of *jus in bello* and our views about the permissibility of harming in non-war contexts reveals a serious *prima facie* tension. The tension rests on the fact that ordinarily the moral assessment of an activity's ultimate aims functions as a constraint on the permissibility of its constituent acts, particularly so when these acts involve inflicting serious harms on others. Yet the orthodox view holds that this is not the case in war. Instead, the norms governing harming in war are more permissive than those that apply elsewhere.²²

My aim at this point is not to take a stand on whether this result should be taken to count against an orthodox view, which has been extensively discussed by others. Instead I am interested in what follows from a commitment to an orthodox view of *jus in bello*, once this tension is made overt, in terms of theorising about the authority criterion and its role within just war theory. In Section 9 I will consider the more specific issue of how the defensibility of orthodox just war theory rests on a defence of the authority criterion.

Given the present aim, the important point to note here is that in order to avoid an obvious problem of inconsistency, orthodox just war theory requires a commitment to what I term the *Discontinuity Thesis*. According to the discontinuity thesis, war is morally disanalogous from ordinary cases of violence in some important respect, and thus cannot be analysed solely in terms of justifications for harming contained within ordinary interpersonal morality. In conditions of war, normal moral principles are either replaced or supplemented by additional war-specific moral considerations.²³ On this ethically dualist view, there need be no conflict between the moral norms that govern each domain, since war and non-war fundamentally differ in some morally relevant respect. War is to some degree morally *sui generis*, irreducible to the principles that govern other domains of action.²⁴

²¹ In addition, Asa Kasher and Amos Yadlin argue that entering military service does not alter the normative situation between a citizen and their state, so that the state is not permitted to impose additional risks on their military personnel simply in virtue of their combatant status. Asa Kasher and Amos Yadlin, 'Military Ethics of Fighting Terror: An Israeli Perspective', *Journal of Military Ethics* Vol.4, No.1 (2005), 3-32 at p.17.

²² In addition to the equality thesis, the orthodox principle of non-combatant immunity has also been shown to be difficult to reconcile with our more general views about permissible killing. (See, especially, Helen Frowe, *Defensive Killing: An Essay on War and Self-Defence* (Oxford: Oxford University Press, forthcoming)). If so, this reveals that the norms applicable to conduct in war are also more *restrictive* on an orthodox view than those that govern harming in other contexts.

²³ The Discontinuity Thesis is similar to a view Seth Lazar labels 'exceptionalism'. Seth Lazar, 'The Problem of Political Aggression', in Seth Lazar and Cecile Fabre (eds), *The Morality of Defensive War* (Oxford: Oxford University Press, 2014), 11-39.

²⁴ For example, both Henry Shue and Michael Walzer each, independently, endorse a version of the Discontinuity Thesis. Henry Shue, 'Do We Need a 'Morality of War' in *Just and Unjust Warriors*, 87-111; Walzer, 'Response to McMahan's Paper'. Judith Jarvis Thomson and Frances Kamm have also, independently, suggested versions of it, albeit without explicit endorsement. Judith Jarvis Thomson,

The idea that war is morally distinct from other walks of life is central to folk judgments regarding war and has a long historical and sociological pedigree. As Stephen C. Neff has pointed out, many of the ancient civilisations worshipped separate deities for war and mere violence, indicating the perceived distinctness of the two spheres. Neff also emphasises the pervasiveness of the distinction in language, noting the different words used to pick out interpersonal violent conflicts compared to the kind of enmity encountered in war, a trend that holds up well cross-culturally.²⁵ It is fair to say that a conception of war as morally discontinuous has been dominant within the just war tradition.²⁶ It is commonly claimed, for example, that war is governed by a ‘public’ morality, distinct from the ‘private’ morality that governs interactions between individuals.²⁷

5.The Demarcation Requirement

The next step in the argument for a more expansive interpretation of the authority criterion notes an important adequacy condition for orthodox just war theory, entailed by its commitment to the Discontinuity Thesis. If it is true that conduct in war is governed by distinct, and more permissive, moral norms than those that apply in all other contexts, then it is vitally important that just war theory is able to clearly distinguish between the activities to which its norms apply and those to which it doesn’t.²⁸ For example, just war theory needs to be able to distinguish between genuine wars and so-called ‘gang wars’. While these two phenomena may share some important empirical features – large-scale, protracted and organised violence most obviously – orthodox just war theorists presumably do not want to conclude that participants in such conflicts possess the same permissions to cause harm that are granted combatants under orthodox *jus in bello*, which apply independently of the moral merits of the aims they promote by fighting. In cases of violence-other-than-war, just war theorists need to be able to argue that the standard, peacetime norms of interpersonal harming apply. To put the point another way: Since orthodox just war theorists are committed to the view that war is morally distinct from other activities, they need to be able to know a war when they see one.²⁹ Term this the *Demarcation Requirement*.³⁰

‘Self-Defense’, *Philosophy and Public Affairs* 20, No.4 (1991), 283-310 at p.297; Frances Kamm *The Moral Target* (Oxford: Oxford University Press, 2012), p.27.

²⁵ Neff, *War and the Law of Nations*, pp.13-20. Neff does note that a small minority of cultures, such as the Innuit, do seem to lack a strong distinction between war and other forms of violence.

²⁶ I offer support for this claim in Section 8.

²⁷ For a book length discussion of this contrast, see Andrew Fiala, *Public War, Private Conscience: The Ethics of Political Violence*, (London: Continuum, 2010).

²⁸ Jeff McMahan also notes this requirement. *Killing in War*, p.31.

²⁹ As George Fletcher puts it, “not every shootout at the OK Coral qualifies.” George Fletcher, *Romantics at War: Glory and Guilt in the Age of Terrorism* (Princeton: Princeton University Press, 2002), p.3.

³⁰ David Luban raises a similar problem regarding demarcating the boundary between the application of human rights law and the humanitarian law of armed conflict. David Luban ‘War Crimes: The Laws of Hell’ in Larry May (ed), *War: Essays in Political Philosophy* (Cambridge: Cambridge University Press, 2008), 266-288 at pp.276-280.

The importance of the Demarcation Requirement is worth stressing. Demarcation is required not only to avoid practical worries about how to evaluate specific cases, but rather to prevent just war theory from running into a serious theoretical problem. The problem is that, in the absence of a means of distinguishing war from non-war, a large proportion of all acts of harming will have an indeterminate moral status under an orthodox conception of *jus in bello*. This is because, on this view, whether a token act of harming is morally permissible or impermissible will often depend on whether or not it is carried out within a state of war. Just war theorists cannot appeal directly to *jus in bello* norms in order to settle the question of permissibility, since these norms are specific to war. The most that could be said is that 'This act of harming would be permissible if the norms of *jus in bello* apply to it, impermissible if not'. But this does nothing to resolve the indeterminacy issue. Hence, unless each act of harming can be assigned exclusively to either the domain of war or non-war, just war theory will generate a problem of incoherence – rendering acts of harming neither permissible nor impermissible. Since this is a fatal problem for any normative ethical theory, a successful resolution of the Demarcation Requirement is the first task for orthodox just war theory.

6. The Revised Interpretation of the Authority Criterion

I have argued that orthodox just war theory entails a commitment to the Discontinuity Thesis and must therefore resolve the Demarcation Requirement. These two points provide the basis for an alternative and more expansive account of the role of the authority criterion, as providing just war theory with the resources for achieving the crucial demarcation.

This role cannot be fulfilled by any other standard component of just war theorising, such as the requirements of just cause, right intention, proportionality, last resort and prospect of success. Each of these criteria plays a necessary role in making the central distinction between wars that are morally justified and those that are not. For this reason, none of the above criteria can be appealed to in order to help just war theory make the more fundamental distinction between those activities that are governed by its norms of *jus in bello* and those activities that are not. Unjustified wars are importantly still *wars*, subject to precisely the same norms of conduct under orthodox just war theory. To invoke one of these criteria in order to make the distinction between war and non-war would not only lead to a very odd conception of warfare, in which unjust wars would no longer qualify. It would also dramatically undermine the central orthodox commitment to the Equality Thesis, since it would make *in bello* permissions conditional on some degree of *jus ad bellum* adherence.

Having excluded these criteria, only the authority criterion remains. Importantly, this criterion does not suffer from the same problem that warranted rejecting the other requirements. To see this, recall the earlier characterisation of the authority criterion as an internal rather than external requirement. Rather than

focussing on the rights and wrongs of the interactions between a belligerent and their opponent, the authority criterion inquires only into whether a belligerent is of a certain type. It is this difference in evaluative focus that enables the authority criterion to fulfil the role of resolving the Demarcation Requirement.

On the revised interpretation that I argue for, the criterion serves not simply to identify the entities that are capable of waging *justified* wars, but to identify the entities that are capable of waging war *simpliciter*, whether justified or not.³¹ The thought here is that war – understood as the class of activities to which the *in bello* norms of just war theory apply – is identified by “determining the entities that are allowed to begin and engage in war.”³²

Conceiving of war as an activity of a limited class of entities enables orthodox just war theory to draw the necessary normative boundary between the violent activities that are covered by its norms and those that are not. War and its attendant norms are distinguished from other activities by distinguishing the entities that are morally entitled to have their violence evaluated under the norms of just war theory from the entities that are not.

Given that the coherence of orthodox just war theory hinges on whether it has the resources to resolve the Demarcation Requirement, we can see that the authority criterion plays a much more fundamental role within the theory than is standardly assumed. In fact, I think there is strong case to be made that the authority criterion is the *most* important component of the theory, since, as argued in the previous section, the tenability of orthodox just war theory rests on a resolution of the Demarcation Requirement.

Interestingly, on the revised interpretation the authority criterion functions as an *in bello*, rather than *ad bellum*, requirement.³³ At first glance, it may seem unclear why this is so. After all, *jus in bello* is usually thought to pertain to quite specific action-guiding norms, such as ‘targeting non-combatants is prohibited’ or ‘do not torture prisoners of war for information’. It is not obvious what the authority criterion has to do with these. We can appreciate the *in bello* function of the authority criterion by distinguishing between the *content* of *in bello* norms and their *jurisdiction*. By the *content* of these norms, I mean the substantive, first-order rules of conduct in war, such as the two prohibitions mentioned above. This is what most people are referring to when they talk about ‘the rules of war’. The *jurisdiction* of *jus in bello* norms, by contrast, refers to the question of to the range of activities

³¹ Helen Frowe makes a similar point, suggesting that one function of the authority criterion is to define what counts as war. Helen Frowe, *The Ethics of War and Peace: An Introduction*, (Abingdon: Routledge, 2011), p.59. However, Frowe does not provide an account of why it morally matters that war be defined in such terms. It is this missing element that I aim to provide in this paper.

³² Alexander Moseley, ‘The Philosophy of War’, *Internet Encyclopedia of Philosophy*, available at <http://www.iep.utm.edu/war/>. Moseley does not offer this statement as an interpretation of the role of the authority criterion.

³³ A similar point has also been suggested, independently, by Cecile Fabre and Christopher Finlay. Cecile Fabre *Cosmopolitan War* (Oxford: Oxford University Press, 2012), p.160. Christopher Finlay ‘Legitimacy and Non-State Political Violence’, *Journal of Political Philosophy*, 18, No.3 (2010), 287-312. My aim in this paper is to provide a more detailed and precise account of why this is the case.

and persons to whom these norms are applicable. Given this distinction, we can see that the authority criterion plays the role of setting the jurisdictional scope of *in bello* norms: In order for acts of harming to fall within the scope of *jus in bello*, they must be carried by individuals fighting on behalf of an entity which satisfies the authority criterion. The authority criterion thus does not function as an additional component of *jus in bello*, alongside the requirements of discrimination and proportionality, but rather fulfils the logically prior role of determining when these norms apply.³⁴

On the revised interpretation, then, the primary normative effect that follows from the possession or absence of war-making authority concerns whether individuals' violent conduct is morally permissible or impermissible. This is because, as explained above, on an orthodox view the moral status of acts of harming depends on whether or not they fall within the jurisdiction of *jus in bello*, since these norms are more permissive than those that govern interpersonal harming in non-war contexts. Put in the broadest terms, on the revised interpretation the authority criterion captures the following normative effect:

The Revised Authority Criterion: In order for an individual participating in armed conflict to be subject to the more permissive norms of just war theory, they must participate on behalf of an entity that possesses a certain set of properties. Individuals who participate on behalf of entities which lack those properties are not subject to these additional permissions and remain subject to the ordinary norms of interpersonal harming.

Under the revised interpretation of the authority criterion, we can appreciate the moral significance of philosophical definitions of war, such as Brian Orend's, which make explicit reference to the character of the entities engaged in violence, as

³⁴ I borrow the notion of 'logical priority' from Anthony Coates, who briefly suggests a similar interpretation of the authority criterion to my own in the context of his discussion of terrorism. *The Ethics of War*, pp.123-124. Coates points out that it is problematic to understand the wrongfulness of terrorism in terms of violations of the just war principle of non-combatant immunity, because non-combatants immunity is a war-specific notion, implying that terrorists are engaged in war and are entitled to moral evaluation under the norms of just war theory. (For a similar point, see Robert E. Goodin, *What's Wrong With Terrorism* (Cambridge: Polity Press, 2006), Ch.1). After raising this worry, Coates then concludes "that if any criterion of war merits greater application to terrorism than any other...it is the logically prior principle of legitimate authority." (p.124). However, Coates does not provide an explicit account of why invoking the authority criterion is meant to resolve the worry, or why the criterion is 'logically prior' in the manner claimed. Moreover, in the majority of his discussion of the authority criterion (pp.125-145) Coates retreats from the more expansive interpretation that he initially suggests, reverting instead to the standard, *ad bellum* interpretation. In this paper I aim to have provided the necessary arguments for expanding the role of the authority criterion in the manner that Coates alludes to. Furthermore, if successful, my arguments show that that this expansion is not necessitated merely by specific practical worries about terrorism. Rather, the criterion is required to play this additional role for more theoretical reasons, in order to prevent just war theory from running into a fatal problem of moral indeterminacy and incoherence. If correct, this shows that Coates' and Goodin's worry about excluding terrorism from just war evaluation is a symptom of a much more general issue.

opposed to definitions employed by empirical social-scientists, which focus instead on the quantitative intensity of violence.³⁵ For Orend, “War is a phenomenon which occurs *only* between political communities, defined as those which either are states or intend to become states.”³⁶ In light of the foregoing discussion, we may interpret such definitions as offering an account of the relevant properties that must be possessed in order satisfy the authority criterion, in its revised *in bello* role. The idea being that war-specific permissions to cause harm apply only to the individuals who fight on behalf of states or entities that aspire to statehood.³⁷

7.The (Real) Challenge of Irregular Belligerency

My argument in support of the revised interpretation has proceeded at a fairly abstract level. In this section I provide further support for it by considering an important practical issue raised by contemporary armed conflicts – that they are fought by a diverse range of ‘irregular’ belligerents that are not recognised states. Examples include ethnic or religious groups, revolutionary and secessionist movements, factions within a civil war, ‘warlords’, terrorist groups, and armed criminal gangs.

While several theorists have pointed out that this empirical phenomenon poses an important challenge to just war theory³⁸ – and to the authority criterion in

³⁵ For example, the Correlates of War Project, which provides a major source of data for the empirical study of warfare, classifies wars as sustained combat, involving organised forces, resulting in at least 1,000 combat deaths per twelve-month period. http://www.correlatesofwar.org/COW2%20Data/WarData_NEW/COW%20Website%20-%20Typology%20of%20war.pdf

³⁶ Brian Orend, ‘War’ in Edward N. Zalta (ed), *The Stanford Encyclopedia of Philosophy* (Fall 2008 Edition). Available at <http://plato.stanford.edu/archives/fall2008/entries/war/>

³⁷ The formulation here is intended to allow for the possibility that *in bello* permissions may apply asymmetrically to opposing parties in an armed conflict, since one party may satisfy the authority criterion (and so be subject to norms of *jus in bello*) whereas the opposing party may not (and so be subject to ordinary norms of interpersonal harming.) For example, in the case of a recognised state engaging in armed conflict with a non-state entity, such as a terrorist organisation. Term this the *unilateral* reading of the revised authority criterion. By contrast, the quote from Orend’s suggests an alternative *bilateral* reading, which requires the authority criterion to be satisfied by *both* belligerents in order for war-specific norms to apply to *either*. Both readings seem defensible, though my intuitions favour the unilateral reading. But for our purposes we need not settle the matter here. The main claim that I defend and elaborate upon in this in this paper – that fighting on behalf of a legitimate authority is a *necessary* condition for evaluation under the norms of *jus in bello* – is consistent with either reading. (The extent to which it approaches a sufficient condition does vary depending on the reading.) In addition, it is worth pointing out that, on either reading, the fact that a non-state entity fails to qualify as an authority need not entail that it is unjustified in fighting against a state (since its violence could be justified in terms of ordinary norms of interpersonal harming, such as self-defence). Nor does a non-state entity’s failure to qualify entail that its state opponent is justified in fighting against it, since such measures would remain subject *jus ad bellum* requirements. Thanks to an anonymous reviewer for pressing me to clarify these points.

³⁸ See, for example, Endre Begby, Gregory Reichberg and Henrik Syse, ‘The Ethics of War. Part II: Contemporary Authors and Issues’, *Philosophy Compass* 7, No.5 (2012), 328-347 at p.331. More broadly, proponents of the ‘new wars’ thesis, such as Mary Kaldor, argue that the diversity of actors involved in modern armed conflict poses deep challenges to normative international political theory more generally. Mary Kaldor, *New and Old Wars: Organised Violence in a Global Era*, 2nd Edition (Cambridge: Polity Press, 2007). For proposals as to how the norms of war may be adapted to apply to modern war, see Paul Gilbert, *New Terror, New Wars* (Washington: Georgetown University

particular³⁹ – I will argue that contemporary discussions frequently misconstrue (and underestimate) the nature of the challenge, since they assume the standard interpretation of the authority criterion. I then demonstrate that the revised interpretation provides a clearer account of the (deeper) challenge that irregular belligerency poses to just war theory.

While my arguments are intended to apply to all accounts of just war theory that endorse both: (i) an orthodox conception of *jus in bello* and (ii) the standard interpretation of the authority criterion, I will focus on Nicholas Fotion's recent work.⁴⁰ This is worthy of particular attention, since (like many just war theorists) Fotion accepts both these views, while addressing the issue of irregular belligerency head on.⁴¹

Fotion rightly points out that irregular belligerency poses a particular problem for the requirement that wars be waged by an appropriate authority, which he interprets as requiring that wars be initiated through the appropriate legal institutions of a state. The challenge, as Fotion sets it up, is that the inclusion of this requirement seems to heavily bias just war theory against non-state belligerents, since such groups will often lack the requisite institutions. As he puts it, such groups "may have leaders, even charismatic ones, but these leaders do not have legitimate authority."⁴² The worry is that just war theory will render the vast majority of wars fought by irregular belligerents unjustified *a priori*. This statist bias is unattractive, since presumably *some* wars fought by irregular belligerents *could* be justified. We may term this the *Standard Challenge* of irregular belligerency, since it corresponds to the standard interpretation of the authority criterion as an *ad bellum* requirement.

In light of this challenge, Fotion offers a novel revision to just war theory, by dividing it into two parts: 'Regular Just War Theory' (JWT-R), which applies to traditional conflicts between state actors, and 'Irregular Just War Theory' (JWT-I), which applies to armed conflict involving non-state entities. While JWT-R retains all the standard just war criteria, Fotion boldly eliminates the authority

Press, 2003); Michael Gross, *Moral Dilemmas of Modern War: Torture, Assassination, and Blackmail in and Age of Asymmetric War* (Cambridge: Cambridge University Press, 2009); Kasher and Yadlin, 'Military Ethics of Fighting Terror: An Israeli Perspective'.

³⁹ Eric A. Heinze and Brent J. Steele, 'Introduction: Non-State Actors and the Just War Tradition', in Eric A. Heinze and Brent J. Steele (eds), *Ethics, Authority and War* (Basingstoke: Palgrave MacMillan, 2009), 1-20.

⁴⁰ Nicholas Fotion, *War and Ethics*, Ch.9; Nicholas Fotion, 'Two Theories of Just War', *Philosophia* 34 (2006), 53-64.

⁴¹ Fotion does not explicitly endorse an orthodox conception of *jus in bello*. However, such a commitment can be inferred from what he does say on the topic. For example, he writes "it is easy to separate that part of a theory of exception having to do with starting a war (justice of the war) and the protracted period of time that follows once the war is started (justice in the war)." *War and Ethics*, p.21. Fotion also endorses a view of the *in bello* discrimination and proportionality requirements that are equally satisfiable by combatants who participate in just and unjust wars. *War and Ethics*, pp.21-22. Thus, taken together, it seems fair to attribute to Fotion a commitment to the orthodox Equality Thesis.

⁴² Fotion, *War and Ethics*, p.121.

requirement from applying to non-state actors under JWT-I.⁴³ On the revised theory, the authority criterion functions only as a conditional requirement, in that the criterion need only be satisfied *if* it can in fact be satisfied. As Fotion puts it, “Since they [irregular belligerents] are unable to satisfy the principle, even in theory, JWT-I does not ask them to do so.”⁴⁴ This ingenious twin version of just war theory is designed to bring the theory up-to-date, removing its unpalatable statist bias.

However, there is a deep, though non-obvious, problem with this response to the challenge of irregular belligerency, arising from Fotion’s jettisoning of the authority criterion while maintaining a commitment to an orthodox conception of *jus in bello*. As argued above, such a conception entails a commitment to the Discontinuity Thesis, which in turn gives rise to the Demarcation Requirement. The problem, for Fotion, is that by jettisoning the authority criterion in the case of irregular belligerents he denies himself the resources to resolve the Demarcation Requirement, which generates some highly implausible results.

The problem can be drawn out by considering the following example. Imagine a large and well-organised criminal gang, known as the Zepos. In order to increase their criminal empire, the Zepos declare themselves to be at war with the state in which they operate and which threatens to hamper their activities. The Zepos then conduct a campaign of lethal violence in pursuit of this aim. The Zepos armed fighters clearly identify themselves at all times, target only military personnel, and do not use any force beyond that required for achieving their goals.

Furthermore, imagine that when confronted with the accusation that they are acting seriously morally wrongly by killing and maiming in pursuit of such aims, individual Zepo fighters offer the following reply: “It may well be true that our aims are unjust. However, this injustice is a matter of *jus ad bellum*. Since the norms of *jus in bello*, including the permission to target enemy combatants, obtain independently of *jus ad bellum*, we cannot be deemed to be acting wrongly by reference to such aims. Our actions can only be evaluated by the standards of *jus in bello*, which we followed to the letter.”

Clearly, something has gone amiss with this argument, since it is – I take it – uncontroversial that Zepo fighters *are* acting morally wrongly by targeting and killing their victims, even if the victims are members of the military. The obvious rejoinder to their claims to the contrary is to argue that the norms of *jus in bello* are just not applicable to the violent activity which the Zepos are engaged in. The underlying thought here is that groups such as the Zepos lack the ability to create a true state of war, and hence their violence falls outside the jurisdiction of just war theory and its war-specific norms of conduct. Once this argument is made, the claims of Zepo members to moral immunity can be rejected.

⁴³ The criterion remains applicable to state actors engaged in armed conflict with non-state actors under JWT-I. Fotion also relaxes the criterion of reasonable prospect of success in JWT-I. *War and Ethics*, p.120.

⁴⁴ Fotion, *War and Ethics*, p.121.

As argued above, this crucial idea that war is to be morally distinguished from other activities by reference to facts about the parties engaging in violence is captured by a more expansive interpretation of the authority criterion. On the revised interpretation, it is the authority criterion that contains the resources for the argument that Zepo members act morally impermissibly. The thought is that these individuals do not enjoy a war-specific permission to kill, in virtue of the fact that they do not fight on behalf of a war-making authority. Instead, their actions are governed by ordinary principles of permissible harming, which rule their actions to be seriously morally wrong.

The problem for Fotion's twin just war theory is that it is unable to make this necessary argument. As irregular non-state belligerents, the violence of the Zepos falls under JWT-I, which does not subject such groups to an authority requirement. The troubling implication of this is that JWT-I lacks the resources to explain why the Zepo fighters are acting morally wrongly, since it lacks a means of resolving the Demarcation Requirement. The most that can be said under JWT-I is that the Zepos clearly lack a just cause, but all that can be concluded from this is that the Zepos are fighting an unjust *war*, which is precisely the concession that needs to be rejected.

Fotion does consider the possibility of a demarcation problem arising for his twin theory. Fotion's worry is that the theory may suffer from vagueness when applied to particular cases, so that it may be difficult to distinguish between groups which are capable of satisfying the authority criterion and those which are not. The result of this is that we may not know whether JWT-R or JWT-I applies to the particular case, the worry being that just wars may be wrongly classified as unjustified, and *vice versa*. After considering the problem, Fotion concludes that, "In the end the dual-theory approach to Just War Theory seems viable. It helps keep us clear about what kind of war we are engaged in, it doesn't suffer from so much vagueness as it seemed it did at the outset and although it perhaps triggers more wars than the classic theory, those additional wars are few in number."⁴⁵

However, this misses the deeper problem of demarcation facing the twin theory. What should be of concern here is not that it may struggle to tell us "what kind of war" we are dealing with, and hence which version of just war theory applies. Rather, it is that it lacks the resources to explain why, in the vast majority of cases of violent activity, *no* version of just war theory should apply.

As mentioned at the outset of this section, the problem that I have pressed against Fotion's twin theory has wider significance. The very same demarcation problem arises when applying any version of just war theory to the cases of irregular belligerency that assumes both an orthodox account of *jus in bello* and the standard interpretation of the authority criterion. The problem is just more easily diagnosable in Fotion's account.

To demonstrate, let us return, one last time, to the case of the Zepos. When applied to this case, just war theories that accept the two standard assumptions *are*

⁴⁵ Fotion, 'Two Theories of Just War', pp.60-61.

(unlike Fotion's theory) able to conclude that the Zepos fail to satisfy the authority criterion. However, given that these theories treat the criterion as solely an *ad bellum* requirement, all that follows from this failure is that a belligerent's armed conflict is *ad bellum* unjustified. Making this point does not provide any resources for denying the Zepo's claim to evaluation under the norms of orthodox just war theory. Hence, precisely the same problem that affects Fotion's twin theory arises more generally.

If my arguments have been successful, we can see that the real challenge posed by irregular belligerency is not – *contra* the Standard Challenge – that it makes it more difficult to distinguish between *ad bellum* just and unjust wars, or that it unfairly renders wars fought by non-state actors harder to justify. Rather, the prevalence of irregular belligerency in contemporary armed conflicts puts pressure on the claim, indispensable to mainstream just war theory, that the spheres of war and non-war can be cleanly separated. Term this the *Revised Challenge*. Importantly, the Revised Challenge is essentially a problem of *jus in bello*, not *jus ad bellum*. It is a challenge about how the precise scope of *jus in bello* norms is to be demarcated. In a world in which the *de facto* ability to employ large-scale organised violence is available only to clearly identifiable state-actors, such demarcation seems relatively straightforward. But this is not our world. A diverse range of actors now possess and exercise the capacity to bring about levels of organised violence comparable to that of interstate warfare. Furthermore, as the example of the Zepos shows, in many cases it is powerfully intuitive that the members of such groups do *not* enjoy any war-specific permissions to cause harm, despite the fact that their activity certainly *looks* a lot like war in many respects.

Recognising the challenge of irregular belligerency as primarily one of demarcation provides support for the revised interpretation of the authority criterion. It shows that the necessary moral distinction between war and non-war cannot be achieved in terms of the quantitative criteria employed by empirical social scientists, since there are cases in which these criteria are met, but where it seems clear that the norms of just war theory do not apply. Instead, the required demarcation must be achieved by reference to facts about the parties engaging in violence. This is precisely the subject matter of the authority criterion.

In order to respond to the challenge of irregular belligerency, a much more precise account of what the possession of war-making authority consists in is needed, which tells us more than the vague intuition that agents who use force on behalf of established states fall within it while agents who fight on behalf of criminal gangs such as the Zepos clearly do not. The challenge of irregular belligerency requires orthodox just war theorists to venture into the spectrum of cases between these two poles and provide criteria for morally distinguishing warfare from other violent activities, and to do so in terms of facts about the parties involved. Given that irregular belligerency is now very much the norm rather than the exception, the practical significance of the authority criterion should not be underestimated.

8. Classical Just War Theory and the Authority Criterion

Thus far, I have argued that a revised, and more expansive, interpretation of the authority criterion is entailed by a commitment to an orthodox conception of *jus in bello*. In this section, I demonstrate that the argument generalises to other approaches within the just war tradition that do not share this specific commitment. In particular, I show that the authority criterion plays the same role within classical just war theory, as formulated in the writings of Catholic theologians such as Augustine and Aquinas, despite the important differences between the classical and orthodox views.

On the revised interpretation that I have put forward, the importance of the authority criterion arises from a commitment to the view that the norms governing conduct in war are distinct from and irreducible to the norms that govern interpersonal harming in other contexts, because they are more permissive. Within orthodox just war theory, it is the commitment to the Equality Thesis that necessitates such a view, since the notion of moral equality is generally absent from our settled views about permissible harming in ordinary, non-war circumstances.

Given the ubiquity of an orthodox view, it is tempting to assume that it has a long and distinguished pedigree. However, this is not the case. The Equality Thesis is in fact a relatively recent development, only becoming established in the eighteenth and nineteenth centuries with the rise of international law.⁴⁶ By contrast, classical just war theory rejected the Equality Thesis. For the classical theorists, only combatants who fight in wars that have a just cause can permissibly attack and kill their opponents. Those who fight in unjust wars commit a serious moral wrong by doing so.⁴⁷

Interestingly, despite rejecting the Equality Thesis, classical just war theorists did not attempt to ground the permission to fight and kill in just wars in the ordinary moral permissions to use force available to individuals, such as self-defence. As Gregory Reichberg points out, on a classical view,

It was...understood that public war should be waged and its morality judged by reference to a set of norms that are not directly reducible to those governing private self (and other)-defense.⁴⁸

⁴⁶ Gregory Reichberg, 'The Moral Equality of Combatants – A Doctrine in Classical Just War Theory? A Response to Graham Parsons', *Journal of Military Ethics* 12, No.2 (2013), 181-194.

⁴⁷Ibid, at 181-185. This point is also stressed in, among others, Jeff McMahan, 'War' in David Estlund (ed) *The Oxford Handbook of Political Philosophy* (Oxford: Oxford University Press, 2012), 298-318; Neff, 'War and the Law of Nations', p.63; Gregory Reichberg, 'Just War and Regular War: Competing Paradigms' in *Just and Unjust Warriors*, 193-214; Uwe Steinhoff, 'Rights, Liability and the Moral Equality of Combatants', *Journal of Ethics* 16, No.4 (2012), 339-366.

⁴⁸ Reichberg, 'The Moral Equality of Combatants – A Doctrine in Classical Just War Theory? A Response to Graham Parsons', p.182.

In the terminology introduced earlier, we can say that classical just war theory was also committed to the Discontinuity Thesis. The reason for this is that the classical theorists endorsed a more restrictive account of permissible homicide than that generally accepted today. In particular, they took a much more restrictive view of permissible self-defensive killing.⁴⁹ On the most extreme view, such killing was straightforwardly morally impermissible.⁵⁰ On a more moderate view, defensive killing may have been permissible in a weak sense, but only under extreme and unusual circumstances, where the agent's 'back was against the wall', so that the act of killing could be construed as an unintended and instinctive lashing out.⁵¹ I use the term 'permissible in a weak sense' because, even in these cases, self-defence was viewed more as an excuse than a justification, in contrast to contemporary practice.⁵² Given such a view, it is clear why classical just war theorists could not attempt to ground a permission to participate in war in norms of interpersonal morality. Such an attempt could only yield pacifism as a result, since these norms would not permit individuals to engage in the premeditated and organised acts of killing constitutive of warfare.⁵³ In order to square this conception of permissible interpersonal harming with a commitment to the permissibility of participation in war, it is necessary to hold that conduct in war is governed by distinct, and more permissive, moral norms.

So, despite their very different substantive accounts of permissible conduct in war, we can see that both classical and orthodox just war theory share a common commitment to the Discontinuity Thesis. Once this is made overt, we can see the central importance of the authority criterion within the classical theory, for the same reasons that I have argued in the case of contemporary orthodox just war theory. The role of the criterion is to isolate those violent conflicts to which the more permissive norms of just war theory apply. The thought being that individuals who use force on behalf of a legitimate war-making authority are thereby subject to a more extensive set of permissions to cause harm, whereas

⁴⁹ Oliver O'Donovan, *The Just War Revisited* (Cambridge: Cambridge University Press, 2003), p.22.

⁵⁰ This appears to have been Augustine's view, as well as that of St. Ambrose. See, John Langan, 'The Elements of St. Augustine's Just War Theory', *The Journal of Religious Ethics* 12, No.1 (1984), 19-38 at 27; Louis J. Swift, 'St. Ambrose on Violence and War', *Transactions and Proceedings of the American Philological Society* 101 (1970), 533-543 at p.537.

⁵¹ See Neff, *War and the Law of Nations*, pp.59-62; Reichberg, 'The Moral Equality of Combatants – A Doctrine in Classical Just War Theory? A Response to Graham Parsons' p.189; Michael Thompson, 'Aquinas and Locke on Self-Defense', *University of Pittsburgh Law Review* 57 (1996), 677-684.

⁵² Thompson, 'Aquinas and Locke on Self-Defense', at 677-679. George Fletcher points out that a successful invocation of the medieval common law defence of *se defendendo* resulted only in the defendant's avoidance of the punishment of execution, while conceding the wrongfulness of the act. The successful defendant was still required to give up property to the crown by way of recompense for the homicide. He notes, "Until the Statute of Henry VIII, passed in 1532...there was no theory of self-defense that rendered a killing fully lawful, justifiable and therefore free of the taint that affected excusable homicide." George Fletcher, 'Defensive Force as an Act of Rescue', *Social Philosophy and Policy* 7, No. 2 (1990), 170-179 at p.171.

⁵³ For contemporary arguments for a similar conclusion, see Richard Norman, *Ethics, Killing and War* (Cambridge: Cambridge University Press, 1995); David Rodin, *War and Self-Defence* (Oxford: Oxford University Press, 2002).

those who use force privately (or on behalf of entities which lack the relevant authority) are covered by only the more minimal permission (or perhaps mere excuse) of self-defence.⁵⁴ This interpretation is supported by Reichberg, who points out that for the classical theorists,

Chief among the factors separating the two sorts of conflict was the role assigned to legitimate authority – war requiring it, and self-defense not...Those called to war (i.e. *bellum* in the proper, public denotation of the term) and serve in it, are bound by a norm that has little applicability within the sphere of private self-defense.⁵⁵

This coheres nicely with the argument that I have offered for a more expansive conception of the authority criterion within contemporary orthodox just war theory. My interpretation may then be viewed as rehabilitating an older and historically dominant view, rather than being purely revisionary or esoteric. The brief discussion of classical just war theory also demonstrates the generality of my arguments. The importance of the authority criterion rests on a general commitment to the Discontinuity Thesis, and not on any particular substantive account of just conduct in war. Despite their differences, viewing classical and orthodox approaches from the perspective of the authority criterion reveals an important continuity in the just war tradition that often goes unnoticed.

9. Conclusion

A complete account of the legitimate authority requirement will answer two main questions. The first, interpretative question establishes the normative consequences are claimed to follow from the requirement being satisfied or not satisfied. The second, evaluative question concerns whether those normative consequences *in fact* follow. The first question is obviously prior to the second, since in order to assess whether the authority criterion can be morally justified, we need to know precisely which claims stand in need of justification.

My project in this paper has been to give an answer to the first, interpretive question, aiming to have provided a detailed (and somewhat revisionary) account

⁵⁴ This thought is endorsed by Elizabeth Anscombe, the most influential recent proponent of a classical conception of just war, who writes that “The right to attack with a view to killing is something that belongs only to rulers *and those they command to do it*”. G.E.M. Anscombe, ‘War and Murder’, in *The Collected Papers of G.E.M. Anscombe. Volume Three: Ethics Religion and Politics* (Oxford: Blackwell, 1981), 51-61 at p.53 (emphasis added). Michael Thomson makes a similar point, arguing that “premodern practice,...restricted justified killing to that legitimately performed by agents of the state.” Thomson, ‘Aquinas and Locke on Self-Defense’, p.678.

⁵⁵ Reichberg, ‘The Moral Equality of Combatants – A Doctrine in Classical Just War Theory? A Response to Graham Parsons’, p.189. James Turner Johnson makes a similar point, noting that within classical just war theory, “There is a fundamental moral difference between the use of the sword by one in sovereign authority or on his behalf and the use of the sword by a private individual. The former may wage *bellum*, which is the use of the sword on behalf of the common good; the latter may not.” James Turner Johnson, ‘Aquinas and Luther on Sovereign Authority’, pp.9-10.

of the role that the legitimate authority requirement plays within the just war tradition. If successful, my arguments have shown that the authority criterion plays an additional, and arguably much more important, role than is usually thought. While standardly taken to be an *ad bellum* requirement (determining whether a war is just or unjust), I have argued that the criterion primarily functions as an *in bello* requirement (determining whether individuals' conduct in armed conflict is morally permissible). It does so by determining whether individuals' actions are evaluable under ordinary norms of interpersonal morality, or are instead subject to more permissive norms of *jus in bello*.

In this concluding section, I outline some aspects of the second, evaluative question raised by this interpretation. Though an adequate treatment of this topic would be another paper in itself, the following remarks aim to motivate further research into the prospects for the legitimate authority criterion, by clarifying the issues at stake.

On the view that I have argued for, the authority criterion captures the claim that individuals who fight on behalf of certain kinds of group or entity thereby acquire more extensive permissions to harm others. The evaluative question, then, is whether this impressive normative consequence can be justified. More specifically, the question is how acts of killing and injuring that would otherwise be morally impermissible can become permissible, in virtue of being carried out by an agent acting on behalf of a particular kind of group or entity.

Set up this way, we can see that irregular belligerency not only raises a problem of demarcation, but also poses a justificatory challenge. For it is not sufficient simply to identify a certain set of properties that identify the groups to whom *jus in bello* permissions intuitively apply. In addition, it must also be explained *why* those properties ground and justify those more extensive permissions. The challenge of irregular belligerency, then, is not to explain why members of terrorist groups or criminal organisations such as the Zepos lack any special permissions to kill and injure, for this can be explained in terms of norms of ordinary interpersonal morality. Rather, it is to explain why members of *any* kind of group or organisation can acquire more extensive permissions to harm others in virtue of that membership. Since, as I have argued, just war theory is committed – either implicitly or explicitly – to a claim of this sort, the question of whether the revised authority criterion can be morally justified should be of central concern. In what follows I sketch three possible strategies of justification, before raising some potential difficulties.

A first potential view invokes the moral significance of collective political action, of which warfare is a paradigmatic example. The thought here is that when an appropriately constituted political entity acts, through the coordinated action of its members, this action has a normative personality irreducible to the sum of its component actions. Christopher Kutz has done most to develop such a collectivist understanding of war in defence of the view that norms of *jus in bello* are morally

special and more permissive.⁵⁶ For Kutz, the norms governing conduct in war must reflect the fact that when combatants confront each other on the battlefield they do so not merely as private individuals, but as representatives of their political communities. On this view, the permission to kill in war is grounded in the collective and political character of the activity, and not in the norms of interpersonal morality that apply to private individuals. Combatants in war possess what Kutz terms an “essentially political permission” to harm their opponents.⁵⁷

This argument is open to two interpretations. On one view, acting on behalf of a political collective generates additional permissions by giving members moral reasons to cause harm. On an alternative view, the permissions follow from the fact that participants in collective political actions do not bear responsibility for their acts in the usual manner.⁵⁸ Instead, responsibility is attributable to the collective as a whole, or perhaps its members *qua* members, but not to individual combatants *qua* private individuals.⁵⁹

A second possible strategy also invokes the moral significance of collectives, but appeals instead to considerations of partiality, rather than collective agency. The argument starts from the uncontroversial premise that members of certain kinds of group have special obligations to one another, in virtue of sharing morally important relationships. It is then argued that these obligations can be sufficiently important to justify acts of harming in war that would not be permissible in the absence of those relationships. For example, Seth Lazar has recently argued that the duty to protect one’s associates from serious harm in times of war can be weighty enough to override the duty not to harm non-associates, thus justifying doing so.⁶⁰

A third justificatory strategy eschews talk of collectives and instead invokes the idea of legitimate authority as discussed in the political and legal philosophical literatures. On this view, to have legitimate authority is to possess the morally justified power to issue commands and, by doing so, place those commanded under an obligation to obey.⁶¹ The argument under consideration holds that additional permissions to cause harm in war can be grounded in the obligation to obey an authority. The thought being that those who are subject to morally legitimate

⁵⁶ Christopher Kutz, “The Difference Uniforms Make: Collective Violence in Criminal Law and War”, *Philosophy and Public Affairs* 33, No.2 (2005), 148-180. See also, Fletcher, *Romantics at War*; Tamar Meisels, ‘In Defence of the Defenceless: The Morality of the Laws of War’, *Political Studies* 60, No 4 (2012), 919-935; Noam Zohar, ‘Collective War and Individualist Ethics: Against the Constriction of Self-Defense’, *Political Theory* 21, No.4 (1993), 606-622.

⁵⁷ *Ibid.* p.153.

⁵⁸ Kutz suggests that he is committed to this interpretation. *Ibid.*, p.179.

⁵⁹ On this point, see Judith Lichtenburg, ‘How to Judge Soldiers Whose Cause is Unjust’, in Rodin and Shue (eds), *Just and Unjust Warriors*, 112-129.

⁶⁰ Seth Lazar, ‘Associative Duties and the Ethics of Killing in War’, *Journal of Practical Ethics* 1, No.1 (2013), 6-51.

⁶¹ For useful introductions to the concept of authority, see Joseph Raz, ‘Introduction’ in Joseph Raz (ed), *Authority* (Oxford: Oxford University Press, 1990), 1-19; Scott Shapiro, ‘Authority’ in Jules Coleman and Scott Shapiro (eds), *The Oxford Handbook of Jurisprudence and Philosophy of Law* (Oxford: Oxford University Press, 2002), 382-439.

authorities can be morally required, all things considered, to obey commands to cause harm in war. Importantly, this will include cases in which causing harm would not be morally permissible in the absence of the authority's command.⁶²

As with the first strategy surveyed above, this argument admits of two interpretations. On one view, the commands of authorities provide subjects with undefeated moral reasons for causing harm in war. On a contrasting view, the normative consequence of acting under authority is to absolve the subject of responsibility for their actions. Instead, responsibility is transferred to the authority, leaving the subject free of wrongdoing.⁶³

While each of these strategies faces specific challenges, two general points are worth making. Firstly, each of these arguments identifies some fairly demanding moral criteria that a group has to meet in order for its members to enjoy extended permissions to cause harm in war. Given this, it seems unlikely that all groups to whom the norms of war are normally attributed (i.e. all recognised states) will satisfy the required conditions. For example, some poorly functioning states may fail to qualify as collective agents, while others will fail to possess the authority to impose moral obligations on their subjects.⁶⁴ Hence, even if successful in showing how groups can generate permissions to cause harm in war, proponents these arguments will presumably have to endorse a degree of revisionism in terms how these permissions are distributed.

Secondly, the arguments must avoid permitting too much. In particular, they should not permit the intentional killing of innocent non-combatants. The worry is that if, as claimed, acting on behalf of a particular group can permit an agent to inflict certain harms that would otherwise be impermissible – the killing of enemy combatants – then why should these very same considerations not also permit additional acts of harming that would otherwise be impermissible – such as the killing of enemy non-combatants?⁶⁵ So, a successful defence of the revised authority criterion will not only have to explain how group membership can extend an individual's permissions to cause harm in war, but also impose principled limits on this extension.

I close by pointing out the implications of a failure to justify the revised authority criterion. As I have argued, common judgements about the permissibility of conduct in war depend on the idea that war is governed by distinct, and more

⁶² See, David Estlund 'On Following Orders in an Unjust War', *Journal of Political Philosophy* 15, No.2 (2007), 213-234. [Reference omitted for blind review].

⁶³ This seems to have been Augustine's view, see *The City of God Against the Pagans*, R.W Dyson (ed), (Cambridge: Cambridge University Press, 1988). Bk.1. Ch.21. Graham Parsons has recently put forward an explicit version of this argument. Graham Parsons, 'Public War and the Moral Equality of Combatants', *Journal of Military Ethics* 11, No.4 (2012), 299-317.

⁶⁴ For arguments that states often lack the authority that they claim for themselves see, for example, Leslie Green, *The Authority of the State* (Oxford: Oxford University Press, 1988); A. John Simmons, 'Political Obligation and Authority' in Robert L. Simon (ed) *The Blackwell Guide to Social and Political Philosophy* (Oxford: Blackwell Publishers, 2002), 17-37; Joseph Raz, *The Authority of Law: Essays on Law and Morality* (Oxford: Oxford University Press, 1979), Ch.12.

⁶⁵ [Reference omitted for blind review]

permissive, moral norms, and that this claim is captured by the authority criterion. If, however, it cannot satisfactorily be explained why acting on behalf of a certain kind of group or entity can increase an individual's permissions to harm others in war, then these judgements will have to be abandoned, along with the view that war is moral discontinuous with ordinary life. This is likely to result in some highly revisionary implications, since our theory of permissible conduct in war will have to be brought into alignment with our wider views about permissible killing and injuring in other contexts. The extent of these revisions will depend on our specific account of permissible harming, but, at very least, it is hard to see how the orthodox Equality Thesis could survive the transition, for the reasons discussed in Section 4. More radically, if the classical just war theorists were correct to hold that participation in wars cannot be justified in terms of ordinary interpersonal morality, a failure to justify the authority criterion would provide strong support for pacifism.