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The Sources and Status of Just War Principles

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ABSTRACT *Michael Walzer presents the theory of the just war that he develops in* Just and Unjust Wars *as a set of principles governing the initiation and conduct of war that are entailed by respect for the moral rights of individuals. I argue in this essay that some of the principles he defends do not and cannot derive from the basic moral rights of individuals and indeed, in some cases, explicitly permit the violation of those rights. I argue, further, that it does not follow, at least in some cases, that the principles are false. Even if some of the principles are not adaptations of a theory of rights to the problems of war, they may still be rational, pragmatic accommodations to epistemic and institutional constraints under which we must now act. Yet I also argue that respect for the rights that Walzer claims that individuals have requires us to try to overcome the epistemic and institutional impediments that restrict us at present. As those impediments are removed, the reasons for acknowledging and following some of the central principles Walzer espouses will diminish and, perhaps, disappear.*

KEY WORDS: Michael Walzer, just war, moral equality of combatants, civilian liability, prisoners of war

The Structure of Walzer's theory

I first read *Just and Unjust Wars* in 1980, about a year after I had begun my graduate work in philosophy. I was then, and have remained, greatly influenced by it. Over the years I have reread various chapters, some on several occasions. But only after I was invited to contribute to this special issue did I again read the book through. Again I emerged greatly impressed, perhaps even more so than when I first read it. I have written pieces that have been critical of various claims made in the book, and I have often stated my own views about the morality of war by contrast with or in opposition to those claims. But I nevertheless find much to admire in this book, and much to agree with, particularly in Walzer's judgments about issues of practice, such as preemptive war, the demand for unconditional surrender, siege warfare, reprisals, terrorism, and responsibility for war crimes.

Most of my disagreements are with claims that Walzer makes at a higher level of abstraction. These disagreements concern the content and status of certain general principles, both substantive and methodological. In a few cases, I think the principles are mistaken; in others, I think the principles have

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a role in regulating the practice of war, but that Walzer misidentifies their source and misconstrues their status. This may seem an insignificant disagreement, a disagreement about the taxonomy of moral principles devoid of relevance to matters of practice. But I think that how we understand the nature of these principles does indeed have implications that are of practical significance.

Different passages in *Just and Unjust Wars* are suggestive of different ways of understanding the sources and status of the principles that compose Walzer's theory of the just war. Certain passages, for example, suggest that we *devise* these principles to help us to achieve certain purposes. This interpretation is, indeed, suggested by the label that Walzer gives to the set of principles he seeks to defend: 'the war convention.' And he says, quite explicitly, that 'the war convention . . . remains one of the more imperfect of human artifacts: recognizably something that men have made . . .' (Walzer 2000: 45). He also says that *jus in bello* – the part of just war theory concerned with the conduct of war – 'requires us to make judgments about . . . the observance or violation of the customary and positive rules of engagement' (2000: 21). This seems to imply that the just war principles governing the conduct of war are merely customary and positive in nature rather than elements of basic, nonconventional morality.

Yet the war convention appears to be a miscellany of principles derived from a variety of sources. Walzer indicates the heterogeneity of the convention's elements when he describes it as 'the set of articulated norms, customs, professional codes, legal precepts, religious and philosophical principles, and reciprocal arrangements that shape our judgments of military conduct' (2000: 44–45). And there are numerous other passages in which he recognizes that there are valid principles of different types that all constrain the practice of war.

For example, of the elaborate rules governing surrender and the treatment of prisoners, he writes that 'it is not easy to see all this as the simple assertion of a moral principle. It is the work of men and women (with moral principles in mind) adapting to the realities of war, making arrangements, striking bargains' (2000: 46).[1] This may seem to confirm the interpretation according to which the principles that Walzer defends are mere contrivances for reciprocal benefit, but it also implies a contrast between the rules of surrender and moral principles that have a grounding that is perhaps independent of agreement and convention.

Walzer also draws a distinction between 'war rights' and other rights. He refers, for example, to an older naval code according to which merchant seamen on ships carrying military supplies were held to have a right not to be attacked. But he notes that once it ceases to be possible to intercept such ships and impound their cargo without attacking them, the right of merchant seamen not to be attacked 'lapses. It is not a retained right but a war right, and rests only on the agreement of states and on the doctrine of military necessity' (2000: 146). And later, referring to principles that prohibit the use of certain weapons, such as poison gas, he observes that 'soldiers have only a war right, and not a more basic right, to be attacked with certain weapons

and not with others' (2000: 215). Walzer never defines the difference between war rights and other rights, but one can infer from the context that war rights are the products of specific agreements or deliberately established conventions. They are not natural or human rights but are instead 'human artifacts: recognizably something that men have made.'

We may, therefore, take Walzer to assert, or at least to presuppose, that the war convention comprises principles that are of different types, that have different origins and different forms and degrees of normative authority. Some of the principles establish mere war rights. But others require respect for rights that are not the creations of bargaining, agreement, or the conscious establishment of conventions. That he sees these rights as the foundation of his account of the just war is evident in the following quotations:

> I want to suggest that the arguments we make about war are most fully understood (though other understandings are possible) as efforts to recognize and respect the rights of independent and associated men and women. The morality I shall expound is in its philosophical form a doctrine of human rights. (2000: xxi–xxii)

> Individual rights (to life and liberty) underlie the most important judgments that we make about war. (2000: 54)

> A legitimate act of war is one that does not violate the rights of the people against whom it is directed. (2000: 135)

> No one can be threatened with war or warred against, unless through some act of his own he has surrendered or lost his rights. (2000: 135)

> The standards of permissibility rest on the rights of individuals. (2000: 143)

> The rights of innocent people have the same moral effectiveness in the face of just as in the face of unjust soldiers. (2000: 228)

> The deliberate killing of the innocent is murder. (2000: 323)

At least in *Just and Unjust Wars*, Walzer remains agnostic about the ontological status of these individual rights. He concedes that 'how these rights are themselves founded I cannot try to explain here. It is enough to say that they are somehow entailed by our sense of what it means to be a human being. If they are not natural, then we have invented them, but natural or invented, they are a palpable feature of our moral world' (2000: 54). If he ultimately believes that these rights are invented, which is how I understand him in his later writings,[2] he also believes that they are invented in a different way from war rights. They are invented, but not intentionally or even consciously; instead they arise or emerge slowly over time through processes of communal interaction and the evolution of social meanings. Because Walzer is, finally, a relativist about morality, who sees densely elaborated moralities as cultural artifacts, and more abstract, impartial, and cosmopolitan moralities as merely the points of contact or areas of overlap among local moralities, he does not think that morality is as firmly anchored in the

nature of things as I think it is. But it seems to be a presumption in the book that the rights to which he refers in the passages just quoted, and to which I will refer as 'moral rights' to distinguish them from war rights, are generally recognized in moralities that have evolved within particular cultures, and are therefore as nearly universal and as deeply anchored as anything can be in his conception of morality.

Individual moral rights are, then, foundational in Walzer's account of the morality of war. But where exactly do they fit in the war convention? It is clear that Walzer thinks that they are in some sense the source – or at least *a* source – of the rules, principles, codes, and so on that are constitutive of the war convention. He writes, for example, that 'utilitarianism ... does not provide us with customs and conventions. For that, we must turn ... to a theory of rights' (2000: 133). And in a recently published paper, he refers to 'our ordinary morality,' in which moral rights are recognized and embedded, and claims that 'the conventions represent the adaptation of this morality to the circumstances of war' (Walzer 2006: 45).

This claim helps to explain what otherwise appears to be an inconsistency in *Just and Unjust Wars*. Recall that, at one point, Walzer seems to assert that the principles of *jus in bello* are merely 'customary and positive rules of engagement' (Walzer 2000: 21). This seems inconsistent with his later claim that 'the rules of "fighting well" [that is, the rules of *jus in bello*] are simply a series of recognitions of men and women who have a moral standing independent of and resistant to the exigencies of war' (2000: 135). But these apparently conflicting claims can perhaps be reconciled if the standing of individuals as bearers of moral rights finds recognition in or through principles that have passed into custom and, in some cases, have been legally codified.

But the war convention is not just a set of lower-level principles that apply the theory of rights directly to the moral problems raised by war. Individual rights are apparently only dimly visible in the theoretical and historical foundations of the war convention. Referring to a nearly universal set of beliefs about the moral immunity of certain people to attack in war, Walzer writes that:

> [I]t is very likely that some general principle is at work in all these judgments, connecting immunity from attack with military disengagement ... The historical specifications of the principle are, however, conventional in character, and the war rights and obligations of soldiers follow from the conventions and not (directly) from the principle, whatever its force. Once again, war is a social creation. The rules actually observed or violated in this or that time and place are necessarily a complex product, mediated by cultural and religious norms, social structures, formal and informal bargaining between belligerent powers, and so on ... Exactly like law in domestic society, they will often represent an incomplete or distorted embodiment of the relevant moral principle. (2000: 43)

According to this view, individual rights lie behind the judgments people make about moral immunity in war and indeed most other judgments they make about the rights and wrongs of war. There is a line of derivation, but the principles that best articulate the common core of our beliefs about rights have passed through a variety of cultural lenses and pragmatic filters in the

process of generating the customs, norms, and laws that are constitutive of the war convention.

But this view, which emerges from the remarks by Walzer that I have just quoted, fails to cohere with the passages I cited earlier in which Walzer asserts a more direct connection between individual rights and the principles he defends and to which he appeals in offering judgments about various aspects of the practice of war. When he claims, for example, that 'a legitimate act of war is one that does not violate the rights of the people against whom it is directed,' there is no suggestion that such a principle may admit exceptions as a result of cultural variation or may acceptably be revised as a result of bargaining among belligerents.

I will offer here a hypothesis about how these various suggestions about the role of rights in Walzer's theory might be reconciled. Walzer never explicitly distinguishes between the war convention, which he presents himself as defending, and the theory of the just war, which he also presents himself as defending. But the heterogeneity of the elements of the war convention suggests that the relation between the war convention and the theory of the just war that Walzer defends cannot be one of identity. Rather, the theory of the just war – which is an explicitly moral theory – is presumably just one component of the war convention, which also includes the international law of war, the professional codes of various military organizations, and so on. So I suggest that we interpret the quotations about individual rights that I presented earlier as indicating the relation between individual rights and the principles of what Walzer takes to be the best account or interpretation of the theory of the just war. His account of the just war is a philosophical distillation of beliefs about individual rights into principles that may be directly applied to the problems of war. It coexists and competes with other similar or overlapping accounts of the morality of war within the larger and amorphous body of customs, norms, codes, and laws that constitute the war convention.

The Domestic Analogy

I will argue that some of the substantive principles that Walzer defends in developing and setting forth his theory of the just war fail to cohere with the idea that these principles are essentially requirements of respect for individual rights in the context of war – that is, that they are constraints on the initiation and conduct of war that are entailed by respect for the rights of individuals. Before turning to substantive principles, however, I will briefly suggest that one of the central methodological principles on which Walzer explicitly relies is of its nature ill suited to the task of deriving principles and judgments that are sensitive to the moral rights of individuals.

This methodological principle is what Walzer calls the 'domestic analogy.' It claims that states 'possess rights more or less as individuals do,' so that we can see relations among states as analogous to relations among individuals. Consider, for example, the claim that A has a right not to be unjustly attacked by B and therefore has a right to attack B in self-defense if B engages in

aggression. According to the domestic analogy, A and B could be individual persons or they could be states. What's true of the morality of relations among individuals is also true of the morality of relations among states, for states *are* individuals. By viewing states as individuals with rights analogous to those of individuals, we can, according to Walzer, see 'the world of states' as 'a political society the character of which is entirely accessible through such notions as crime and punishment, self-defense, law enforcement, and so on' (2000: 58).

Yet the attempt to understand the morality of war through the domestic analogy does not focus our attention on individual moral rights but instead necessarily obscures any role they might have in morally constraining the practice of war. If we conduct our thinking about war by focusing on relations among states and treating states as if they were individuals with rights that are the analogues of the rights of persons, the actual rights of actual persons become essentially invisible. Individual persons may appear in our moral thought as the agents, representatives, or partial embodiments of the state, and there may be a general presumption that because states are charged with the protection of the rights of their citizens, respect for the rights of states will translate into respect for the rights of their citizens. But if we take the domestic analogy seriously, it should lead us to treat individual persons as if they had no more significance in relations between states than a person's individual cells have in relations between persons. In the latter case, harms to a person matter, while effects on his cells matter only insofar as they affect *him*. According to the domestic analogy, effects on individual citizens should matter only insofar as they bear on the rights of the state.

In practice, the domestic analogy has in fact led people to ignore individual rights in ways that have proven disastrous. According to traditional liberal morality, Mill's 'harm principle' is broadly correct: individuals may be coerced only to prevent them from harming other individuals; they may not be coerced with respect to matters that concern only themselves. If states are individuals with rights that are the analogues of individual rights, they should have a right of nonintervention analogous to the individual right against paternalism. If so, they too may be coerced only to prevent them from harming or violating the rights of other *states*. They may not be coerced with respect to their purely domestic affairs. Reasoning of this sort has been historically influential in discouraging humanitarian intervention in defense of the fundamental rights of individuals against violation by their own government, even in cases in which the violations have amounted to genocide.

It also seems to be an implication of the domestic analogy, though one that has fortunately received little historical recognition, that there can be no requirement of discrimination in war. In its generic formulation, the requirement of discrimination is the requirement to distinguish morally between legitimate and illegitimate targets of attack and to confine one's intentional attacks to the former. As it is usually understood in substantive terms, it forbids intentional attacks against noncombatants but permits attacks against combatants. But if the state is itself an individual and has acted in such a way as to forfeit its right against attack, and if all of its citizens are

equally parts of the state, then it seems that they should all be legitimate targets of attack. It might, of course, be said that only the state's combatant members are legitimate targets of attack because they are the only part of the state that is threatening and are thus the only part that may be attacked in self-defense. But when one person threatens another, there is no one part of the person that poses the threat; *he* poses it and there is no *part* of him that may not be attacked if attacking him there is necessary for self-defense by the victim. So if the domestic analogy is correct and states have rights analogous to those of individuals and may also forfeit those rights in the same way that individuals sometimes do, then when a state engages in unjust aggression, the state as a whole, and not just some subset of its citizenry, should lose its right not to be attacked.

I have said that this implication of the domestic analogy has had little historical recognition, but it has been the basis for certain doctrines of collective responsibility, collective guilt, collective liability, and collective punishment. In this respect at least, the influence of the doctrine has been pernicious.

It is also worth noting, in concluding this brief discussion of the domestic analogy, that even to function as an effective heuristic device, the domestic analogy must deploy notions of the collective good, collective intention, collective belief, etc. on the assumption that these collective analogues have the same kind of moral significance as their individual counterparts. The notion of the collective good, for example, may imply that uncompensated harms to individual members of the collective have no more significance than harms that are compensated for within the life of an individual have for that individual. This, I think, is an evident distortion, as is the idea that a collective intention that is somehow compounded out of individual intentions that have perhaps been processed through some institutional decision procedure could have the same moral significance as an intention formed and acted on by an individual moral agent.

The Moral Equality of Combatants

The requirement of discrimination is the most important substantive principle of the doctrine of *jus in bello*. As I just noted, according to its orthodox contemporary interpretation, this principle holds that while noncombatants are not permissible targets of attack, all combatants are legitimate targets for other combatants. The idea that all combatants are permitted to attack all other combatants, irrespective of whether they are fighting in a just or an unjust war, is one component of the substantive principle that Walzer calls the 'moral equality of soldiers' – though I will call it the 'moral equality of combatants,' to make clear that it applies to naval and air personnel as well as to soldiers.

It will facilitate the statement and discussion of this principle to introduce a terminological distinction. Let us refer to those who fight in a war that lacks a just cause as 'unjust combatants,' and to those who fight in a just war as 'just combatants.' This distinction is not exhaustive because it leaves out

combatants who fight in a war that has a just cause but is wrongful for some other reason – for example, because the war is unnecessary for the achievement of the just cause or because its expected bad effects are disproportionate to the importance of the just cause. Combatants of this third type need not concern us here.

The principle of the moral equality of combatants asserts, in effect, that all combatants, just and unjust alike, have the same rights, immunities, and liabilities. It asserts that a combatant's moral status is unaffected by whether the war in which he fights is just or unjust. This principle is certainly part of the war convention but it is also central to Walzer's account of the just war. It is implicit in the requirement of discrimination as Walzer understands it, and the requirement of discrimination is the one component of Walzer's theory of the just war that is most clearly supposed to derive from individual rights.

Recall that Walzer claims that 'a legitimate act of war is one that does not violate the rights of the people against whom it is directed,' and thus that 'no one can be threatened with war or warred against, unless through some act of his own he has surrendered or lost his rights.' For the moral equality of combatants to be compatible with these claims, it must be true that just combatants either waive or altogether lose their right not to be attacked or killed by enemy combatants. What Walzer explicitly claims is that they lose it. 'That right,' he contends, 'is lost by those who bear arms "effectively" because they pose a danger to other people' (2000: 145). It does not matter that they have done no wrong: 'Simply by fighting,' just combatants lose 'their title to life and liberty . . . even though, unlike aggressor states, they have committed no crime' (2001: 36).

Walzer never explains the basis of these claims, but in the tradition that informs his work they are associated with the idea that self-defense is always presumptively permissible. We are permitted to defend ourselves against those who attack us; thus, because combatants on each side threaten those on the other, all lose their rights vis-à-vis their adversaries. Noncombatants, by contrast, threaten no one and therefore cannot be attacked defensively. They retain their right not be attacked or killed.

But the idea that people lose their moral right not to be attacked or killed simply by posing a lethal threat to another is false, and is almost universally recognized as such, at least outside the context of war. If a person is the victim of an unjustified, culpable, and potentially lethal attack, she does not forfeit her right not be killed by engaging in necessary though potentially lethal self-defense. Although she now poses a lethal threat to her assailant, her engaging in justified self-defense does not make it permissible for that assailant to kill her in self-defense. As in domestic law, there can be no justified defense against a fully justified attack.

If this is right, then not only does the principle of the moral equality of combatants not derive from the moral rights of individuals, but it is actually incompatible with respect for those rights. For if just combatants do not lose their rights when they engage in justified defense, then when unjust combatants attack them, they violate those rights and therefore act wrongly. But if unjust combatants violate rights when they attack just combatants,

while just combatants do not violate rights when they fight in justified defense, the principle of the moral equality of combatants cannot be compatible with principles that require respect for individual moral rights.

It might, of course, be argued that all combatants *waive* their rights not to be attacked or killed vis-à-vis their adversaries. Walzer does gesture in the direction of this idea in his brief discussions of wars in which all combatants fight 'freely' – that is, when combatants on both sides choose to fight for reasons of their own rather than being compelled to fight either by the necessity of defense or by threats from their leaders. If, for example, there were a war fought entirely by mercenaries on both sides, it might be plausible to regard them all as waiving their rights against attack vis-à-vis their adversaries, as boxers and duelists do. But it is clear that wars as they are fought now are not like this; nor does Walzer base the moral equality of combatants on the suggestion that all combatants somehow consent to be attacked.

Even though the moral equality of combatants does not derive from individual moral rights and is even incompatible with principles that do derive from such rights, it does not follow that it has no role in the normative regulation of war. A doctrine very like the moral equality of combatants does in fact have a proper and important place in the war convention, given the present state of international law and international legal institutions. It is necessary in current conditions to grant just combatants and unjust combatants alike a *legal* permission to attack and kill enemy combatants. In legal and conventional terms, combatants on both sides in a war must be regarded as equals, or as having the same status. Their legal or conventional rights and liabilities must be the same. We might call this view the 'legal equality of combatants,' or perhaps the 'conventional equality of combatants.'

The ultimate foundations of the legal equality of combatants are epistemic. In part because of what psychologists call in-group/out-group bias, people tend to trust their own country and its government and to distrust other countries, at least in situations of conflict. For this and various other reasons, most combatants believe, usually unreasonably but occasionally even reasonably, that the wars in which they fight are just. This is true of just and unjust combatants alike. And even those unjust combatants who suspect or even recognize that their war is unjust are generally far more likely to fight, or to continue to fight, than to refuse to fight. Furthermore, because it is a rare person who will acknowledge his wrongdoing, either while he is engaged in it or afterwards, even those unjust combatants who suspect or believe that their war is unjust will nevertheless tend to *claim* that it is just. For these reasons, whatever is legally permitted to the just in war will be done by the unjust as well. A law that would grant permissions to the just that it would deny to the unjust would therefore be wholly ineffective in constraining the unjust.

The difference here between international law and domestic law is that, in domestic law, people are obliged by the relatively determinate nature of the laws and by the effectiveness of the mechanisms for the enforcement of these laws to take great care in determining whether their beliefs about what is legally and morally permissible are correct. They cannot act with impunity on

the basis of whatever belief they happen to have, or feign to have. At the international level, by contrast, it is considerably more difficult for an ordinary combatant to determine whether a war is just or unjust, and there is no international judicial body that is competent to deliver judgments about matters of *jus ad bellum* with anything approximating the epistemic reliability of a domestic criminal court. The combatant, therefore, has no authoritative source of guidance, and for this reason, among others, liability for unjust wars, or for crimes against peace, is restricted to those in positions of decision-making authority, who are presumed to have competent legal counsel.

Because of the epistemic constraints under which combatants must act, which are in part the result of the absence of any authoritative source of judgment in matters of *jus ad bellum*, the laws of *jus in bello* must be neutral between just and unjust combatants. But a set of neutral laws that would deny to the just and unjust alike all that ought to be forbidden to the unjust would be no more effective than non-neutral laws that would deny to the unjust what they would permit to the just. Neutral laws that denied to the just what ought to be denied to the unjust would constrain no one. And they would themselves be fundamentally unjust in that they would in effect deny to the just the right of self-defense against the unjust. (Advocates of nonviolent resistance might dispute this claim. But while they are right that violent defense is unnecessary far more often than most people believe, they are wrong if they claim that it is never necessary for successful resistance.)

The only feasible option, therefore, is to grant legal permission to both just and unjust combatants to fight and to kill in war. At least at present, there would be little advantage yet many risks in making participation in an unjust war illegal. The most significant obstacle is the absence of any judicial body that is both legally *and epistemically* competent to make an authoritative determination about whether a war is just or unjust. In the absence of more rigorous procedures than we have at present for evaluating matters of *jus ad bellum*, the status of any combatant as an unjust combatant must remain too contentious to be a basis of legal prosecution. Moreover, in the absence of an authoritative pronouncement, either before or during the course of a war, about whether the war is just or unjust, unjust combatants will in most cases be able to plead nonculpable ignorance to a charge of participation in a criminal war, thereby mitigating their liability and excusing them from severe punishments, and thereby also diminishing the deterrent value of any punishment that might be justly imposed.

There remains, however, a deep difference between the permission just combatants have to participate in war and that which is granted to unjust combatants. The permission under which just combatants act is a moral permission that is also recognized in law. The permission granted to unjust combatants, however, is legal and conventional only. The international law of war must, for pragmatic reasons, grant a legal permission to unjust combatants to engage in morally wrongful killing. Since just combatants are innocent in the relevant, generic sense – that is, they have done nothing to forfeit their moral right not to be killed – the international law of war must

grant a legal permission to unjust combatants to engage in the intentional killing of the innocent.[3] It must legally condone the violation of the individual moral right to life – a significant point of divergence between the legal equality of combatants and principles requiring respect for individual moral rights.

The Rights of Noncombatants and Prisoners of War

The legal permission to kill the innocent is, however, a permission to kill only innocent *combatants*. There is no pragmatic reason to permit the killing of noncombatants. Exactly the opposite is true: there are pragmatic reasons to maintain a categorical legal prohibition of the killing of noncombatants. And surely, one might think, this is one point on which morality and the law must coincide. Yet I think that this is in fact another point of divergence. I believe that the correct criterion of liability to attack in war is moral responsibility either for a wrong that is of a type that its prevention or correction constitutes a just cause for war, or for an unjust threat in war (McMahan 2004). If this is right, and if there are some civilians who bear a significant degree of responsibility for an unjust war, if killing them would make an important contribution to the achievement of the just cause, and if they could be attacked without causing disproportionate harm to the innocent, then morality might permit or even require that they be killed.

But, again, given the present state of international law and international institutions, whatever is permitted to the just will be done by the unjust. It would therefore be intolerable to have a non-neutral rule that would permit, on rare occasions, intentional attacks against *liable* civilians by just combatants. For such a rule would inevitably be taken by unjust combatants to justify their attacking enemy civilians who would in fact be innocent (and *all* noncombatants on the just side are innocent in the context of war). And it would also inevitably be taken by just combatants to justify their attacking enemy civilians in conditions in which those targeted would not bear a sufficient degree of responsibility to make them liable to military attack, or in which, while *some* of those targeted would be liable, there would also be a sufficient number of other, innocent civilians killed to make the attack objectively disproportionate.

But it would be even more intolerable to have a neutral rule that permitted the killing of noncombatants to just and unjust combatants alike. The only tolerable legal regime is therefore one that forbids intentional attacks against noncombatants to all. Unlike a neutral prohibition of killing enemy combatants, a neutral prohibition of killing enemy noncombatants would not deny a right of self-defense to the just. It might, on occasion, deny just combatants a defensive option that not only would be morally permissible (at least in the absence of the legal proscription) but would also be their best or most effective defensive option in the circumstances. In this respect, the legal prohibition of the killing of noncombatants by just and unjust combatants alike is analogous to domestic legislation that would prohibit the possession of guns to everyone, including both criminals and those who would use a gun

only for legitimate defense. The general prohibition of guns would surely on occasion impair an innocent individual's capacity for legitimate self-defense; but it would, if effectively enforced, enhance the antecedent security of each innocent person relative to any feasible situation in which some private citizens were permitted to possess guns.

Thus far I have argued that the permission granted to unjust combatants to attack and kill just combatants has no foundation in individual moral rights, and indeed is incompatible with respect for these rights. It is not an adaptation of the liability rules of ordinary morality to the conditions of war, but is instead a concession to pragmatism. Its force derives entirely from its utility. I have also argued that the exceptionless prohibition of intentional attacks on civilians or noncombatants has a similar foundation. There are occasions on which it is morally permissible (or would be in the absence of the legal prohibition) for just combatants intentionally to kill certain noncombatants – namely, those who bear a significant degree of responsibility for the wrong that provides the just cause for war. The reason for promulgating and enforcing an exceptionless prohibition of intentional attacks on civilians is again pragmatic. It derives from the necessity of avoiding the consequences that would ensue if the restricted *moral* permission were recognized in law.

There is one more area of Walzer's account of the just war that I will mention, which it is tempting to regard as deriving from individual moral rights but in which at least some of the principles have a conventional foundation. This is the area of the theory concerned with the treatment of prisoners. As we saw earlier, Walzer explicitly concedes that some of the elaborate rules governing what prisoners of war may and may not do, and what may and may not be done to them, are clearly 'the work of men and women . . . adapting to the realities of war' (2004: 46), rather than logical derivations from fundamental moral principles. Yet there is a later passage that suggests that the prohibition of the *killing* of prisoners has a deeper basis. Imagine a situation in which a unit of just combatants captures some prisoners while deep in enemy territory. If the prisoners are released, they will return to their base, alert their comrades to the presence of the unit, and help to track it down and attack it. If the just combatants attempt to take the prisoners with them as they flee enemy territory, the prisoners will slow them down, consume their rations, and seek to call attention to their presence, thereby endangering them in various ways. It is important in this example that the prisoners are unjust combatants, for this means that they have *wrongfully* created a situation in which, if they are allowed to live, they will pose a grave threat to the survival of the just combatants.

In these circumstances, I believe that it could be permissible for the just combatants to kill them in self-defense – or, perhaps, in self-preservation, if the direct threat were from unjust combatants other than the prisoners themselves. That is, I believe that in these circumstances the unjust combatants lack a right not to be killed. Walzer concedes that some legal writers have recognized the permissibility of killing prisoners in such circumstances. Thus, he quotes Francis Lieber's military code for the Union

Army, a seminal document in the history of the law of war, which asserts that 'a commander is permitted to direct his troops to give no quarter . . . when his own salvation makes it impossible to cumber himself with prisoners' (2000: 305). Walzer's response is that 'surely in such a case the prisoners should be disarmed and then released. Even if it is "impossible" to take them along, it is not impossible to set them free. There may be risks in doing that, but these are exactly the sorts of risks soldiers must accept' (2000: 305). It is perhaps most plausible to interpret this passage as presupposing that the prisoners have a *moral right* not to be killed. But Walzer never explicitly asserts this. Perhaps he believes that they have only a *war right* not to be killed – that is, a right that derives from agreement or from customs or conventions grounded in considerations of utility. If so, there may be no disagreement here. For there is no serious dispute that, in the long run, it will be better for everyone, just and unjust combatants alike, if all parties respect a set of rules that grant prisoners of war various rights against their captors.

But I go further than this in making a claim that I believe Walzer would reject as incompatible with the moral equality of combatants. This is that just combatants have rights as prisoners that unjust combatants lack. When their existence as prisoners imperils the lives of their captors, unjust combatants are protected against being killed *only* by agreement or convention. If their own side were to repudiate the agreement, their right would lapse. If their own side were to violate the convention, that could in principle make them liable to be killed in reprisal. But just combatants have not only a war right but also a *moral* right not to be killed, even when their remaining alive poses a significant threat to the lives of their captors. For just combatants retain in war the same right not to be killed that they possessed outside the context of war.

The Practical Significance of the Status of Just War Principles

Suppose that I am right about all this – that is, suppose that some of the central principles of Walzer's version of the theory of the just war are not applications of the theory of individual rights to the domain of war but are instead rules that reflect pragmatic accommodations to various practical and epistemic constraints that preclude our being able to apply the principles of a rights-based morality directly to the problems of war. Walzer might be unfazed. He might claim that the principles of his theory of the just war work better, in the circumstances, to protect individual moral rights than any alternative set of principles. This could be true even though his principles permit the intentional killing of just combatants by unjust combatants, which I believe is tantamount to permitting wrongdoers to engage in the systematic violation of the moral right not to be killed of a certain class of innocent people. He might think – indeed he *does* think – that the attempt to determine the rights and wrongs of war by reference to individual rights, responsibilities, and liabilities as they are outside the context of war is pointless because it would be devoid of practical significance. Thus, in a recent article, he writes that 'I don't think that the effort to tell the moral

story of war and warfare in terms of individual responsibility is going to work – that is, it's not going to do any work on the ground. The story can be told, but I don't see how it impacts on the actual course of the battles (or, for that matter, on the aftermath of the battles)' (Walzer 2006: 45).

I think, however, that it may be of considerable practical significance whether I am right that some of the central principles of Walzer's theory of the just war, which has represented the consensus view since the publication of *Just and Unjust Wars* thirty years ago, are dictated by pragmatic considerations, and are thus well suited for direct translation into law, rather than being principles requiring respect for individual moral rights that are specially adapted to the domain of war. I will conclude by noting two general ways in which a shift in our understanding of the status of these principles could be of practical moment.

One is that the recognition that the relevant principles – in particular, the moral equality of combatants – are conventional principles designed to serve morally motivated goals makes it possible to think of them as revisable, perhaps in quite radical ways, in response to changes in the landscape of war, particularly in background legal institutions. If, for example, we see the principle that permits unjust combatants to kill just combatants as merely a concession to necessity, we can then attempt to design new institutions that would obviate the necessity of granting this permission, which, as I have argued, is effectively a conventional permission to violate certain people's fundamental moral rights. We can try to design institutions that would make it feasible to promulgate legal and conventional norms that would not only serve to mitigate the general destructiveness of war but would also require greater respect for individual moral rights than the current laws and norms do.

We might, for example, strive to create an impartial, international court that would be empowered to deliver authoritative and enforceable judgments about matters of *jus ad bellum*, not just in the aftermath of war but while war is in progress and even, perhaps, before it starts. If such a court could achieve a degree of epistemic reliability comparable to that of a domestic court's determinations of individual guilt and innocence, it might then be practicable to revise the international law of war to make it illegal, and perhaps punishable, to fight in an unjust war. Problems would of course remain – for example, in ensuring the impartiality of the court, in resisting pressures to impose collective liability on unjust combatants, in determining what an individual combatant ought to do when his own domestic law, or his own individual judgment, conflicts with that of the court, and so on. But the existence of such a court could potentially enable us to revise the laws of war in ways that would increase their congruence with the nonconventional morality of war – for example, by eliminating some of the practical obstacles to implementing non-neutral laws of *jus in bello* that would grant permissions to just combatants that they would deny to unjust combatants.

The second general way in which it could be of practical significance to recognize that some of the central principles of Walzer's widely accepted account of the just war are radically conditioned by pragmatic considerations

is that they would cease to have the kind of grip on the conscience of the individual that they currently do. Consider, for example, the principle of the moral equality of combatants. If this is regarded as an unmediated deliverance of basic, nonconventional morality that tells us which moral rights combatants have and which they lack, then conscripts, reservists, and active-duty military personnel will believe that they do no wrong, and violate no one's rights, if they obey a call to fight in what they perceive – rightly, let us assume – to be an unjust war. That being so, they have little incentive, and perhaps even little reason, to reflect about whether wars in which they are commanded to fight are just or to deliberate about whether to fight or instead to refuse. If, however, they regard the moral equality of combatants as a principle designed with pragmatic considerations in mind, a principle that states only the conventional war rights of combatants and permits the violation of some combatants' fundamental moral rights, they will then not be entitled to defer with complacency to a command to fight. They will be denied the reassurance that they will not be guilty of a grave moral wrong if they obey, and they will be unable to rationalize their participation on the ground that responsibility for what they do lies entirely with their political leaders, provided only that they obey the conventional rules of engagement.

I believe that the consequences of viewing the moral equality of combatants for what it really is would be on balance good, particularly insofar as people would become more skeptical of the permissibility of participating in morally dubious wars, which itself could help to deter governments from launching unjust wars, for fear of widespread conscientious refusal. I concede, however, that the consequences of recognizing that the categorical prohibition of the killing of civilians is, like the moral equality of combatants, a concession to human fallibility and moral infirmity would likely be bad on balance. And the same may be true, though to a lesser degree, of the probable consequences of recognizing the proper status of the neutral rules governing the treatment of prisoners of war.

It is my hope, however, that we can have the benefits of recognizing the true status of the moral equality of combatants as, in effect, the conventional or legal equality of combatants, while finding effective ways of motivating compliance with neutral prohibitions of the killing of civilians and prisoners that do not rely on disguising these prohibitions as direct derivations of the moral rights of all civilians and all prisoners of war. We can, after all, make the case, as we have so far successfully done with the ban on poison gas, that in the long run it is in the interests of all parties to respect these prohibitions. And we can add that, while basic, nonconventional morality recognizes exceptions to the prohibitions, it supports them in most cases, so that there is a presumption in favor of erring on the side of caution. Morality does indeed categorically prohibit attacks on civilians and the killing of prisoners *by unjust combatants*. Because it is common for unjust combatants to believe that they are just combatants, and because the killing of civilians or prisoners is permitted even to just combatants only very rarely, it is always *morally* perilous for any combatant to violate these prohibitions.

If this is right, a person who wants to be guided in matters of war by respect for the rights of individuals will do best, by the standards of basic, nonconventional morality, not to avail himself of the legal permission to participate in an unjust war but to obey, in all but the most extreme circumstances, the prohibitions of the killing of civilians and prisoners.

Notes

[1] Compare Walzer's claim that 'belligerent armies . . . are subject to a set of restrictions that rest in part on the agreements of states but that also have an independent foundation in moral principle' (2000: 131).

[2] Strictly speaking, Walzer thinks that the business of morality is interpretation rather than invention. But it is interpretation of what we have created rather than discovered (Walzer 1987: ch. 1; Walzer 1994: ch. 1).

[3] If, as Walzer says, 'the deliberate killing of the innocent is murder' (2000: 323), the law of war must permit acts that are close to murder. The intentional killing of just combatants is not murder, however, given the pervasive assumption that all combatants are legitimate targets in war. At a minimum, the necessary form of *mens rea* is lacking.

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