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The Law of War and Its Relationship to the Morality of War

This chapter explores the moral justifiability of two core features of the contemporary law of armed conflict (LOAC), sometimes also referred to as international humanitarian law.[1] The first is the fact that its rules apply equally to those who fight irrespective of whether the state or state-like actor for whom they fight is legally (or morally) justified in going to war. From the standpoint of the law of war, combatants do nothing wrong, or at least nothing criminal, as long they adhere to the law of war. The second is the fact that the law of war categorically prohibits combatants from intentionally targeting civilians and civilian infrastructure when waging war, but prohibits attacks on combatants and military objectives only under certain conditions (for example, when soldiers are incapacitated due to injury). Following common practice, I label the first of these two features of the LOAC the equality of combatants, and the second the principle of noncombatant or civilian immunity.[2]

Are these two features of the law of war morally defensible? If so, why is that? If not, why not, and what sort of reforms should we pursue? To answer these questions, we need to elaborate and defend specific accounts of the ends or aims the law of war serves, or ought to serve, and the means whereby it can or should do so. In the first three sections of this chapter we consider the views of theorists who take the LOAC to be concerned with minimizing violations of individual rights. As we will see, some argue that the LOAC serves this goal by publicly communicating to combatants (as well as those in a position to judge their conduct) who is morally liable to defensive force. Others argue that the LOAC contributes to the minimization of individual rights violations by improving combatants' practical reasoning. The thought is that combatants do better at waging war justly, or at least at reducing the injustices they commit when waging war, if they adhere to the LOAC than if they rely on their own understanding and application of the moral norms that govern killing in war. The theorists whose views we consider section IV reject the claim that the LOAC aims, or

[1] For an accessible overview of the Law of Armed Conflict, see "War and Law," International Committee of the Red Cross, accessed January 10, 2020, www.icrc.org/en/war-and-law.

[2] This second principle is sometimes referred to as the principle of discrimination or distinction.

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should aim, at the minimization of individual rights violations. Instead, they argue that the LOAC serves the humanitarian goal of reducing the harm war causes, and that it does so by attempting to strike an optimal balance between restrictions on how combatants may fight and their willingness to comply with those rules in their pursuit of self-preservation and victory in war.

I REVISIONIST JUST WAR THEORY AND THE INSTRUMENTAL ARGUMENT FOR THE LOAC

In his groundbreaking book, *Just and Unjust Wars*, Michael Walzer offers a moral argument for the equality of combatants and the principle of noncombatant immunity.[3] In virtue of posing a threat to one another's lives, he argues, combatants on all sides to a conflict forfeit their right not to be attacked by their opponents. They are equal, then, in the sense that no soldier, sailor, and so on, has a moral claim against opposing combatants that they not use force against him or her. Noncombatants, in contrast, retain their moral right not to be attacked, since in carrying on with their lives they do nothing to make themselves liable to defensive force. Were it successful, this line of argument might well provide a compelling moral defense for the existing law of war. The reason why international law ought to mandate the equal treatment of combatants, independent of whether they wage a just war, is that they are morally entitled to such treatment. Likewise, international law ought to categorically prohibit deliberate attacks on civilians because such attacks are morally impermissible. In short, the law of war is morally justifiable because it serves the goal of promoting moral conduct by publicly communicating to both combatants and those with the standing to hold them accountable the moral standards that ought to guide the waging of war

This defense of the law of war succeeds only if posing a threat to another's life is both necessary and sufficient to make a person morally liable to defensive force. Over the past two decades, a number of philosophers have challenged this claim. Jeff McMahan, for example, points out that if merely posing a threat to another's life suffices to justify the use of defensive force, then a bank robber who engages in a shootout with a police officer commits no wrong if he kills the officer.[4] Yet this conclusion is surely mistaken. A far more plausible view is that morality permits the police officer to use deadly force against the robber, albeit within certain constraints, while the thief enjoys no moral right to use deadly force against the officer, or anyone else. This asymmetry reflects the fact that the police officer has a just cause for the use of force, namely, the protection of his own life and that of bystanders to the crime from the actions of a culpable aggressor, while the thief enjoys no right to use force to

[3] Michael Walzer, *Just and Unjust Wars, 5th Edition* (New York: Basic Books, 2015), pp. 34–41, 127–59.

[4] Jeff McMahan, "The Ethics of Killing in War," *Philosophia* 34, 1 (2006): 25. McMahan takes this example from Walzer (*Just and Unjust Wars*, p. 128), although he argues that Walzer draws the wrong conclusion from it.

successfully advance his goal of robbing the bank and evading capture. If the possession of a just cause provides a necessary condition for the morally permissible use of force, however, then only those combatants who fight on behalf of a state or political group with a just cause for going to war enjoy a right to kill or injure enemy combatants. Unjust combatants, in contrast, have no right to do so; rather, unlike just combatants, they are morally liable to defensive force.

McMahan also denies that posing a threat to another is a necessary condition for moral liability to defensive force. Instead, he maintains "a person is morally liable to attack in war by virtue of being morally responsible for a wrong that is sufficiently serious to constitute a just cause for war, or by being morally responsible for an unjust threat in the context of war."[5] Although quite controversial, the first part of this claim might gain some initial plausibility from the thought that influential politicians, business persons, media moguls, religious leaders, and other civilians who play a key role in initiating or perpetuating unjust wars are more deserving of death or injury than are many of the men and women who actually fight them.

If true, McMahan's revisionist just war theory entails that the content of the law of war diverges significantly from that of the morality of war. Whereas the law of war holds combatants to be symmetrical in their liability to being attacked, revisionist just war theory entails asymmetric liability: just combatants may attack unjust combatants, but unjust combatants may not attack just combatants. Moreover, the criteria for liability to attack in war that McMahan defends entail conclusions at odds with the principle of noncombatant or civilian immunity. It is possible, and perhaps even likely, that some civilian members or supporters of a state or state-like actor that wages war without a just cause bear a degree of responsibility for that injustice large enough to make them liable to attack; that is, legitimate targets of defensive force. The law of war, however, categorically prohibits intentionally targeting civilians. Thus, if McMahan's revisionist account correctly describes the morality of war, the existing law of war cannot be defended on the grounds Walzer's argument suggests, namely, that it facilitates the just conduct of war by publicly communicating the correct moral standards to which combatants ought to adhere when waging war

Perhaps surprisingly, McMahan does not argue that in order to be morally defensible the law of war must be reformed so that its content mirrors that of the revisionist just war theory he defends. Rather, he maintains that the main purpose of the law of war "is to induce people to conform their behavior as closely as possible to the requirements of morality," from which it follows that the law of war ought to be morally assessed in terms of how well it serves as a tool for advancing this goal.[6] As we saw in Chapter 6, one way in which law can help agents better conform to the requirements of morality is by mediating between them and the moral reasons that

[5] Jeff McMahan, "The Morality of War and the Law of War," in *Just and Unjust Warriors*, eds. David Rodin and Henry Shue (Oxford: Oxford University Press, 2008), p. 22.

[6] Ibid, p. 33.

apply to them. If people will do better at acting as morality requires by deferring to the law's assessment of what they may, must, or must not do than if they act on their own judgment, then that is what they ought to do.[7] When it comes to waging war, McMahan maintains that in general people will commit fewer violations of the morality of war if they guide their conduct according to the existing law of war, or at least something close to it, then if they act on their own judgment of who is morally liable to attack.[8] This conclusion may seem counterintuitive. After all, the law of war does not proscribe attacks on combatants, yet at least one party to a war will fight without a just cause, and therefore its combatants will lack a moral right to use defensive force against their opponents. Compliance with the law of war does nothing to improve unjust combatants' conformity to the moral reasons that apply to them, since those reasons require that they immediately cease fighting. As McMahan points out, however, practically all those who wage war will believe that they are morally justified in doing so.[9] Moreover, given the burdens under which many combatants labor when war is imminent or ongoing, that conclusion may be a reasonable one for them to draw, even if it is often false. These burdens include limited access to the nonmoral information necessary to determine whether the considerations that morally justify resort to war have been met, attempts by various actors, oftentimes including their own government, to employ deception and propaganda to shape combatants' beliefs, and a lack of time, and/or education, and/or the maturity needed to draw a well-reasoned conclusion regarding the justifiability of resort to war. To these considerations McMahan adds "a patriotic tendency to trust in the moral rectitude of one's own society and government, deference to political and moral authority, the sense of professional obligation, and – last but not least – the pervasive assumption, promulgated by the dominant theory of the just war, that it is not a combatant's responsibility to enquire whether the war in which he or she has been commanded to fight is just."[10] Finally, even those who harbor doubts about the justice of the war they wage are likely to assert that their war is just in order to rationalize their participation in it. Insofar as we are interested in the law of war's capacity to guide the conduct of combatants, then, there is no reason for it to distinguish between those rules that apply to just combatants and those that apply to unjust combatants, since all combatants will guide their conduct according to the former. Instead, the law of war should simply consist of rules that apply equally to all combatants, and that make no reference to the justice of a combatant's resort to war.

[7] Unless it is more important that they decide for themselves than that they get it right. Presumably that condition rarely if ever applies to the conduct of war.

[8] Ibid, pp. 33–6. See also Adil Ahmad Haque, "Law and Morality at War," *Criminal Law and Philosophy* 8, 1 (2014): 79–97, and *Law and Morality at War* (Oxford: Oxford University Press, 2017), especially chapter 2.

[9] McMahan, "Morality of War," 27–8.

[10] Ibid, 28.

This still leaves open the question of what the legal rules governing the conduct of all combatants ought to be, and, in particular, whether those rules ought to include a prohibition on intentionally targeting civilians. As we saw previously, if it is moral responsibility for an unjust threat that makes a person liable to attack in war, then in principle some civilians may be justly targeted, while some combatants may be immune to attack. Why not revise the law of war to reflect these moral truths? The answer, again, is that combatants will commit fewer injustices if they adhere to a rule that prohibits targeting noncombatants than if they act on their own judgments regarding specific noncombatants' moral liability to attack in war. Clearly this is true for those who lack a moral justification for resort to war; on the assumption that intentionally targeting civilians will not lead to a shorter war, and so fewer overall injustices, we ought to prefer whatever legal rule most restricts the necessarily moral rights-violating conduct of unjust combatants. McMahan maintains that it is also likely to be true for just combatants, however, who may frequently err in their assessment of enemy noncombatants moral liability to attack.[11] Moreover, the fact that a person is morally liable to attack in war does not suffice to justify an actual attack on that person; rather, doing so must also be a proportionate and necessary use of defensive force.[12] On the plausible assumption that the intentional targeting of a civilian will rarely satisfy all three conditions, the legal prohibition on targeting civilians will almost never require even just combatants to refrain from conduct permitted by the revisionist morality of war. If so, then the legal proscription on the intentional targeting of civilians generally tracks the demands of the revisionist morality of war, even if it also suggests a mistaken justification for why noncombatants ought not to be targeted, namely, that because they are civilians they have necessarily done nothing to make themselves liable to deliberate attack in war.

Adil Ahmad Haque appeals to the moral difference between killing and letting die to further buttress the kind of instrumental justification for deference to the law of war under investigation here. Suppose that the wrongness of killing someone who has done nothing to make herself morally liable to such treatment far exceeds the wrongness of letting such a person die. Haque maintains that "it is highly unlikely that by following the law [prohibiting intentional attacks on civilians] soldiers will allow substantially more harm to their fellow soldiers than they will avoid inflicting on morally immune civilians."[13] If so, then even if unfailing compliance with the law of war entails that just combatants occasionally do wrong, for instance, fail to prevent the death of a just combatant by targeting a noncombatant who is liable to such treatment, those wrongs will be examples of a lesser type of wrongdoing than the wrongs combatants will commit when they inevitably err in their identification

[11] Ibid, 32.

[12] Very roughly, proportionality requires that the good achieved by an act of war warrant the harm that act inflicts, while necessity requires that combatants inflict the least harm that they can compatible with the success of the particular act of war they perform.

[13] Haque, "Law and Morality at War," 88.

of civilians as liable to attack according to the revisionist morality of war.[14] Haque employs similar reasoning to defend conformity to a legal rule that permits the targeting of all combatants, regardless of whether they bear a level of responsibility for an injustice that makes a person liable to lethal defensive force:

> Soldiers who try to follow the deep morality of war and distinguish between morally liable and morally immune combatants probably will allow many more fellow soldiers to be killed as a result of constant hesitation and often misplaced restraint. At the same time, such soldiers probably will kill only somewhat fewer immune combatants, since many immune combatants will be reasonably but mistakenly identified as liable combatants.[15]

On balance, compliance with the legal rule in question leads to a morally better outcome than will occur if combatants act on their own judgment regarding liability to attack in war, since the small increase in the number of wrongful killings committed by those who follow the law will be outweighed by the large increase in the number of wrongful instances of letting die they avoid. This line of argument might be even more compelling were the law of war reformed to limit the class of legitimate targets in war to those it is reasonable to believe perform a combat function, as Haque maintains it should be.[16]

Even if in general combatants will better conform to the demands of morality if they use the law of war to guide their conduct than if they rely on their own moral judgment, McMahan acknowledges that this will not always be the case. Rather, he argues that on those exceedingly rare occasions when the morality of war requires that a just combatant violate the law of war, say by deliberately attacking noncombatants, he ought to do so.[17] However, he adds three important caveats. The first is that the combatant should be very confident in his judgment that this violation of the law of war is morally justifiable: "The presumption is against violation [of the law of war] and combatants should be reluctant to give their individual judgment priority over the law, for the law has been designed in part precisely to obviate the need for resort to individual moral judgment in conditions that are highly unconducive to rational reflection."[18] Second, the combatant must also take into account the effect

[14] Note that this line of argument is distinct from the one set out in the previous paragraph, which focuses only on the frequency with which just combatants will make erroneous moral judgments, rather than the significance or seriousness of the wrong they do.

[15] Ibid.

[16] Ibid, 96.

[17] McMahan, "Morality of War," 39. The requirement that such attacks satisfy the requirements of proportionality and necessity, and that they not cause a morally unacceptable amount of collateral damage, explains why these occasions will be rare.

[18] Ibid, 41. Arguably, on the purely instrumental account of law's practical authority that both McMahan and Haque endorse, conflicts between law and morality should not be understood as conflicts between two different *reasons for action*, but instead as a conflict between two different *judgments* regarding what an actor has an undefeated reason to do. Therefore, talk of a case where the revisionist morality of war requires what the law of war forbids should be understood as one where an individual

his illegal conduct will have on others' adherence to it. If, as a consequence of his action, other combatants will engage in morally unjustifiable violations of the law of war, then even though the combatant would not morally wrong the noncombatant he proposes to attack, his conduct may not be morally justifiable all-things-considered. Finally, McMahan maintains that, in general, combatants who commit morally justifiable violations of the law of war ought to bring that fact to the attention of a court that can hold them accountable for their conduct. Moreover, that court may be morally permitted or even required to punish combatants for their illegal conduct even if it rightly judges their actions to have been morally required. McMahan defends both of these conclusions by appeal to their positive impact on overall compliance with the law of war, and so the extent to which it serves as a mechanism for reducing the injustices committed by those who fight.

II CRITICISMS OF THE INSTRUMENTAL ARGUMENT FOR THE LOAC

McMahan (and Haque's) instrumental argument for the law of war faces numerous challenges. For example, Seth Lazar contends that as long as McMahan concedes that combatants ought to violate the law of war whenever it conflicts with what the morality of war requires, he cannot defend deference to the law of war on the grounds that it will lead to greater conformity to morality's true demands.[19] Since morally astute combatants will know that under certain conditions they have a moral duty to violate the law of war, they will need to constantly consider whether these conditions are met in the situation they confront. To answer that question, they will need to determine for themselves what the morality of war requires of them in that situation; only then will they know if it requires conduct contrary to the law of war. If, in order to determine whether they should comply with the law of war, combatants must engage in the very exercise of moral judgment for which the law is supposed to substitute, then the law of war cannot serve the goal of enhancing their conformity to the reasons that apply to them by replacing their judgment with its own.

This objection misconstrues the judgment combatants must make, however. What combatants must ask themselves is not whether the morality of war requires illegal conduct, but whether they have compelling reasons to believe that, in their current situation, they are more likely to judge correctly what the morality of war requires than is the law. Insofar as all combatants have standing reasons to be suspicious of their ability to engage in sound moral reasoning regarding who among their foes is morally liable to attack, they ought to operate with a strong presumption against violating the law of war. The standards of evidence deployed in American civil and criminal law may help illustrate this point. To judge that the

combatant judges correctly that a prospective attack on a noncombatant is morally permissible, while the law of war communicates the mistaken judgment that it is not.

[19] Seth Lazar, "The Morality and Law of War," in *The Routledge Companion to Philosophy of Law* (New York: Routledge, 2012), p. 368.

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preponderance of evidence favors X over Y is to hold that X is more likely to be true than is Y. Where one finds the evidence favoring X over Y to be clear and convincing, one maintains that X is substantially more likely to be true than is Y. In criminal trials, however, neither a preponderance of evidence nor clear and convincing evidence justifies finding a defendant guilty of the crime with which he or she has been charged. Rather, a jury (or judge) should do so only if they believe beyond a reasonable doubt that the defendant committed the crime in question. Likewise, when it comes to compliance with the law of war, combatants should treat neither a preponderance of evidence nor clear and convincing evidence that morality requires illegal conduct as justifying such action. Instead, they should violate the law of war only when they believe beyond a reasonable doubt that morality requires them to do so. Given that many of the reasons combatants have to be suspicious of the quality of their moral judgment are typical of war, the adoption of such a strong presumption in favor of compliance with the law seems eminently justifiable. Indeed, the greater challenge to McMahan (and Haque) may well be the opposite of the one Lazar levels against them, namely, that the reasons they give for a *presumption* in favor of compliance with the law of war, or at least the principle of noncombatant immunity, actually warrant the treatment of those rules as *categorical or unconditional* rules for the conduct of war.

Lazar also challenges the claim that combatants will generally do best at conforming to the demands of McMahan's revisionist morality of war if they comply with the legal rule prohibiting deliberate attacks on noncombatants.[20] His objection takes the form of a dilemma: if the threshold for moral responsibility for a wrong that makes one liable to defensive force is low, then many noncombatants will be legitimate targets of war. If so, then from the standpoint of enhancing combatants' conformity to the moral reasons that apply to them, the optimal legal rule governing targeting in war may well be less restrictive than the existing one. For example, it may prohibit only deliberate attacks on noncombatant minors. In contrast, if the threshold for moral responsibility for a wrong that makes one liable to defensive force is high, then this may well entail not only that targeting noncombatants is rarely permissible, but also that many of those who fall within the legal category of combatant are not morally liable to attack. In this case the legal rule that would best serve to enhance combatants' conformity to morality may be one that prohibits their fighting at all, even in a broad range of cases in which they rightly conclude that they have a just cause for war. Regardless of which horn of this dilemma we embrace, deference to the existing law of war cannot be justified on the grounds that it produces the optimal outcome, that is, the fewest unjust acts of war we can achieve.

In describing the first horn of the dilemma, Lazar appears to assume that the optimal legal rule ought to track only moral liability to attack in war. But this is not so; the optimal legal rule ought to track all of the considerations that figure in the

[20] Ibid, 368.

moral justifiability of an act of war, and this includes proportionality and necessity. If those conditions are rarely satisfied in the case of noncombatants, but combatants will be regularly tempted to think that they are, then we have compelling reasons to believe that a legal rule prohibiting the intentional targeting of civilians is optimal even if many noncombatants are morally responsible for the kind of wrong that makes a person liable to defensive force. A response to the second horn of Lazar's dilemma might begin by conceding that the law of war ought to be reformed so that it places greater restrictions on who may be deliberately attacked, perhaps along the lines Haque suggests. A compelling rebuttal to Lazar's claim that many combatants will lack responsibility for the kind of injustice that makes them liable to defensive force might then be forthcoming. Alternatively, we might argue that a legal rule prohibiting war would often be ineffective, either ignored entirely or quickly revised to contain exceptions that largely vitiated it as a tool for minimizing injustice. If so, then for all the wrongful killing of nonliable combatants it might fail to proscribe, a legal rule that prohibits only deliberate attacks on civilians but that is moderately effective at shaping the conduct of war might produce the closest conformity to the morality of war we can hope to achieve.[21]

As we saw in the previous section, McMahan contends that even when combatants are highly confident in their judgment that the morality of war requires a violation of the law of war, they should still forbear from such conduct if it will cause others to engage in morally unjustifiable illegal conduct. Substantively, Lazar contends this conclusion places excessive moral demands on (just) combatants, who are expected "to sacrifice their lives, and the opportunity to contribute to a just cause, because of speculative claims about how their conduct might connect with the voluntary wrongful actions of other combatants in the future."[22] But Lazar also adds that this argument can be framed without any reference to law: roughly, an agent ought not to perform a morally required act of war if that will cause others to commit violations of the morality of war they would not otherwise commit. Thus, he concludes that this line of argument is not really a defense of compliance with the law of war.

In one important sense Lazar's conclusion is correct: at this stage in an agent's deliberation, the mere fact that the law directs him not perform a certain act, say intentionally targeting a noncombatant, does not provide him with a reason not to perform that act. Given an instrumental account of law's authority, the law of war lacks a justifiable claim to the combatant's deference in this case. Yet the law's practical authority remains an essential consideration even for agents who rightly conclude that they are not bound by it (in the case at hand). McMahan's argument singles out one particular way in which a *pro tanto* morally required act may turn out to be morally prohibited all things considered, namely, if it makes the law of war a less effective tool for minimizing injustice. There are other paths to this conclusion, however, which do not

[21] In fact, this is one reason Lazar gives for rejecting David Rodin's proposal that the law of war be reformed so that its content mirrors that of revisionist just war theory. See ibid, 375.

[22] Ibid, 369.

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turn on others' respect for the law. For example, it may provoke or inspire actors who are ignorant of the law of war, or who pay no heed to it, to perform immoral acts that they would not otherwise have performed. In such cases, the consequences that render a combatant's targeting of civilians morally impermissible all-things-considered make no reference to the law of war. That is not true of McMahan's example, however, in which it is *the diminution of the law of war's effectiveness* at steering actors away from the commission of certain injustices that entails the all-things-considered moral impermissibility of targeting civilians. Thus, there remains an important sense in which an argument for compliance with the law of war that rests on the effects it will have on general respect for the law appeals specifically to law's practical authority.

In a paper entitled "Do We Need a Morality of War?," Henry Shue argues that McMahan's (and, by implication, Haque's) argument for compliance with the law of war actually supports a stronger conclusion, namely, that the morally best law of war just is the morality of war.[23] Shue's argument turns on two key premises. The first is that the epistemic and motivational "defects" McMahan and Haque point to in order to justify the claim that combatants should follow the law rather than act on their own judgment are not only typical but also ineradicable features of war. Therefore, the normal state of affairs in war is one in which it is impossible for combatants to discern who among the enemy's combatants and noncombatants are liable to attack. The second is that to be plausible a putative standard of right conduct must satisfy a particular interpretation of the dictum "ought implies can," namely, that in general those who engage in the kind of activity to which that standard applies be able to use it to guide their conduct. If a necessary condition for the existence of any norm, moral or legal, is that it generally be capable of guiding the conduct of those to whom it applies, and if actual human beings engaged in war generally cannot guide their conduct according to McMahan's revisionist just war theory, then we ought to reject his account of the morality of war. This implies, of course, that the moral justifiability of the law of war cannot be grounded in the contribution it makes to enhancing combatants' adherence to the revisionist morality of war.

Haque criticizes both of the premises in Shue's argument. Whereas Shue characterizes war as "a situation in which many individuals, most of whom he or she cannot see, are routinely and relentlessly, hour after hour, day after day, trying to kill him or her," Haque argues that not all combatants currently fight in such circumstances.[24] For example, combatants such as drone pilots sometimes have access to a good deal of information regarding potential targets' moral liability to attack, as well as the time to consider that information in a setting that is fairly conducive to the exercise of sound moral judgment.[25] More generally, Haque writes, "the context of war, including its epistemic and pragmatic dimensions, may change over time, and we should have

[23] Henry Shue, "Do We Need a 'Morality of War?'" in *Just and Unjust Warriors* (Oxford: Oxford University Press, 2008), pp. 87–111.
[24] Shue, "Morality of War?" 99.
[25] Haque, "Law and Morality at War," 91.

a clear view of the moral considerations that may remain constant."[26] This claim is difficult to assess in the absence of an analysis of the concept of war. For example, it may be that the kind of technological and structural changes necessary to significantly diminish the epistemic and motivational shortcomings that typically characterize contemporary war will necessarily amount to its elimination. Whatever use of lethal force still occurs in such a world might then be best described as a form of policing, a practice that is already subject to rules governing the use of force that are distinct from, and far less permissive than, those that govern the conduct of war.

Shue's second premise, Haque argues, mistakenly treats as a necessary condition for a standard of rightness what is only a necessary condition for a decision procedure.[27] A standard of rightness specifies what makes an act permissible, prohibited, or required, whereas a decision procedure serves to guide actors' conduct in light of the evidence available to them. The revisionist morality of war provides an account of what makes killing and other acts of war right or wrong; that is, it identifies standards of rightness for the conduct of war. There is no reason to assume, however, that a standard of right or just conduct in war either provides or should provide the best decision procedure for waging war. Rather, we should adopt whatever action-guiding rules will best enable us to conform to the appropriate standards of rightness, and as we saw in the previous section, for Haque that means relying on legal rules for the conduct of war that diverge from the morality of war. As for the standards of rightness, including the moral norms governing war, their truth depends neither on what people believe nor on what people are motivated to do.[28]

Shue can concede all of the points Haque makes, however, but still maintain that revisionist just war theory ought to be rejected because it demands the impossible. It seems plausible to hold that morality does not require people to do things that are beyond our physical capacity, for instance, that require feats of strength few if any human beings can perform. Why should we not draw the same conclusion when it comes to belief formation and/or motivation? This appears to be Shue's position: among the things morality does not require people to do is to form accurate beliefs regarding others' moral responsibility for a threat that justifies the use of defensive force in circumstances in which doing so is typically impossible.[29] Haque and McMahan both take the position that nonculpable ignorance provides combatants with an excuse, but not a justification, for any infractions of the revisionist morality of war. Yet we might well wonder why the inability of combatants to adhere to the

[26] Ibid, 82.

[27] Ibid, 82–3.

[28] As McMahan writes: "[T]he morality of war is not a product of our devising. It is not manipulable; it is what it is. But the laws of war are conventions that we design for the purposes of limiting and repairing the breakdown of morality that has led to war, and of mitigating the savagery of war, seeking to bring about outcomes that are more rather than less just or morally desirable." McMahan, "Morality of War," 35.

[29] Henry Shue, "Laws of War, Morality, and International Politics: Compliance, Stringency, and Limits," *Leiden Journal of International Law* 26, 2 (2013): 275.

revisionist morality of war ought to be characterized as a moral failing, although not one for which combatants ought to be blamed, rather than as a regrettable fact about human beings. After all, we do not think a lack of superhuman strength merely excuses people, so why should we think a lack of superhuman knowledge and motivation does so? If the answer is that in the latter case we believe the actors could have done otherwise, or, in other words, that forming the right beliefs and acting on them is not inherently at odds with waging war, then we need an argument for why this is the case. Ultimately, then, the dispute between Shue and Haque and McMahan turns on different conclusions regarding human nature and the implications this has for the content of morality.

III REVISIONIST JUST WAR THEORY AND THE ARGUMENT FOR REFORMING THE LOAC

Although they draw fairly similar conclusions regarding the morality of war, David Rodin rejects McMahan's defense of the existing law of war and argues instead that it ought to be reformed so that its content closely approximates, or even mirrors, the content of revisionist just war theory.[30] Rodin begins by noting that:

> [R]ules, both legal and moral, perform many important regulatory functions beyond their role in guiding the immediate deliberations of those addressed by the norms. Most obviously they help to inform the response of others . . . [and] these reactions play an important part in the behavior regulating function of rules by creating incentives and disincentives for forming beliefs in morally appropriate ways.[31]

Therefore, a sound moral assessment of the law of war must take into account not only the negative consequence of holding unjust combatants accountable for their immoral conduct, but also "the potential benefits that may arise from providing a sanction for participation in unjust war, [which if] effective could reduce the total incidence of war with commensurate benefits of justice and security."[32]

To evaluate this argument, we must first distinguish between public and private sanctions, with criminal prosecution and punishment as an example of the former, and individual moral judgment and condemnation (including the unjust combatant's self-assessment) as an example of the latter. Suppose that the existing law of war serves to shield unjust combatants from private sanctions by creating or strengthening a widespread but, we will assume, false belief that combatants commit no wrong as long as they obey the law. Might the law of war be modified so that it no longer has this effect; for example, by explicitly characterizing the rules as applying

[30] David Rodin, "Morality and Law in War," in *The Changing Character of War*, eds. Hew Strachan and Sibylle Scheipers (Oxford: Oxford University Press, 2011), pp. 446–63.
[31] Ibid, 452.
[32] Ibid, 452.

to *just* combatants? If so, might such a change increase the frequency with which unjust combatants are held accountable for their wrongful conduct, and so over time lead military personnel and those who care for them to take greater responsibility for discerning whether the war they have been ordered or encouraged to fight is a just one? Rodin eschews such a change to the content of the law of war, holding only that the existing, neutral, law should be given an asymmetric interpretation according to which only just combatants can comply with it. But if this interpretation is to contribute to a diminution in the occurrence of unjust war by strengthening the practice of privately sanctioning unjust combatants, it will need to be broadly disseminated and adopted. Explicitly characterizing the law of war as applying to just combatants might well provide a perspicuous means for doing so.

Public sanctions for law-abiding but unjust combatants, particularly criminal trials and punishment, appear far less likely to produce a net gain in justice and security. At present, they are likely to be administered either by the victorious party in the war, or by domestic actors in the defeated state who opposed the group that fought and lost the war. In both cases, we might well worry these actors will use the criminal law to exact revenge and/or to further their political or economic interests, rather than to hold combatants accountable for fighting an unjust war. Furthermore, there is no reason to assume that victory in war tracks the justice of a party's cause, and therefore no reason to think that a legal rule that makes law-abiding unjust combatants liable to punishment will be administered in such a way that it is (mostly) unjust combatants who are put on trial. The creation of criminal liability merely for having fought in an unjust war might also create perverse incentives that would lengthen wars while making them even more horrific. Faced with the prospect of punishment, combatants who might otherwise choose to cease fighting may instead choose to continue despite their dwindling prospects for victory. Moreover, combatants might conclude that "because *anything* they might do in war would be wrong . . . they might as well abandon all restraint in order to win the war as quickly and decisively as possible, thereby affording themselves as much protection as possible, since if they win, it will be more difficult to prosecute and punish them."[33] Conversely, McMahan suggests that by not exposing combatants to criminal liability merely for fighting in an unjust war, the law may temper the righteous indignation that so often animates human beings in times of war. The goal of minimizing wrongful killing and injury may be best served if soldiers, sailors, and the like, perceive enemy combatants as simply doing their job, rather than as wrongdoers who bear personal responsibility for an unjust war.[34]

Despite suggesting that a moral assessment of the law of war should take into account the effects that its use to hold unjust combatants accountable for their wrongdoing will have on justice and security, Rodin makes no effort to explore what

[33] McMahan, "Morality of War," 30.

[34] To be clear, the claim is not that unjust combatants bear no responsibility for the war they fight, only that the law of war may contribute to mitigating the evils of war by fostering the belief that they do not.

the consequences of a change to the existing law might be. To the contrary, he asserts that we should be "highly skeptical of arguments about the likely effects of differing configurations of rules, especially when, as is almost always the case in international relations, it is difficult to support such arguments with solid empirical evidence."[35] Indeed, Rodin contends that oftentimes it is possible to formulate diametrically opposed but equally plausible hypotheses regarding the consequences of a change to the law of war. To illustrate this point, he considers the likely effects on the security of just states were the law of war reformed so as to make law-abiding combatants criminally liable for having fought in an unjust war. While the effects might be negative if it led many combatants to choose not to go to war even though they were morally justified in doing so, they might also be positive if the change in the law made it even more difficult for potential aggressors to launch unjust wars. He concludes that "speculating about the potential harmful or beneficial consequences of complex matters of rule formation is usually a futile exercise and a poor guide to ethics or to the configuration of international law."[36]

There are several reasons to think this conclusion too strong, however. The fact that we find it difficult to gather the information necessary to determine the consequences of a rule, or what the effects of some alternative rule will be, may warrant a low level of confidence in whatever conclusions we draw. However, it does not undermine the claim that the moral justifiability of adopting one legal rule rather than another depends on the former producing a morally better outcome than the latter; for example, greater conformity to the demands of revisionist just war theory. Indeed, as we will see, Rodin himself ultimately relies on an empirical claim when he maintains that the existing law of war cannot be justified as a lesser evil. Moreover, we should be careful not to move too quickly from the judgment that two contradictory hypotheses are equally plausible to the conclusion that they are equally probable. The former judgment often reflects a rough assessment of the likelihood that a hypothesis will turn out to be true, whereas the latter judgment depends on the evidence we are able to amass in support of each hypothesis, including the weight we assign to different pieces of evidence. Finally, while we often have good reason to seek additional information that confirms or conflicts with our hypothesis that one rule is superior to another, if we must choose between them then we ought to choose the one we think produces the better outcome, even if our confidence in the truth of that judgment is low.

Rodin's final objection to McMahan targets his instrumental approach to justifying the law of war. Where law regulates conduct that morality neither requires nor forbids, Rodin argues that legislators may enact the rule they believe will produce the most social utility. In such *mala prohibita* cases, the law makes it morally wrong to perform acts that it would not be wrong to perform were there no law, or perhaps,

[35] Rodin, "Morality and Law in War," 453.
[36] Ibid, 453.

were the content of the law different than what it is. In other cases, however, the law purports to regulate conduct that is morally wrong independent of the law forbidding it. Examples include *mala in se* criminal offenses such as murder, assault, and rape. Where "law articulates, and makes administrable an underlying moral norm," Rodin contends, it "is not free to assume any configuration that may be maximally useful; [rather] it is constrained by the content of the underlying moral norms."[37] Just as the underlying moral norms prohibiting murder, assault, rape, and so on constrain the content of (a just) criminal law, so too the underlying moral norms of revisionist just war theory place limits on the content of the law of war. In particular, if morality prohibits intentionally targeting those who have done nothing to make themselves liable to attack in war, then the law of war ought to reflect that fact by explicitly prohibiting attacks on just combatants. To defend the existing legal rule, which does not make unjust combatants criminally liable for killing just combatants, on the grounds that it will produce better consequences is to embrace a form of consequentialist moral reasoning at odds with respect for all human beings' right to life.

To drive home this conclusion, Rodin invites his reader to consider the following hypothetical example:

> Imagine a society in which an ethnic minority is despised and subject to persistent abuse and harassment. This abuse culminates in a macabre tradition on the national anniversary in which a single man from the community is captured and ritually hanged in the central square of the capital city. In the years in which the scapegoat ritual is prevented or fails, the general violence and abuse against the minority increase dramatically resulting in several dozen additional deaths. Suppose now that a proposal is put forward to formalize a set of legal rules regarding the treatment of the minority in this society. The lawmakers are humanely motivated and they have good reason to believe that the optimal law for securing the rights of the ethnic minority as a whole would be one which permitted the hanging of the ritual scapegoat under strictly controlled conditions and provided robust legal protections to members of the community outside this unique context.[38]

Rodin maintains that we ought to reject the proposed legal rules because they sanction the killing of a member of the ethnic minority as a (mere) means to minimizing the injustices committed by the majority. Likewise, because it fails to proscribe the immoral conduct of unjust combatants, "the law of war is inconsistent with morality for precisely the same reason that the scapegoat law would be inconsistent with it – it creates a legal right for certain people to violate the moral rights of others, as a means to achieving a broader desirable end."[39]

One might argue in response that Rodin mischaracterizes McMahan's and Haque's defense of the law of war, which rests not on a consequentialist account

[37] Ibid, 454.
[38] Ibid.
[39] Ibid, 455.

of what makes acts right or wrong, but an instrumental argument regarding the use of law to enhance conformity to a rights-based or deontological morality. Why not pick the decision procedure that best serves to minimize rights violations? Presumably Rodin's answer will be that it is not permissible to enact a law that will produce greater conformity to the demands of morality if it does so by encouraging actors to violate a person's moral rights. Rights serve as side-constraints on the pursuit of desirable states of affairs, including a range of outcomes in which those same rights are better secured or advanced. If we abandon that understanding of the nature of rights, then claims regarding rights become nothing more rules of thumb for promoting (morally) desirable consequences.

Haque contends that the instrumental approach he employs to defend the law of war does not justify the adoption of a law that permits the scapegoat ritual because "the permission does not help those subject to it conform to deontological moral norms."[40] This is not obviously true, however; Rodin's description suggests that in the absence of a law permitting the scapegoat ritual, members of the ethnic majority would violate the moral right to life of even more members of the ethnic minority. If so, then it appears that the government will enable members of the ethnic majority to do better at acting as they should if it legally permits the scapegoat ritual than it if continues to legally prohibit it. While members of the ethnic majority will still fail to fully conform to the deontological norm prohibiting unjust killing, the magnitude of their failure will be less than it would otherwise be.

The foregoing argument may misconstrue the instrumental justification for law's practical authority, however. Perhaps that justification, properly understood, requires that legislators make a good faith effort to identify what morality requires of their subjects, and to communicate that to them. The law ought to treat its subjects as responsible moral agents, actors who are capable of responding appropriately to the reasons that apply to them. In the scapegoat case, that means communicating the judgment that neither membership in the ethnic minority nor whatever rationale underlies the tradition of ritually hanging one of its members justifies the ritual killing. Were members of the ethnic majority to defer to the law rather than acting on their own moral judgment, or the moral judgment expressed by the communal norm that sanctions the scapegoat ritual, then they would do better at acting on the moral reasons that actually apply to them. Thus, the existing legal prohibition on killing, which contains no exception for the scapegoat ritual, is legitimate even if members of the ethnic majority wrongly disregard it, and so the law does not succeed at preventing the injustice of the scapegoat ritual. The question is not will subjects *actually* do better if they follow the law that if they act on their own judgment, but *would they* do better if they followed the law than if they acted on their own moral judgment. Although a law permitting but regulating the scapegoat ritual may produce a better outcome, it cannot be morally justified on the grounds

[40] Haque, "Law and Morality at War," 85.

that it enhances agents' conformity to morality in the manner that makes law legitimate.

Rodin does acknowledge that the violation of individual rights, including the right to life, can sometimes be morally justifiable as a lesser evil.[41] But the evil avoided must be significantly greater than the evil committed, lest a deontological ethic like the revisionist morality of war collapse into a straightforwardly consequentialist one in which an act is right if it produces the least evil (or the most good). Given that in waging war unjust combatants typically engage in many acts of wrongful killing and assault, the law of war's failure to proscribe such conduct would have to dramatically reduce the number and seriousness of the wrongs that would otherwise occur in order for it to be justified as a lesser evil. Rodin doubts the law of war satisfies that standard. He may be right, but contrary to what he implies, this is not obviously so. For example, suppose that at present reformulating the law of war so that it explicitly condones attacks only by just combatants will make little difference to the occurrence of just wars, while permitting criminal prosecution of law abiding combatants accused of waging an unjust war will lead to many of the outcomes McMahan predicts, including longer wars, a weaker commitment to other rules that aim to limit how war is fought, and an increase in the resentment and hatred that sow the seeds for future conflict. If so, then the existing law of war may produce much less evil than would occur were it reformed so as to closely approximate the revisionist morality of war, or that would take place under any third alternative (including the absence of any law of war at all). Of course, this argument depends on the truth of the aforementioned empirical claims, but then so too does Rodin's conclusion. The key point is that it is impossible to assess the truth of the claim that a rule does, or does not, satisfy the conditions for a lesser evil justification without building an empirical argument as to what the world would be like were we to adopt an alternative rule, or no rule at all. If Rodin remains committed to the claim that at present all such arguments are only speculative, then he ought to conclude that we do not and cannot know whether the existing law of war is justifiable as a lesser evil, rather than asserting that it is not.

Two other features of Rodin's last objection to McMahan merit discussion. The first concerns how we ought to understand the law of war's failure to proscribe unjust combatants' attacks on just combatants. Rodin suggests that the law of war grants both just and unjust combatants a legal liberty or privilege to attack enemy soldiers.[42] As long as they conform to the legal rules governing how and when combatants may be targeted, soldiers do no legal wrong in attacking one another because, unlike civilians, those they attack have no legal right not to be attacked, and this is so regardless of whether they fight with a just cause. In sum, the LOAC "creates a legal

[41] Rodin, "Morality and Law in War," 455.
[42] Ibid, 455.

right for certain people to violate the moral rights of others, as a means to achieving a broader desirable end."[43]

Haque disagrees. He maintains that we should conceive of the LOAC as addressed to two sets of actors: combatants and the domestic and international officials who claim jurisdiction over them. With respect to the former, the LOAC does not maintain that as long as they conform to its standards combatants do no moral wrong. Rather, it maintains only that combatants will *do better* at avoiding moral wrongdoing if they act in accordance with the LOAC than if they act on the basis of their own moral judgment. The latter claim is consistent with combatants still committing moral wrongs even if they fight in accordance with the LOAC, most clearly in the case of unjust combatants. As for domestic and international legal officials who claim jurisdiction over the conduct of combatants, Haque argues that they should understand the LOAC as imparting a legal immunity to combatants who adhere to its rules when waging war, not a legal liberty.[44] When the law accords an actor a liberty to perform an act, it maintains that (at least in the eyes of the law) the actor does no wrong when she performs that act. In contrast, when the law accords a legal immunity to actors who perform a particular act, it maintains only that they have a right not to be prosecuted or punished for doing so, not that they did no wrong in acting as they did.

Consider, once again, Rodin's scapegoat example. Perhaps reform of the law that creates a liberty right for the majority to carry out its horrific ritual killing is morally problematic not only because it makes the government or the political community complicit in this injustice, but also because it expresses the view that members of the ethnic minority are of lesser moral importance than are members of the ethnic majority. After all, the state licenses the killing of the former in at least one type of case where it does not license the killing of the latter. But now suppose the reform proposal includes only the creation of a criminal defense akin to diplomatic immunity, that is, one that precludes criminal trial and punishment for a violation of the law prohibiting murder if an actor kills an innocent person as part of the scapegoat ritual. Might this reform enable the state to convey the message that, regardless of the ethnic group to which he or she belongs, no one ought to be killed if he or she has not committed an act the state declares to be one that makes a person liable to defensive force? And might the government sufficiently distance itself from the killing of the scapegoat so that it can claim not to have used him or her as a mere means to advancing a further good? After all, the government does nothing to the scapegoat; all it does is refrain from doing something to those who kill the scapegoat that it is permitted, or perhaps required, to do to those it suspects have wrongly killed

[43] Ibid.

[44] Haque, *Law and Morality at War*, 23–30. See also Lazar, "Morality and Law of War," 376. More precisely, the immunity concerns one state's prosecution of another state's combatants under international or domestic law. It does not preclude a state prosecuting its own combatants for violations of its own laws governing war fighting.

someone other than the scapegoat. While opinions may divide on these questions, many will likely conclude that Rodin's objection still hits home; that is, that unless a defense of "scapegoat immunity" is justifiable as a lesser evil – and he implies it is not – such a reform to the law is impermissible. Likewise, in granting immunity to criminal prosecution to all combatants, the law of war necessarily treats attacks on just combatants as a means to preventing other or more rights violations, a course of action that is justifiable only if it is necessary to prevent a far greater evil.[45]

The second feature of Rodin's objection that warrants closer examination is the conception of law on which he relies. Recall that Rodin describes as the purpose of the criminal law the articulation and administration of moral norms. One way to interpret this description is as an endorsement of the concept of law Ronald Dworkin defends. As we saw in Chapter 4, on this account of law, a practice of coercive government counts as a genuinely legal one if and only if it treats all of its subjects with equal concern and respect. Since the proposal to regulate rather than outlaw the scapegoat ritual fails to treat members of the ethnic minority with equal concern and respect, its adoption is inconsistent with government according to the rule of law. Rodin's description of the scapegoat case leaves it unclear whether the society he describes is one that satisfies to an adequate degree the conditions for the rule of law, and so what sort of moral reasoning government officials ought to use when making, applying, and enforcing the law. For the reasons described in Chapter 5, however, we may well conclude that international relations is not a context in which human interactions are subject to the rule of law. If so, then when we evaluate the law of war we ought to rely on strategic moral reasoning, not the principled moral reasoning incumbent on officials in a genuine legal order. Specifically, we should ask whether the existing rules best serve to advance the twin goals of mitigating the injustices endemic to human interaction in the absence of the rule of law, and advancing the goal of realizing the rule of law in domains of human interaction where it currently does not exist. Thus, we can agree with Rodin that genuine law ought not to be made or identified on the basis of strategic or instrumental reasoning, but deny that the law of war is genuine law, in the sense synonymous with government in accordance with the rule of law. In other words, Rodin errs when he assumes that the sort of moral reasoning appropriate for identifying permissible uses of force in conditions characterized by the rule of law ought to be employed as well to identify the rules that ought to guide actors in circumstances where those conditions are not met.[46]

[45] Haque's defense of a legal immunity for combatants who adhere to the law of war suggests he thinks it can be justified as a lesser evil. See ibid, 28–9.

[46] Reliance on the distinction between the form of moral reasoning appropriate to these two types of circumstance coheres with a description of war as necessarily a social practice in which participants cannot be treated with equal concern and respect. That is why we have a fundamental moral obligation to expand the rule of law, and in so doing, eliminate the occurrence of war. This line of argument coheres nicely with the one presented in the next section.

IV A HUMANITARIAN DEFENSE OF THE LOAC

Thus far, all of the theorists we have considered take the purpose of the law of war to be the advancement of respect for combatants' and noncombatants' individual moral rights.

Walzer maintains that the existing law of war serves this goal by communicating or publicizing the true moral principles governing the use of force in war, which include the *moral* equality of combatants and a moral prohibition on targeting civilians. While Rodin agrees with Walzer that the law should "articulate and make administrable" the morality of war, he embraces a revisionist morality of war and so maintains that this requires significant revisions to the content of the law of war (or at least to its interpretation). McMahan and Haque share Rodin's belief that the content of the existing law of war deviates from the true (revisionist) morality of war, but nevertheless defend compliance with it on the grounds that this will produce fewer rights violations than will occur if Rodin's demands for reform are met. Thus, they broadly concur with Walzer regarding the content of a morally defensible law of war, although they offer a different account of why a morally defensible law of war ought to have that content.

Janina Dill and Henry Shue argue for an alternative approach to morally evaluating the law of war, one that eschews a concern with individual rights and embraces instead a humanitarian concern with minimizing killing, maiming, and the destruction of property.[47] They take as the starting point for their assessment of the law of war the fact that it addresses agents who have already chosen to resort to war.[48] Given that these agents are already committed to the use of military force to achieve some goal, the most the law of war can do to affect their conduct is to channel it in ways that limit the death and destruction that are part and parcel of waging war. Dill and Shue maintain that a law of war that prohibits any conduct on the part of combatants not directly related to weakening the military forces of the enemy best serves this goal. A more restrictive set of rules will achieve less uptake among combatants, and so fail to prevent some of the harm that could have been avoided were the law less demanding but internalized to a greater degree and/or by a greater number of combatants. Of course, it might be possible to achieve even higher levels of compliance with a less restrictive set of rules. However, the more permissive content of those rules will result in the occurrence of more harm than would occur under

[47] Janina Dill and Henry Shue, "Limiting the Killing in War: Military Necessity and the St. Petersburg Assumption," *Ethics and International Affairs* 26, 3 (2012): 311–33. For a similar argument, see Tamar Meisels, "In Defense of the Defenseless: The Morality of the Laws of War," *Political Studies* 60, 4 (2012): 919–35.

[48] Dill and Shue do not deny that moral and legal norms also govern the decision to go to war; rather, their claim is only that the law of war addresses those who have already chosen to resort to war. The law of war should be understood to express a conditional claim: *if* you have chosen to go to war, *then* you ought to fight in accordance with these rules. See Shue, "Morality of War?" 105.

rules that limited the conduct of war to acts that directly contributed to weakening the enemy's military forces.

Dill and Shue maintain that their proposed standard for morally evaluating the law of war justifies both of the features under investigation in this chapter, namely, the fact that the law of war draws no distinctions between just and unjust combatants, and the fact that it prohibits intentional attacks on civilians but not on combatants. They emphasize, however, that their moral defense of the law of war "does not even have the pretense of providing a moral justification for wounds and deaths among combatants on the individual level."[49] Indeed, Dill and Shue's humanitarian case for the law of war pays no attention at all to justice, or to the vindication of individual rights. This conclusion may seem hard to square with their claim that the law of war serves to "protect the moral rights of many civilians to life and physical security."[50] But while the law may well have this effect, Dill and Shue do not ground the prohibition on targeting noncombatants in the fact that they have done nothing to make themselves liable to defensive force (assuming this is the case). Rather, they argue that war is not the kind of social practice that can distribute benefits and burdens in response to personal desert; it is not an activity that tracks, even roughly, moral responsibility for conduct that makes one liable or not liable to death or injury.[51] If this is an essential feature of war, as Dill and Shue maintain, then any attempt to elaborate rules for war that make its conduct just, meaning largely respectful of individual moral rights, is doomed to fail. The most we can hope to do is to make war less awful. As Dill and Shue write, "limiting the further harms and wrongs issuing from activity that ought not to be occurring at all is a morally distasteful, yet morally vital, enterprise at the heart of the laws for the conduct of war."[52]

McMahan and Haque might concede that the content of the law of war will *inevitably* diverge significantly from the content of the morality of war, and yet still maintain that the protection of individual rights, rather than the minimization of death and destruction, provides the standard we should employ to select among competing legal rules. After all, they could say, given the choice between a rule that does better at advancing the protection of individual rights but worse at minimizing overall harm, and a rule that does the opposite, we ought to choose the former (unless the latter rule is a lesser evil). Even if we assume the truth of revisionist just war theory, however, it may be that the nature of war raises insurmountable barriers to identifying the legal rules that do best at enhancing conformity to it. Instead, the kind of evidence we are able to gather regarding the effects, or likely effects, of various rules may concern only their impact on the incidence of death, injury, and

49 Dill and Shue, "Limiting the Killing," 322.

50 Ibid, 323.

51 They point out that in this respect war is like the market, which is also a social practice ill-suited to allocating burdens and benefits in line with personal desert or moral virtue.

52 Ibid, 326.

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destruction of property. If so, then not only should individuals not rely on revisionist just war theory to guide their conduct in war, legislators ought not to rely on it when considering which reforms, if any, ought to be made to the law of war.

Rodin contends that Dill and Shue make the same error as McMahan, namely, disregarding the fact that fundamental moral rights impose constraints on the content of the law. In offering a humanitarian moral defense of the law of war, they embrace a strategy of permissive regulation, one that condones certain wrongful killing on the grounds that it leads to less overall suffering than would occur under any alternative rules. Rodin asserts that a proper respect for individual rights bars such consequentialist reasoning, however. To make his case, he asks whether it would have been permissible in 1806 to subject the slave trade to strict legal regulation rather than outright prohibition, if there had been good evidence that the former would better protect the victims of slavery than would the latter.[53] His answer is no, of course. Shue offers a twofold response.[54] First, he emphasizes that a humanitarian moral defense of the law of war does not imply that combatants act rightly as long as they comply with the (morally best) law of war. Rather, he maintains only that the most we can expect of rules that actually serve to guide the conduct of agents who have already decided to go to war is that they limit the death, damage, and destruction they cause. The humanitarian argument is premised on a claim regarding what is possible, not what is (morally) optimal. Second, and relatedly, the adoption of a policy of permissive regulation is compatible with efforts to eliminate the occurrence of war. Regarding the legality of the slave trade, then, the ex ante question is whether its prohibition *together with some further set of policies* will better advance the goal of reducing the slave trade than will some form of permissive regulation *together with some further set of policies* (which might include prohibition at a later date). To answer that question, we need to know how different legal regimes are likely to shape actors' conduct, and what supporting policies are likely to be adopted. The parallel conclusion holds vis-à-vis the regulation of war; an incremental approach along many fronts may prove a better strategy for reducing the incidence of war and the injustices endemic to it than a sweeping legal prohibition. Of course, each of these replies reflects a commitment to a form of consequentialist reasoning that Rodin rejects.

The humanitarian defense of the law of war provides one way to understand Shue's claim that the morality of war just is the morally best law of war. War is a type of social practice necessarily at odds with respect for individual dignity, or the treatment of all individuals with respect for even their basic moral rights. When it comes to the conduct of war, we must lower our moral aspirations and focus only on channeling violence in ways that make the inevitable moral toll less calamitous. What morality requires of us vis-à-vis the conduct of war is that we identify the

[53] Rodin, "Morality and Law in War," 460.
[54] Shue, "Laws of War," 282–4.

conventional codes of conduct, including the law of war, that best serve this practical goal. Once we do so, we have identified the morality of war; there are no other standards of right conduct, especially ones that are grounded in individual rights, that apply to participants in war.

This position necessitates an awkward balancing act when it comes to the moral assessment of just combatants who comply with the morally best law of war. Do they act justifiably? If a morally justified act is one that conforms to the moral rule that applies to acts of that type, then the answer would seem to be yes; by hypothesis, our combatants adhere to the morally best rules for waging war. Yet war inevitably involves terrible harm inflicted on those who do not appear to be liable to such harm. Do they really have no basis for complaint against the combatants who harm them, as the description of the combatants' conduct as morally justified implies? Perhaps, then, just combatants often only act excusably, not justifiably, even when they comply with the morally best law of war. While they still morally wrong some or even all of those they harm, they are not blameworthy for doing so.[55] But now the combatants may complain that if it is not possible for them to wage war in a way that respects individual rights, then they ought not to be charged with wrongdoing when they adhere to the morally best rules for waging war that humans can follow.

There is another way to interpret Shue's claim that the morally best law of war just is the morality of war, however, one at which he sometimes gestures but perhaps does not fully embrace. On this interpretation, the content of our moral rights is a function of the norms we can generally expect human beings to follow, which depends in turn on a number of factors, including the institutional context in which people interact. On this account, the list of acts a person has a moral right that others not perform will vary depending on the context in which she interacts with those others. Note that this does not equate the content of our moral rights with whatever existing (positive) law says it is. Rather, it holds only that the content of our moral rights is determined by the morally best law (together, perhaps, with other social norms), and that the morally best law reflects certain facts about the conditions under which norms successfully structure human interactions. What this account of moral rights does imply, however, is that the content of the moral right not to be killed or injured in the context of war may well differ significantly from the content of the moral right not to be killed or injured in "ordinary" or "peacetime" life.

When it comes to theorizing rules governing the use of force, Shue maintains that the crucial distinction is the cross-cutting one between "the standards, be they moral or legal, for ordinary life and the standards, be they moral or legal, for war."[56] This is so because "the circumstances of war are so different from the context of ordinary life

[55] This is the position McMahan and Haque take, but as we have seen, they are both less convinced than Dill and Shue that war cannot be fought in a manner consistent with revisionist just war theory, and less concerned by the possibility that the standards of right conduct in war may turn out to be ones with which human beings will normally fail to comply.

[56] Shue, "Morality of War?" 88.

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that, even when the same fundamental moral touchstones are the reference, the differences in the circumstances yield different specific guidelines."[57] As we have seen, one crucial difference concerns the possibility of reliably determining which actors are liable to defensive force (and, perhaps, what type or amount of force). In addition, Shue argues that the content of the norms governing the use of force must be sensitive to the institutional setting in which they purport to govern human conduct. In domestic life, the reason "one can normally be reasonably expected and morally required to refrain from violent forms of self-help is because the background institutional context, much of it structured by further layers of laws with no analogues in the international arena, generally provides help in the form of the relatively impartial civil institutions, like police and courts, that contribute to the rule of law."[58] In contrast, "war breaks out where impartial institutions are yet to be created or any existing impartial institutions are thought by at least one party to have failed to protect their vital interests."[59] Indeed, wars are doubly anarchic. Not only do they occur in the absence of an effective impartial government that is recognized by all parties as enjoying legitimate authority to resolve disputes over the scope or content of their rights, there is also no one "available to enforce the laws of war except the participants in the war, who must then attempt to enforce the rules upon each other while attempting to defeat each other and avoid death."[60] Therefore "it would hardly be surprising if the best rules that could govern such an anarchic, violent realm as international conflict were, in various ways, disanalogous to the principles governing ordinary life."[61] Shue's reference here to "rules that could govern" reiterates the claim that discussed earlier in this chapter, namely, that a necessary condition for the existence of a norm, moral or legal, is that it be one with which human beings acting in good faith can generally be expected to comply. Taken together, these remarks by Shue point to the conclusion set out in the previous paragraph: the "fundamental moral touchstones" such as human beings' fundamental welfare and agency interests are invariable, but the content of the norms that specify appropriate responses to those "touchstones" vary depending on the social setting in which they actually serve to regulate human conduct.

This context-dependent account of moral rights entails that just combatants who abide by the morally best law of war act justifiably, and not merely excusably.[62] To see why this is so, suppose that among the set of rules regulating the conduct of war with which human beings can generally comply, the one that best reflects the

[57] Ibid, 87. See also Shue, "Laws of War," 272–3.
[58] Shue, "Laws of War," 273.
[59] Ibid, 274. Gang wars, then, may often be genuine wars, insofar as they involve parties who rely on force to vindicate what they take to be (or at least proclaim to be) their rights in a context where the state is either ineffective or corrupt.
[60] Shue, "Morality of War?" 104.
[61] Ibid, 104.
[62] Note that a fully worked out theory along the lines suggested in the text would likely characterize a just cause for war, and so just combatants, in terms of the morally best laws regulating resort to war.

fundamental moral touchstones does not prohibit deliberate attacks on those who perform combat functions. It follows that when just combatants intentionally attack individuals who perform combat functions on behalf of the party with whom they are at war, they do not violate those individuals' moral rights. If we keep in mind that on the context-dependent account the demands of justice in war differ from those in ordinary life, that is, where the rule of law provides a generally reliable mechanism for advancing or honoring the fundamental moral touchstones, then these combatants can be accurately described as waging war justly. This is so even if a world in which human beings sometimes resort to war is necessarily an unjust one because it reflects the incomplete reach of government in accordance with the rule of law. Waging war according to the morally best law of war may be the optimal means to achieving that goal, or at least to preventing it from receding even further from humanity's reach, even if it is also a social practice we should ultimately aim to eliminate. Nevertheless, we should not demand that actors comply with the norms that apply to people in a world in which all human interactions are governed according to the rule of law when they live in a world that does not satisfy that condition.

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