Taking 'justness' seriously in just war: who are the 'miserable comforters' now?

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These are deeply troubling times in the regulation of warfare. The wars in Syria and Iraq, not to mention many other conflicts elsewhere, present us daily with gross violations of the laws of war. For those with any commitment to the 'just war' perspective, this is doubly disturbing: we are shocked not only by the human suffering, but also by the grotesque disjuncture between actual military conduct and the refined and sanitized philosophical apparatus of just war. This tension between principle and practice is, of course, age-old. Moreover, to the bitter critics of just war it comes as no surprise, as atrocities are considered part of the Faustian bargain with an excessively permissive doctrine. How should the friends of just war respond to these new challenges to the laws of war? In the immediate aftermath of 9/11, Nicholas Rengger queried whether just war had 'reached the limit of its elasticity'.[1] It is timely to reconsider his question today: is just war now part of the problem, and how should it best respond to this renewed assault on the regulation of war?

Ethical reflection has been one major tributary of just war, and has of late enjoyed a highly innovative phase. Moral philosophers have been grappling with the many new and old dilemmas presented by the human engagement with violence: notably, they have mounted a series of fundamental revisions to some of the bedrock moral assumptions that have hitherto underlain reflection on the ethics of war. At the very same time, international lawyers—themselves historically important contributors to just war—lament the state of the law of war, in the face of widespread, and often flagrant, non-compliance. Only rarely do they see any silver lining to the dark cloud.[2] While ethical theory has seemingly become much richer, adherence to international humanitarian law appears greatly impoverished in contrast. What, then, is the relationship between ethics and law in war, and is there any onus on ethics to come to law's rescue in these difficult times?

At the end of the eighteenth century, Immanuel Kant dismissed the early exponents of international law, such as Grotius, Pufendorf and Vattel, as 'miserable

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[1] Nicholas Rengger, 'On the just war tradition in the twenty-first century', *International Affairs* 78: 2, March 2002, p. 361.

[2] Travers McLeod, *The rule of law in war: international law and United States counterinsurgency in Iraq and Afghanistan* (Oxford: Oxford University Press, 2014).

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comforters'.[3] According to Kant, in their quest to regulate the fighting, these legal thinkers took their eye off the main goal, namely the fundamental moral reconstitution of the political communities that tolerated the use of force in the first place. Ever since, the respective priorities of 'humanizing' versus 'abolition' have been recurrently contested.[4] Is there now a risk of some contemporary moral philosophers becoming the miserable comforters of today? The question is prompted by their apparently according priority to the prevention (*ad bellum*) of unjust wars by introducing new moral rules that—since they are largely inapplicable as a system of law—may further undermine existing regulation of the battlefield (*in bello*), in wars either just or unjust. If the miserable comforters of yore were charged by Kant with placing too much emphasis on legal restraint, then assuredly those of today seem to place not nearly enough.

Underlying these sundry disagreements, I argue, are competing conceptions of justness,[5] and of how the just war tradition deploys these conceptions. These can be tracked by a review of the fault-lines that have emerged in just war debates between orthodox and revisionist scholars, particularly with regard to the relationship between ethics and law. The argument proceeds as follows. I show how revisionist positions have advanced an ethics of war that creates a divergence from law, and indeed diminishes our concern about the legal implementation of appropriate norms. This is contrary to the practice of just war reasoning, which—like the cognate concept of legitimacy—traditionally rests on some balance between (often competing) ethical, legal and political priorities. This latter form of reasoning reflects, above all, a commitment to dealing with war as an ongoing practice in international society, and not—as revisionists tend to do—as some 'idealized' activity subject to the best of all possible ethics. What is at issue between orthodox and revisionist protagonists, then, is not only a set of disagreements about appropriate principles of discrimination in war, but a more fundamental division about which test for justness is to be applied in just war. My conclusion is that revisionists present a narrowly ethics-based version of justness that marginalizes concern for law and political institutions. In so doing, they risk causing yet further damage to systems of legal restraint already under intense pressure.

Thinking just war

One of the most insightful historians in this field has insisted that: 'The law of war began in ethics and it has kept one foot in ethics ever since.'[6] The thrust of his observation is that the law becomes overly detached from ethical principles at its own peril. Nonetheless, it is precisely this close relationship between the law

[3] Martti Koskenniemi, '"Miserable comforters": international relations as new international law', *European Journal of International Relations* 15: 3, 2009, pp. 395–422.

[4] Geoffrey Best, *Humanity in warfare: the modern history of the international law of armed conflicts* (London: Weidenfeld & Nicolson, 1980).

[5] The standard terminology is, of course, 'justice'. However, that term brings with it a much wider set of debates that are not addressed in this article. I therefore employ 'justness' instead to denote the application of a general conception of justice in the very particular context of just war.

[6] Geoffrey Best, *War and law since 1945* (Oxford: Oxford University Press, 1994), p. 289.

and the ethics of war that has recently become a key site of controversy,[7] and in some hands is now being severely stretched. My concern is similar to Best's, and turns Kant's on its head: what happens if just war adopts an ethics that is too distantly separated from practical issues, including effective application in law? This question is particularly pertinent at the moment; we may recall Rengger's assertion that just war is 'a tradition of moral and political reflection rooted in practice'.[8] Do revisionist moral philosophers today deal with this ethics/law problem in a way that is consistent with Rengger's stipulations for just war?

These past two decades have been a golden age for the ethics of war. The discussion has been mainly structured by the debate between orthodox (Michael Walzer) theory and the revisionist (Jeff McMahan) challenges.[9] As against a justifiable liability to be harmed defined by the presentation of an active threat, McMahan has powerfully enjoined us to rethink the very basis of those liabilities and immunities in war. We should instead distinguish between those combatants who continue to enjoy ethical immunity because they are fighting a 'just' war (in *ad bellum* terms), and those combatants who bear moral responsibility for the 'unjust' war in which they take part. In placing the onus on combatants not to participate in an unjust war, McMahan unsettles the orthodox view of symmetry between combatants. It is not the presentation of a threat that creates a combatant's liability to be killed: it is something else, namely participation in a war that is already unjust. The distinction we must make, then, is between *fault liability* and *threat liability*;[10] and it is the former, not the latter, that justly exposes people to harm in war. While this is primarily presented as ethically more convincing in its own *in bello* terms, it offers the further bonus of strengthening the incentives against resort to unjust war, since combatants will be less likely to take part in these wars if their legal rights in that situation are compromised. In this way it additionally reinforces the *ad bellum* position.

This disagreement between orthodox and revisionist schools can be further illustrated with reference to how they conceive of the relationship between the *ad bellum* and the *in bello* in the two schemes. The orthodox position treats these as two separate conversations. Whatever the judgement about the *ad bellum* justice of the warring parties, we must treat the respective combatants equally, if we are to provide any incentive for all parties to comply with law in war. In short, we must consider the two components of just war differentially, in order to make possible the effective legal regulation of conduct. In contrast, today's revisionists mandate an explicit synergy between the two dimensions: the asymmetric logic of the *ad bellum* has to be reflected also in the unequal rights of combatants *in bello*. The two

[7] Adil A. Haque, 'Law and morality at war', *Criminal Law and Philosophy* 8: 1, 2014, pp. 79–97; Antony Lamb, *Ethics and the laws of war: the moral justification of legal norms* (Abingdon: Routledge, 2013); Tamer Meisels, 'In defense of the defenseless: the morality of the laws of war', *Political Studies* 60: 4, 2012, pp. 919–35; David Rodin, 'Morality and law in war', in H. Strachan and S. Scheipers, eds, *The changing character of war* (Oxford: Oxford University Press, 2011); Henry Shue, 'Laws of war, morality, and international politics: compliance, stringency, and limits', *Leiden Journal of International Law* 26: 2, 2013, pp. 271–92.

[8] Rengger, 'On the just war tradition', p. 360.

[9] There are, of course, many nuanced positions in between, e.g. in the highly original work of Seth Lazar. See Lazar, 'Necessity and non-combatant immunity', *Review of International Studies* 40: 1, April 2014, pp. 53–76; *Sparing civilians* (Oxford: Oxford University Press, 2015).

[10] Stephen P. Lee, *Ethics and war: an introduction* (Cambridge: Cambridge University Press, 2012), p. 170.

dimensions of just war are necessarily, in this way, brought into much closer alignment. When this is done, we enhance the prospects of effective *ad bellum* restraint on resort to war.

However, as is acknowledged, this is starkly opposed to existing legal practice. Of notable significance for the present discussion, therefore, is the revisionist impact upon the realm of law. To the extent that we retain laws predicated on the orthodox premise of the equality of soldiers (embedded in an overarching framework of the fundamental distinction between combatants and non-combatants), the law becomes profoundly detached from coherent ethical premises, and at best serves some kind of utilitarian function.[11] At the very least, we are steered towards a necessary divergence between ethics and law, both in content and in purpose.[12]

Those unconvinced by these revisionist claims harbour deep misgivings about their implications. The critics maintain that any ethical project of this kind is flawed, not least because of the divorce between law and ethical principle that it inevitably entails.[13] As even revisionists openly concede, their ethical principle of discrimination cannot readily or immediately be embraced in effective law. Whatever the practical difficulties in observing the existing distinction between combatants and non-combatants, this principle nonetheless remains more achievable in law than any alternative distinction between just and unjust warriors (let alone between just and unjust non-combatants). What guidance does just war have to offer in the face of this dilemma?

Justness requires more than good ethics alone. For revisionist moral philosophers, the key concern is that the laws of war currently do not reflect a coherent or compelling moral position. For many international lawyers and political theorists, on the other hand, the problem is instead what to do about the challenge to law, and the worry is that these proposed ethical revisions do not lend themselves at all to effective application in a practical legal system. If we accept these ethical principles, we further diminish the prospects for law. This is the impasse to which revisionism leads: law faces an unpalatable choice of deficits, either in ethical coherence or in practical attainability.

How we prioritize these respective concerns is further reflected in how we depict the principal moral challenge. In a review article in this journal, the revisionist ethical position was endorsed in so far as it made a real contribution to addressing 'the most significant moral risks', namely, 'that political leaders will fight unjust wars that they mistakenly believe to be just, or which they know to be unjust but nevertheless choose to fight'.[14] On the opposite side, we are equally encouraged to be mindful that 'the existence and operation of law in an area like this must itself be regarded as a morally important institution'.[15] If the latter is indeed the case, the choice is not simply between (best) ethics and (effective) law,

[11] Rodin, 'Morality and law', p. 453.
[12] Jeff McMahan, 'The ethics of killing in war', *Ethics* 114: 4, 2004, p. 730.
[13] Adam Roberts, 'The equal application of the laws of war: a principle under pressure', *International Review of the Red Cross* 90: 872, 2008, pp. 931–62.
[14] Christian Barry, 'A challenge to the reigning theory of the just war', *International Affairs* 87: 2, March 2011, p. 466.
[15] Jeremy Waldron, 'Civilians, terrorism, and deadly serious conventions', in *Torture, terror, and trade-offs* (New York: Oxford University Press, 2010).

but also between conceptions of justness that take the problem of law seriously as an ethical concern, and those that push it towards the periphery. Thus construed, which is the greater moral hazard: that we contribute to more frequent unjust wars, or that we become increasingly unable legally to restrain any wars at all, just or unjust? This is the full scope of the dilemma that just war now faces.

The just war tradition has many strands, and has continuously reinvented itself to reflect new thinking and new conditions:[16] evolution is in its DNA. Historically, it has been regularly challenged by major changes in warfare, technological and otherwise. Walzer, for example, considered nuclear weapons to have 'exploded' it,[17] and yet it has seemingly adapted to this revolutionary condition. So why would it help with today's problems in regulating warfare if just war theorists took 'justness' more seriously? The short answer is that current debates have become confusingly polarized into fundamentally different ways of speaking about justness in war: this now presents a serious obstacle to genuine dialogue, at the very moment when the laws of war need all the support they can get from the just war tradition. Underlying those specific debates within just war have been hidden perspectives on what 'justness' really means. This now has urgent implications, above all for the role of international law as 'a major carrier of this tradition'.[18] Does just war have any responsibility to develop an ethical theory that takes seriously the beleaguered plight of the laws of war?

Law, ethics and war

There is a manifest danger of slippage between law and ethics of war, as if these were no more than superficially different facets of essentially the same thing. This risk of elision is greatest when law is regarded as inherently an ethical enterprise, and not simply a pragmatic and 'positive' set of rules. If it is true that 'law is a school of moral philosophy',[19] our very posing of the problem in these dichotomous terms—ethics or law—implies a misleading, if not entirely false, opposition. At the very least, the gap between law and ethics can sometimes appear paper-thin. This is especially so today. The emphasis within the currently preferred nomenclature for this body of law—international humanitarian law—makes overt appeal to humanitarian concerns, in a way that the once preferred 'law of armed conflict' did not. Indeed, this is the very reason some international lawyers feel uncomfortable with its terminology, as it appears to reduce positive law to little more than a restatement of ethical (humanitarian) principles.[20]

Most commentators nonetheless do accept that there are important differences between law and ethics. Michael Walzer was adamant that 'legal treatises do not

[16] Cian O'Driscoll, *Renegotiation of the just war tradition and the right to war in the twenty-first century* (Basingstoke: Palgrave Macmillan, 2008).
[17] Michael Walzer, *Just and unjust wars: a moral argument with historical illustrations*, 5th edn (New York: Basic Books, 2015), p. 282.
[18] James T. Johnson, *Can modern war be just?* (New Haven, CT: Yale University Press, 1984), p. 33.
[19] Waldron, 'Civilians, terrorism'.
[20] Michael N. Schmitt, 'Military necessity and humanity in international humanitarian law: preserving the delicate balance', *Virginia Journal of International Law* 50: 4, 2010, pp. 795–839.

… provide a fully plausible or coherent account of our moral arguments'.[21] Legal positivists, from the other side, deny any identity between the two, as ethics cannot fully capture the essence of law.[22] Accordingly, Henry Shue has depicted the relationship between them in contradictory terms: 'The laws of war and morality ought to be as similar as possible, but will necessarily be radically different.'[23] Lamb likewise attaches equal weight to both, and is strongly persuaded that, overall, good law is rooted in good ethics.[24] He insists, moreover, that this integration is the distinctive contribution of the just war tradition. In some respects, Meisels goes even further in pushing towards assimilation in her contention that 'the laws of armed conflict … do not diverge significantly from any deep morality of war'.[25]

Given this spectrum of interpretation, how are we to make sense of this troubling relationship? If the juxtaposition of law and ethics is already complex enough, it becomes markedly more so when placed explicitly within the framework of just war: how exactly do these two sets of considerations fit into this framework? Is war just because it is ethical or because it is legal, or some combination of both? An answer to these questions must fully unpack the notion of 'justness' in its many facets. Does the idea of 'justness' introduce yet further considerations, extending beyond those of law and ethics, and if so what is their nature? If not, how does it then capture this duality, and manage to navigate between their (possibly competing) demands? Can it retain its balance if it keeps one foot on each stool, while revisionist theory pushes the two ever further apart?

The specific concern, then, is precisely about this divergence between law and ethics that has been advanced as one necessary element in the solution of some major ethical puzzles about war. This trend is most closely identified with the revisionist writings of Jeff McMahan. As noted above, McMahan has challenged the basic ethical premise governing the Walzerian notion of the 'moral equality of soldiers'. In his view, if there is any such equality, it is legal, and certainly not moral: that is the problem in a nutshell. This argument forms part of his wider contention about the relationship between law and ethics, and specifically his categorical assertion that 'the law of war must be substantially divergent from the morality of war'.[26] He reaches this conclusion because it seems that, when we consider the applicable laws of war, 'the corresponding moral principles are false'.[27] Something is deeply wrong, and evidently it is the law. This leaves us with a 'stark incongruence between the laws of war and the true morality thereof'.[28] In his own words, McMahan's ethical project requires that we 'distinguish sharply and explicitly between the morality of war and the law of war'.[29]

[21] Walzer, *Just and unjust wars*, preface to the 1st edn, p. xxiv.
[22] Matthew H. Kramer, *Where law and morality meet* (Oxford: Oxford University Press, 2004).
[23] Shue, 'Laws of war', p. 272.
[24] Lamb, *Ethics*, p. 1.
[25] Meisels, 'In defense', p. 919.
[26] Jeff McMahan, 'The morality of war and the law of war', in David Rodin and Henry Shue, eds, *Just and unjust warriors: the moral and legal status of soldiers* (Oxford: Oxford University Press, 2008), pp. 19–43.
[27] McMahan, 'The morality of war', p. 21.
[28] Meisels, 'In defense', p. 921.
[29] McMahan, 'The morality of war', p. 35.

Importantly, McMahan prefaces his own analysis by providing a synoptic history of just war, in which it undergoes a 'pragmatic turn' from the sixteenth century. Prior to this point, he suggests, 'the principles of the just war were quite different from the laws of war in their current form'. Thereafter, he contends, just war thinking has been overtly, and increasingly, colonized by international law. It is clearly this 'combination' that he finds so deeply troublesome. The tradition therefore displays a marked discontinuity around this rupture, reflecting what he describes as a 'shift in thinking about the normative dimensions of war'.[30] It is evidently this resulting pragmatism that McMahan dislikes, and that informs his general attitude towards law. At some point after the sixteenth century, just war was unduly influenced by international law; and, he implies, it should be restored to its pristine condition. In some respects, his is not unlike Kant's critique of the baleful influence of the international lawyers.

The question is how well this position sits with how we think about just war. If justness is taken to be determined exclusively by ethics, that is one thing, and we can debate the ethics in these terms. But what if justness demands also due attention to effective implementation in law, and if this is accepted as a more encompassing ethical requirement? Revisionism appears to cast law adrift, without any ethical bearings to chart its direction. If so, it clearly fails Geoffrey Best's test. But the further question that must be asked—if revisionism does indeed issue in a relative disregard for law—is: how convincing then is its ethical calculus overall? Is it not an overly narrow ethics that discounts its impact on the role of law?

Discussions of the relationship between the law of war and ethics tend, in turn, to become disaggregated into three distinct, but interconnected, sets of debates. These reveal the fundamental disagreements about justness that lurk beneath the surface. The first is the generic one of whether, and how far, we should separate law from ethics in any case. The second is whether we need, in order to do so, to make a further distinction between two types of ethics, one appropriate to the everyday world of peace, and another applicable only to the exceptional world of war:[31] if we ask about the general relationship between the law of war and ethics, which specific ethics apply at that moment? Third, one further interrogation immediately emerges from the same logical sequence. If there are to be considered two types of ethics, exactly how and where are we then to draw that line between peace and war, and so recognize when the exceptional ethics of war are to be applied? This exercise is now demonstrably more challenging, precisely because so many other traditional distinctions surrounding political violence have become increasingly blurred.[32]

As to the first, the most common argument is that, no matter how ethically compelling any principle, law must nonetheless be enacted bearing other technical and practical considerations in mind, and this tends to introduce subtle differences between ethics and law. Even sharper differences are drawn by those who suggest

[30] McMahan, 'The morality of war', pp. 19–21.
[31] Henry Shue, 'Do we need a "morality of war"?', in Rodin and Shue, eds, *Just and unjust warriors*, pp. 87–111.
[32] Claire Finkelstein, J. David Ohlin and Andrew Altman, eds, *Targeted killings: law and morality in an asymmetric world* (New York: Oxford University Press, 2012).

that ethics is the realm of the deontological (and humans must accept its dictates as best they can), whereas law is 'artificial', or 'conventional', or 'voluntary', and as such can appropriately be guided by the instrumental and consequential purposes of human societies. At the extreme, of course, a law may simply express a convention (around a coordination problem, like the side of the road on which to drive) that is devoid of any ethical content, beyond the obligation to adhere to it once given legal expression.

The thrust of the preceding positions is that the two should ideally be kept as close as possible; but there are practical reasons why anything approaching full identity is unlikely to be achieved. This is essentially what Henry Shue captured in his paradoxical summary quoted above. But what are the costs of denying the prospect of any imminent approximation between the two? McMahan's bottom line is that the ethics must be privileged, and we deal with the consequences for law as and when we can: we aspire to a coherent ethics, and accept the costs for law meanwhile. We need not rush to change the substance of that law, but we do in the interim deprive it of compelling ethical support.[33] Another instance is the very powerful cosmopolitan position developed by Cécile Fabre. It should be noted that her argument explicitly does not consider 'the principle of legitimate authority as articulated in positive law'.[34] In other words, the implications for the law of war, including specifically those for war crime tribunals, are to be deferred for later consideration,[35] subject to initial establishment of the valid ethical principles. Again, the timetable is worrisome, given what is happening to the law at the moment.

Moreover, there is also a potential conceptual objection to these positions, if war is indeed to be thought of as *already* a 'legal institution'.[36] In short, is not the 'war' that is the object of these discussions very reductionist, bereft of those very legal framings that make it what it is, and which international society recognizes it distinctively to be? If so, is it not misleading to be so disregarding of law's role? If we acknowledge war as fundamentally a 'legal construct' in the first place,[37] then it makes little sense to ignore these embedded legal dimensions. The objection, in short, is that revisionism does not deal with 'war' as any kind of social reality, already embedded in legal frameworks. Indeed, McMahan treats it conceptually only by occasional reference to 'models'.[38] This constructs an idealized version, from which the essential legalities have already been stripped out, and with which justness can hardly engage.

This leads directly to the second related question. Fully to determine the relationship between the law of war and ethics requires us to specify more carefully the parameters of the relevant ethics. Here, the discussion mostly revolves around

[33] Jeff McMahan, *Killing in war* (Oxford: Oxford University Press, 2009), pp. 107–9.
[34] Cécile Fabre, 'Cosmopolitanism, just war theory, and legitimate authority', *International Affairs* 84: 5, Sept. 2008, p. 965.
[35] Fabre, 'Cosmopolitanism', p. 975.
[36] David Kennedy, *Of war and law* (Princeton: Princeton University Press, 2009), ch. 1.
[37] Nathaniel Berman, 'Privileging combat? Contemporary conflict and the legal construction of war', *Columbia Journal of Transnational Law* 43: 1, 2004, pp. 1–72.
[38] McMahan, *Killing in war*, p. 58.

the axis of a 'normal' ethics of peace, as against the 'exceptional' ethics of war.[39] Many moral philosophers wholly reject this division, as McMahan certainly does: ethics is unified, rather than bifurcated in this way. On the other side, Henry Shue is equally adamant that, while the fundamental moral principles are the same, the applicable rules differ in the context of war. Hence, a distinction between war and peace is vital to understanding the peculiarities of the ethics of war, and especially for developing any workable laws from this basis.[40]

For those who would indeed press for some ethical distinction of this kind, the third issue then becomes the specification of the conditions that establish when the ethics of war come into play. McMahan makes this point clearly, in his own vehement rejection of it:

> It is, however, worth making one general point that applies to all views that claim that the moral principles (if any) that govern the practice of war are different from those that govern other areas of life. This is that on those views it is essential to be able to distinguish with precision between wars and other kinds of conflict … I find this extremely implausible.[41]

Already we have a sense of the wide front along which these battles are being fought. Different understandings of justness are central to the stakes involved.

Taking 'justness' seriously

There is an essential similarity between justness and legitimacy.[42] Indeed, of all the 'legitimacy talk' conducted within international society, a great deal is specifically about whether or not various resorts to armed force have been legitimate (just) or not. As individuals, we all have our own views on what represents legitimacy or justness, and which normative values are decisive in allowing us to reach any overall verdict of this kind. However, we acknowledge that, separately and empirically speaking, something is legitimate in a different sense when it receives a degree of *collective*, rather than merely *individual*, endorsement. Individual actors make legitimacy claims, but it is only the affected constituency as a whole that 'decides' in aggregate whether these should be accepted or rejected, and in what combination. The same is the case with justness. Given this identity, we should apply the same analytical scheme to both.

Accordingly, a cognate discussion of international legitimacy suggests that we should not view the term 'legitimate' as expressing any stand-alone evaluation based on legitimacy as a discrete normative measure in its own right. To ask whether something is legitimate is to pose a question that is unanswerable until the normative criteria informing that assessment have first been specified. That is to say that legitimacy refers to a composite or aggregate evaluation that is necessarily derived from a subset of other norms. Values such as morality, legality and 'consti-

[39] Daniel Brunstetter , '*Jus ad vim*: a rejoinder to Helen Frowe', *Ethics and International Affairs* 30: 1, 2016, pp. 131–6.
[40] Shue, 'Laws of war', p. 275.
[41] McMahan, *Killing in war*, p. 36.
[42] Ian Clark, *Waging war: a new philosophical introduction*, 2nd edn (Oxford: Oxford University Press, 2015), p. 15.

tutionality' may be variably included in that mix. What is certain is that to deem something legitimate is not to score it on an autonomous legitimacy scale, because there is no such thing. To make any kind of sense, the requirements of legitimacy need first to be specified, by demonstrating how an aggregate collective assessment results from the balancing out of the various, and sometimes competing, values in play at any one time.[43] Legitimacy captures that summation, but it is entirely conditional on how those other values are weighed against one another.

For example, it can be argued that to posit a conflict between legality and legitimacy amounts to a category mistake, since legitimacy is the sum of the parts of which legality is but one, and so the two cannot come into direct conflict for this reason. When the Kosovo war was pronounced 'illegal but legitimate', what this actually meant was that, in this particular case, one conception of moral claims was felt to outweigh the demand for adherence to strict legal process, and an overall verdict of 'legitimate' could be recorded. When fully elaborated, this proposition makes sense, whether or not any individual agrees with it. However, it did not represent any straight conflict as such between legitimacy and legality, but rather a leaning towards ethics rather than law in the determination of legitimacy in this case. To suggest otherwise is a form of reductionism, in which legitimacy is conflated with what is morally preferable (and regardless of what the law allows). This simply equates legitimacy with ethics, and excludes all other normative claims from the outset.

The same holds true for justness. What has been considered a 'just' resort to force tends not to be measured against any one single scale of values—there is no stand-alone scale of justness, any more than there is of legitimacy—but rather is derived from a compound of various other normative sources. In the tradition of just war reasoning, justness does not equate exclusively with what is morally appropriate, and in total disregard of law or of prevailing political conceptions of violence. Justness represents instead the shorthand summation for what emerges collectively from the normative balancing between the various relevant considerations. It measures the aggregate outcome, but is not itself an independent scale against which employments of force are to be scored.

What, then, are the individual norms that populate this process from which collective notions of justness emerge? These certainly include both ethics and law in some mixture, and both have featured prominently in the evolution of just war. It would be hard to understand its language of 'justness' without including both, and indeed the very notion of *jus* testifies linguistically to this overlap of (moral) right and law. Ethics and law do not, however, entirely exhaust the reservoir of norms in terms of which justness is potentially determined. A third category routinely added to this mix is the political conceptualization of war/violence itself. This has featured prominently in the collective determinations of justness expressed over the past two centuries, and hence the distinction between war and other forms of violence serves as one further normative resource in its own right. This may well not be so in ideal moral theory (as many revisionist moral

[43] Ian Clark, *Legitimacy in international society* (Oxford: Oxford University Press, 2005), ch. 1.

philosophers protest), but it is patently the case in the practice of international society, and its application of just war: the focal point here is exactly the 'practice' of war with all that this entails.[44] In that practice, what emerges as 'just' with respect to violence is a compound and negotiation of the often competing claims of morality, legality and the political conceptualization of violence. It follows—critically—that to reduce this collective concept of 'justness' to any single one of these individual components, without at least due consideration of the others, is to distort it. To claim a war as 'just but illegal' makes sense only when translated in the same way as 'illegal but legitimate'; that is to say, that a conception of ethics wins out over other normative considerations. It otherwise confuses the aggregate output with those individual normative inputs that feed into the final calculation.

Any such conception entails a number of implications. The justness of a conflict is determined not by considerations derived exclusively from within any one of the domains of ethics, law or politics, but rather by some shifting synthesis among them. To present 'justness' as itself an ethical ideal, in disregard of its utility for law, is as reductionist as it is to apply a scheme of law wholly devoid of ethics, as Best pointed out. In short, even if it could be shown that an unequal distribution of liabilities among combatants is an ethically preferred basis for the *jus in bello*, this does not by itself constitute justness, but is the subject of one claim for justness. For justness to emerge overall, it would need additionally to be shown that, when weighed in the scales against the demands for a workable law, such a principle of discrimination still yields the best aggregate outcome. However, this latter part of the argument is simply absent from the recent debates.

The powerful revisionist school has generated many rich and innovative ways of conceiving of the ethics of war. Nonetheless, in doing so it arguably shows insufficient regard for the condition of the law of war, as one instrument of the deeper political purpose of the just war tradition. It may possibly have presented a more compelling ethics of war—although this too is hotly contested—but it offers an account of justness that is largely deficient, not because of the ethical principles that it brings in, but because of what these require just war to leave out.

'Justness' in the practice of war

If we take Rengger's injunction seriously, these problems must be placed instead in 'a tradition of moral and political reflection rooted in practice'. What does this mean? In effect, those whose stated intent is to recapture just war for *political and moral* theory,[45] or for *international political* theory,[46] view 'justness' in terms significantly different from those writing from any exclusively legal or ethical perspective, unfettered by any more balanced commitment of this kind. The debate is, then, one about the nature of justness, and how we must think about, for example,

[44] Maja Zehfuss, 'Killing civilians: thinking the practice of war', *British Journal of Politics and International Relations* 14: 3, 2012, p. 424.

[45] Walzer, *Just and unjust wars*, preface to the 1st edn, p. xxvi.

[46] Cian O'Driscoll, 'Conclusion', in A. F. Lang, C. O'Driscoll and J. Williams, eds, *Just war: authority, tradition, and practice* (Washington DC: Georgetown University Press, 2013), p. 303.

the proper balance between good ethics and the prospects for workable law. This view of 'justness' closely resembles other analytical schemes that similarly posit legitimacy of, and in, war as a function of morality, but in contention with legal positivism and power politics.[47] For Alex Bellamy, similarly, justice is the amalgam of positive law, natural law and realism.[48] In each of these versions, there is a normative trinity at work: 'justness', then, is not straightforwardly reducible to any single one of these values.

What exactly was at stake in Walzer's claim that just war should be recaptured to bring politics back in? In the most superficial sense, his was an argument derived from political engagement with the Vietnam War, and was political in that rudimentary sense. Clearly, however, he intended much more than this. Above all, Walzer advances a set of claims about the 'political community' and its associated rights. This theme features significantly throughout his discussion, especially with respect to the restrictions on forceful interventions from the outside, and also in defence of those exceptional *jus in bello* violations dictated by the need to protect the political community from destruction, as in supreme emergencies. In short, it could be said that his ethical argument does indeed start off from certain assumptions about the ethical value of the political community itself. However, was he asserting anything beyond this in his effort to locate just war within political theory, and if so, what might this be?

Walzer's 'political' theory, while demonstrably about political community, is also explicitly located within a framework of (imperfect) international society. The community, in fighting for its own rights, reproduces also the logic of that society by defending its rules: while fighting for itself, it fights also for that society of states. In that sense, as is widely acknowledged, Walzer's point of departure is the study of an ethics that is already grounded in a particular set of social practices, defined by the interrelationship between those communities and the encompassing society in which they find themselves.

His is a self-proclaimed work of 'practical morality', not only in the sense that it is relevant to the real world, but also in being literally rooted in an existing social practice.[49] His approach, he insists, gets us 'closer to the most profound questions of moral philosophy', but notably without needing a 'direct engagement' with them. That said, while he writes about ethics, law is very much an integral part of the overall picture he paints. International law is, of course, one major element within international society, widely represented as one of its principal institutions.[50] For the version of justness that starts out from this practice, then, this framing is the *sine qua non*, as it is also for those who hold that the validity of norms

[47] Tarik Kochi, 'Problems of legitimacy within the just war tradition and international law', in Lang et al., eds, *Just war*, p. 116.

[48] Alex J. Bellamy, *Just wars: from Cicero to Iraq* (Cambridge: Polity, 2006), p. 7.

[49] Walzer, *Just and unjust wars*, preface to the 1st edn, p. xvii; see also Hedley Bull, 'Recapturing the just war for political theory', *World Politics* 31: 4, 1979, p. 599.

[50] Kennedy, *Of war and law*, ch. 1; James D. Morrow, *Order within anarchy: the laws of war as an international institution* (Cambridge: Cambridge University Press, 2014); Christian Reus-Smit, 'The politics of international law', ch. 2 in Reus-Smit, ed., *The politics of international law* (Cambridge: Cambridge University Press, 2004), pp. 14–44.

depends on 'institutional context':[51] we cannot do 'pure ethics' as if those specific contexts did not exist; or, if we do, we work within an alternative conception of justness. In this sense, the 'war' that is the object of discussions about 'justness' does already assume a particular institutional context.

This is most explicitly evidenced by the importance within just war of criteria of 'proper' or 'legitimate' authority. At stake here is not just an abstract engagement with law and ethics, but whether or not there is a fundamental willingness to accept a third—and more overtly 'political'—dimension, as part of the normative trinity upon which just war depends. Accordingly, as Jean Elshtain once insisted, 'it is important to see just war thinking in its full elaboration as a theory of international *and* domestic politics'.[52] David Rodin suggests likewise: 'To its great credit, the Just War Theory … is an attempt—an heroic attempt—to combine moral principles with a pragmatic sense of political realism.'[53] This openly acknowledges the need to bring political judgement and institutional context into the assessment.[54]

Those who, reasonably enough, elect to do their ethics from outside this frame[55] are surely at liberty to do so: but they necessarily do it outside this understanding of justness. The full significance of this is powerfully illustrated in one side-debate sparked by whether or not just war theory should consider a *jus ad vim*, specifying the conditions to be met in situations *short* of war. This has spawned some sharp, but profoundly revealing, exchanges that highlight the foundational disagreements over conceptions of justness. Helen Frowe criticizes the entire *jus ad vim* initiative on several grounds, most fundamentally because it 'places unwarranted weight on whether something counts as war'.[56] This, of course, closely echoes McMahan's previously quoted rejection of any enterprise of this kind. In his response, Daniel Brunstetter suggests that Frowe's objection is indeed the essential point—but one that is totally missed. He identifies with a radically different point of departure: 'My own view', he insists, 'is grounded in an empirical observation about how violence is adjudicated in international society.' This neatly expresses the foundational disagreements about the concept of justness that is to be applied. In these specific terms, it follows that 'ethical debate about state use of force has long distinguished between the conditions of peace and war, with different ethical frameworks governing each'.[57] This is quite fundamentally at odds with Frowe's position. What really is at stake is whether we think of justness from an exclusively ethical perspective, or whether it needs to be grounded in the practice of war, where other normative claims also are collectively negotiated.

[51] Allen Buchanan, 'Institutionalizing the just war', ch. 11 in Buchanan, ed., *Human rights, legitimacy, and the use of force* (New York: Oxford University Press, 2010), p. 253.
[52] Jean Elshtain, 'Introduction', in Elshtain, ed., *Just war theory* (New York: New York University Press, 1992), p. 3.
[53] David Rodin, *War and self-defense* (Oxford: Oxford University Press, 2002), p. 189.
[54] Chris Brown, 'Just war and political judgement', in Lang et al., eds, *Just war*, pp. 35–48.
[55] Helen Frowe, *The ethics of war and peace: an introduction* (London: Routledge, 2011), p. 2.
[56] Helen Frowe, 'On the redundancy of *jus ad vim*: a response to Daniel Brunstetter and Megan Braun', *Ethics and International Affairs* 30: 1, 2016, p. 122.
[57] Brunstetter, '*Jus ad vim*', pp. 131–2.

Conclusion

Many of the recent debates around just war have been surrogate disagreements about which version of justness is to apply. Some insist that what is necessary is a law and ethics relevant to the condition of interstate politics, and they start from the adjudications of international society. When they do so, they cast the pertinent issues in a particular light, namely a law and ethics appropriate to a politically configured conception of war. If it is true generally that there is a 'mutually constitutive relationship of international relations and international law',[58] then just war specifically is the consummate expression of this relationship. This is the practice in which, Rengger had suggested, the tradition of just war is rooted.

This is not at all how most revisionist moral philosophers consider these matters. They are, of course, entitled to start from any position they please. For them, the relationship between ethics and law may be a subordinate concern, if indeed it is a concern at all; ethics is all of a piece, regardless of institutional or other context, and ethics has no business getting dragged into the political categorization of violence. It is quite understandable that many moral philosophers will feel disinclined to allow such distractions to get in the way of good ethical analysis.

The pressing question today, nonetheless, is whether the moral principles they advance do, in fact, help to rescue the laws of war at a time when they are under acute challenge, and whether it is indeed the task of just war to address that specific concern. On the orthodox side of the fence, the worry is that an ethics that becomes overly solipsistic may come to displace any serious regard for the travails of law; that as a result we risk losing the great divide between war and non-war that has been paramount in the practical regulation of warfare;[59] and that overall the regulation of warfare may be further undermined rather than advanced.

Those interested in justness in the social practice of just war therefore acknowledge the integrated trinity of ethics, law and politics, and the quest for a set of principles to be implemented in that specific context, not in the best of all ethical worlds. Their concern is to depict an extant social reality at the moment, a snapshot of a continuing process. From that perspective, the ethical revisionists have been pushing for an approach to justness that, in the present context, strikes them as unbalanced overall. The priority that revisionists assign to ethics over law might inadvertently add to the sum of human harm, if it were to detract further from existing efforts to deal with the practical regulation of warfare.

For that reason, we need to take justness more seriously, lest we succumb to ethical frameworks that might end by offering but miserable comfort to those many who find themselves caught up in the mayhem of the battlefield. For them, prevention of unjust wars is already too late, and more urgent ethical imperatives take precedence. Just war needs to take this dilemma seriously, and confront the

[58] Helen M. Kinsella, 'Discourses of difference: civilians, combatants, and compliance with the laws of war', *Review of International Studies* 31: S1, 2005, pp. 163–85.

[59] Braden R. Allenby, 'Are new technologies undermining the laws of war?', *Bulletin of the Atomic Scientists* 70: 1, 2014, pp. 21–31.

hard choice between accepting principles of discrimination that may possibly be ethically compelling when viewed in isolation, but inadequate when placed in the context of the totality of the problem of regulating war as a whole. The quest for this type of justness demands that the problem of effective law be accorded priority. This may foreshadow the need for a more encompassing ethics that already subsumes acceptance of the place of law. At the very least, it requires a more rounded understanding of justness in which the claims of both can be duly weighed in the balance. To do neither of these things is a disservice to those on the battlefield in need of practical forms of comfort.