Deontology, Consequentialism and Reciprocity in Contemporary Just War Thinking

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Abstract:

Keywords:

Prologue: Queen Victoria and Private Patrick McGuire

Private McGuire was taken prisoner during the Crimean War, but overpowered and killed his two guards and made it back to British lines. His commanding officer recommended him for the Victoria Cross, but the award of this medal was vetoed by Queen Victoria. She described his actions as of 'very doubtful morality', commenting that 'if pointed out by the sovereign as praiseworthy, it may lead to the cruel and inhuman practice of never making prisoners, but always putting to death those who may be overpowered for fear of their rising over their captors.' The story came to light when Pte McGuire's other medals were recently put up for sale at auction; the auctioneer commented that 'she thought what he did just wasn't cricket.' Thus it was that Queen Victoria, a decade before the foundation of the Red Cross, articulated the importance of fairness and reciprocity on the battlefield.[1]

Introduction: Contemporary Ethics and Modern Just War Thinking.[2]

Over the course of the last quarter century or more, the just war tradition has gone from being a somewhat obscure focus for the research of theologians and historians of ideas, to providing a widely available language for political theorists, lawyers and commentators to talk about the ethics of war. Arguably, the decade of the 1980s was crucial in this transformation, bracketed at one end by the publication of Michael Walzer's *Just and Unjust Wars,*[3] and at the other by the first Gulf War of 1990/91, with, in between, extensive debates on the morality of threatening to use nuclear weapons, and, at the end of the decade, the liberation of thinking on all matters international represented by the end of the Cold War. But, if just war thinking is now widely employed, this does not mean that everyone is singing from the same hymnbook. Instead, there are (at least) three different conceptions of just war that are current in contemporary discourse: first, there is what I would describe as 'neo-classical' just war thinking, drawing on the deep history of the discourse and applying it to modern conditions; then there is 'legalist' just war thinking, which essentially equates the notion of a just war with that of a war fought in accordance with the Law of Armed Conflict, (a.k.a. International

[1] Knowles 'A Private' (2018).
[2] I am grateful to Cian O'Driscoll for comments on an earlier draft of this article.
[3] Walzer, *Just and Unjust Wars* 1977.

Humanitarian Law) and the UN Charter, possibly amended to allow for the possibility of humanitarian intervention; and finally there is 'revisionist' just war theory, which applies the techniques and assumptions of analytical political theory to the notion of a just war – or, if it is easier to think of these three conceptions as associated with particular individuals, the just wars of James Turner Johnson, Michael Walzer and Jeff McMahan respectively.[4] The fact that there are these three different readings of just war is a source of confusion in the literature, not helped by the fact that just war thinkers themselves do not always recognise the relevant differences – thus many revisionists contrast their work with 'traditionalists' by which they usually mean Michael Walzer, not recognising the extent to which Walzer's work differs from the tradition. Equally, some Catholic just war thinkers, such as Joseph Boyle, have actually dropped the reliance on Augustine and Aquinas that used to characterise their approach in favour of a much more legalist reading of the tradition.[5]

All of this produces confusion, and it may be that to come to terms with some of the modern dilemmas thrown up by the ethics of war it makes more sense to begin with categories drawn from ethical theory more generally, categories such as deontology, consequentialism and the ethics of virtue. The first two of these categories concern the morality of the choices made by individuals (or collective actors); consequentialists assert that choices are to be assessed by the states of affairs they bring about, while for deontologists, choices must conform to a moral norm, irrespective of the states of affairs that result from them. To put the matter in different terms, for deontologists, the Right has priority over the Good; "if an act is not in accordance with the Right it may not be undertaken, no matter the Good it might produce".[6] For the consequentialist, it is the Good that determines right action. Kantian ethics are deontological, as are many contract theories and theories of rights. The most prominent version of consequentialism is utilitarianism, but some consequentialists are pluralists, rejecting the utilitarian view that the good is ultimately singular. Deontologists and consequentialists focus on the morality of the choices made by individuals; virtue ethics, on the other hand, focuses on the kind of person we should be, on the principle that if we are the right kind of person, we will make the right choices. If Kant and Bentham are representative figures for deontology and consequentialism, then Aristotle might be identified as the (distant) progenitor of virtue ethics, with figures such as G.E.M Anscombe and Philippa Foot as modern representatives.[7]

All three of the modern versions of the just war are, at their most basic, deontological, which is to say that they are based on absolute prohibitions or on mandated behaviours, but each, in different ways, acknowledges some role for consequentialism and for forms of political judgement that are most plausibly associated with the virtues. Legalist just war thinking is at root non-consequentialist, but the Law of Armed Conflict (LOAC) includes the notion of 'military necessity' which has a clear consequentialist dimension – and Michael Walzer's famous/infamous notion of 'supreme emergency' is clearly based on consequentialist reasoning.[8] Neo-classical just war thinking is based on categories which seem on the face of it to be based on deontological ethics, notions such as the prohibition of harm to the innocent – but, again, the interpretation of the classical just war categories requires the exercise of the kind of political judgement associated with Aristotelian ethics, and involves strategies for incorporating a consideration of the outcomes of action, such as the notion of 'double effect'.[9]

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[4] See *inter alia* Johnson *Just War Tradition* (1985), Walzer, *Just and Unjust Wars* (1977), McMahan *Killing in War* 2009.
[5] Boyle 'Traditional Just War Theory' (2006)
[6] Alexander and Moore 'Deontological Ethics' (2016)
[7] See Anscombe, 'Modern Moral Philosophy' (2003); Foot, *Virtues and Vices* (2003).
[8] See Walzer, *Just and Unjust Wars*, p. 250 ff.
[9] See e.g. Woodward, *The Doctrine of Double Effect* (2001).

The most purely deontological of approaches to just war is that of the analytical philosophers, which, as we will see, is one reason why this work is difficult to align with the actual conduct of violent conflict.

Both deontological and consequentialist approaches to the ethics of war come with well-founded objections to their positions. The key objection to deontology has already been referred to – sometimes prioritising the Right over the Good may lead to disaster; *fiat justicia ruat caelum* (let justice be done though the heavens fall) is difficult to accept unless one believes, as Christians do, that God will not allow the heavens to fall. The classical version of just war was, of course, created by Christians, but the deontology of revisionist just war theory does not have this backstop. The main objection to consequentialism is rather different, and concerns the problems involved in actually calculating consequences; in the unavoidable absence of perfect information, calculations of consequences will always involve the exercise of judgment. Moreover, the consequences of a discreet act always have to be seen in the context of the flow of events – prioritising the Good over the Right has to involve long-term outcomes rather than the Good associated with a single choice of action.

In summary, to repeat the point, all three versions of modern just war thinking rely on deontological reasoning, albeit each, in its own way, is obliged to make some space for consequentialist arguments. What I want to draw attention to in this article is that the moral world of the soldier in combat works very differently; here, the natural tendency is to think about the rules in consequentialist terms and imposing a regime that prioritises the Right over the Good will always be a struggle. A successful ethics of war will not be based simply on overcoming the moral world of the soldier, but on recognising that, in combat, consequentialist reasoning will always be important and that attempts to produce a theory of the just war that excludes such considerations will be impossible.

The Moral World of the Soldier

Generalising about the moral world of the soldier is, of course, always going to be difficult; we have no database here to draw upon, and the very term 'soldier' has different meanings in different contexts. The just war tradition developed in Europe, and modern just war thinkers generally envisage soldiers as members of armies organised on lines developed over the last few centuries in Europe, but many real-world soldiers now, and in the past, do not fit and have not fitted into this mould. Even within the field of European armies different soldiers will inhabit different moral worlds; it would be unrealistic to think that the moral perspective of, say, a Waffen-SS officer in France in 1944 will have much in common with that of, say, a Danish soldier in Helmand in 2012. Still, with all these provisos in mind, it may be possible to discover some common notions from the memoirs of soldiers, histories of specific wars and books such as John Keegan's *The Face of Battle* and Michael Burleigh's *Moral Combat* which explore these issues.[10] This is the approach adopted here – admittedly the result is biased towards the experiences of modern 'western' soldiers which are the most readily accessible, and later in this article the disjuncture between these experiences and those of 'irregular' warriors fighting asymmetric war will be discussed.

From soldiers' memoirs, official histories and so on principles do emerge, principles which can be generalised at one level of abstraction as the avoidance of unnecessary cruelty and suffering, and at another level, by the notion of reciprocity. These general principles may, or may not, be consistent with the formal rules summarised by the Law of Armed Conflict. Some examples may help to clarify the point being made here.

[10] Keegan, *The Face of Battle* (1976); Burleigh, *Moral Combat: A History* (2010).

First, consider this vignette drawn from the official Second World War regimental diary of the Irish Guards, on campaign in Italy in 1943, recounted by John Keegan in the *The Face of Battle*:

> We ran straight into a large body of Germans and, after a few bursts of Bren and Tommy gun fire, about forty ran out with their hands up. Elated by this, we proceeded to winkle them out at a great pace. Wheeling round the next corner, Lance-Sergeant Weir led his section in a charge against another group of Germans. Those Germans were ready for them and met them with long bursts of fire . . . Weir was shot through the shoulder, but the bullet only stopped him for a moment, while he recovered his balance. He led his men full tilt into the Germans and they killed those who delayed their surrender with the traditional comment, 'Too late, chum'. [11]

The term 'traditional' refers to the moral code of the professional armies of the seventeenth and eighteenth centuries – the Irish Guards were actually formed in 1900 but were closer to the older professional mentality than most British regiments in the Second World War. Professional soldiers were prepared to risk their lives, but resented being asked to do so for no practical purpose; once it became clear that an engagement was lost or that a siege would be broken, the losers were expected to surrender. If they failed to do so and inflicted additional casualties on the winning side, they would be responsible for causing unnecessary suffering, and could expect no quarter.

This is an example of what is, on the face of it, a war crime – but there are examples that point in another direction. Sometimes conduct, or weaponry, that is legal will be widely regarded as improper and punished. Consider the World War I case of serrated-edged bayonets, designed to enlarge and make more difficult of treatment the wounds they caused; these were issued, perfectly legally, to some German troops, but the latter were advised by their comrades to get rid of them, because, only too well aware of the damage such weapons could inflict, British and French soldiers were likely to kill out of hand any prisoner taken bearing them.[12] Similarly, the distaste that many ordinary soldiers have felt for the perfectly-legal trade of sniper is well-documented, and snipers in both World Wars were well-advised to remove the distinctive patches of their trade if taken prisoner.[13]

This latter distaste relates to the fact that the moral world of the soldier clearly distinguishes between cold-blooded murder, and hot-blooded killing. According to the LOAC, a soldier is expected to be aggressive in pursuing legitimate military objectives but, equally, is expected to be able to turn off this aggression immediately once circumstances change, to shift at the drop of a hat from lawfully killing an equally aggressive enemy to accepting the latter's surrender. There is a mass of anecdotal and historical evidence to suggest that this expectation is unrealistic. To kill in hot blood at the end of a bloody fight is not regarded as a crime. The Irish Guards case makes this point ('too late, chum') and a very nice example appears in the film *Saving Private Ryan.* The American soldiers who have survived the carnage on Omaha Beach finally take out the machine guns that have caused so many casualties; German soldiers attempt to surrender and are casually gunned down.

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[11] Keegan, *The Face of Battle* (1976), p.49.

[12] Erich Maria Remarque makes the point clearly in *All Quiet on the Western Front* (1929/1996) p.103.

[13] That this was a genuine issue is illustrated by the fact that one of the worst US war crimes of the Second World War involved the shooting of sniper POWs in Sicily in 1943; the (unsuccessful) defense offered referred to their actions as treacherous. See James J Weingartner 'Massacre at Biscari' (1989).

Present in each of the aforementioned examples is the notion of reciprocity – up front in the case of serrated bayonets, in the background when it comes to hot-blooded killing. Sometimes reciprocity is present in a more direct way; Antony Beevor in his recent history of *Ardennes 1944* tells how in the initial stages of the German advance, the Waffen-SS murdered captured American soldiers in cold blood (the Malmedy Massacre), but as the tide of battle turned, SS soldiers were themselves frequently shot out of hand rather than being taken prisoner, with the tacit, and sometimes explicit, approval of the commanding US General, a clear example of 'tit-for-tat'.[14]

Or consider the case of the British Marine Sergeant Alexander Blackman, a Commando on patrol in Helmand Province Afghanistan in 2011, who was tried and convicted for the offence of murdering a wounded Taliban prisoner. The act came to light because although Blackman turned off the video recorder on his own helmet, the recorder on a comrade's helmet was still live; Blackman can be heard shooting the wounded man, telling him 'it's nothing you wouldn't do to us'.[15]

There is a marked difference in the ways in which the higher military authorities have regarded these reciprocity-based breaches of the LOAC and just war principles. In the World War II cases, the attitude of command staff seems to have been accommodating to the moral outlook of the ordinary soldier. The killing of prisoners by the Irish Guards is recounted with no sense of moral opprobrium in the official history of the regiment, and Anthony Beevor notes that the American High Command seemed at times to be positively in favour of the policy of retribution:

> [When] General Bradley heard that . . . prisoners from the 12th SS Panzer Division Hitler Jugend had spoken of their heavy casualties, he raised his eyebrows sceptically. 'Prisoners from the 12 SS?' 'Oh, yes sir,' the officer replied. 'We needed a few samples. That's all we've taken sir.' Bradley smiled: 'Well, that's good' he said. [16]

As the case of Sergeant Blackman illustrates, this is no longer the attitude of the higher authorities. In his court martial Blackman did not follow up his claim to be acting reciprocally, claiming instead that the insurgent was already dead – still an offence to desecrate the dead, but less serious than murder – but this was rejected by the court. Sentencing him to life in prison with a recommendation that he serve at least ten years, Judge Jeff Blackett, the Judge Advocate General, commented – in a formulation to which we will return later in this article – that

> If the British Armed Forces are not assiduous in complying with the laws of armed conflict and international humanitarian law, they would become no better than the insurgents and terrorists they are fighting.[17]

In broadly similar cases in the US the same position has been held by the authorities. Whereas once reciprocity was tacitly allowed to override the letter of the Law of Armed Conflict, now this get out of jail card has been removed. In the British case, the European Convention on Human Rights, and the Rome Statute creating an International Criminal Court to try war crimes, has undoubtedly had some impact on attitudes as, perhaps, has the increase in size of the Army Legal Services; in 1945, an army of several million was served by just 32 military lawyers, today an army of 80,000 has the benefit of 130 legal officers.

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[14] Beevor *Ardennes 1944* (2015).
[15] A convenient summary of his court cases is Dixon 'Marine A' (2017).
[16] Beevor *Ardennes 1944* (2015) p. 222.
[17] Blackett, sentencing remarks (2012)

In summary, we now seem to be seeing the dominance of a deontological approach to the ethics of war in which the consequentialism characteristic of the moral world the combat soldier inhabits is no longer to be tolerated. But the reasons for this consequentialism – the circumstances and logic of combat – have not changed, and there is plenty of reasons to think that the new official attitude is not as widely shared as deontological just war thinkers or lawyers might hope. Blackman appealed against his conviction and the campaign on his behalf attracted a great deal of public symphony and much covert support from serving soldiers. The appeal was unsuccessful; although the verdict changed from murder to manslaughter and the sentence was reduced to eight years, the conviction stood. This was the first such conviction of a serving soldier since the Second World War, but the stresses and strains accompanying asymmetric warfare suggest that it is unlikely to be the last.

Laws of War in Theory and Practice:

The Law of Armed Conflict (LOAC) is established by international treaties – The Hague and Geneva Conventions and various Protocols – and from the legal perspective requires no further justification. The LOAC consists of a set of imperatives that must be obeyed and in this respect is no different from any other legal code. But, like any other legal code, how it is actually implemented is a rather more complex and ambiguous process that the absolutist attitude to law would suggest. Applying the rules requires a process of interpretation, and frequently this process has to be carried out on the ground, under time pressure, and by soldiers who are not trained in the niceties of legal exegesis. Absolute prohibitions exist, but other rules allow more room for interpretation; the principle of 'military necessity' is recognized by the LOAC and although this principle cannot be used to justify some violations of the code – for example the shooting of prisoners – in other cases matters are less clear cut. Still, in principle, the LOAC are a set of rules which ought to be applied on the battlefield and after, and rest on an approach to ethics that is essentially deontological. As we have seen, evidence drawn from the memoirs and diaries of soldiers, and from historical studies more generally, suggests that soldiers also operate to a set of rules, but rules that are based on consequentialist ethics. There is a disconnect here, but how serious is the problem this disconnect produces is a matter which requires further investigation.

The examples discussed above, where the moral world of the soldier clashed with the formal rules of war, all revolve around notions of fairness – using a weapon that inflicts unnecessary harm, picking out individual targets, expecting to be treated in ways that you would not treat others, moving seamlessly from aggressor to supplicant, these are all behaviours that breach the informal norm of reciprocity; they might be legally mandated but do not seem fair to those engaged, sometimes literally, at the sharp end. In fact, in the two World Wars, this was tacitly recognised, and the authorities distinguished clearly between those breaches of the laws of war that were to be informally condoned and those that demanded a response. As we have seen, hot blood killings of those attempting to surrender could be recognised in official regimental diaries, albeit with a wry turn of phrase, but the cold-blooded killing of prisoners was not condoned, even though most cases were swept under the carpet, recognised as a wrong even when no action was taken.

This might not have been a very satisfactory situation, but things could have been a lot worse. In the Second, World War there was a clear contrast between the way in which the conflict between Germany and the western powers was fought and the very different wars fought on the Eastern Front. In the West, all the armies, with the exception of Waffen SS units, recognised the existence of the Laws of War and although there were serious breaches, some of which have been referred to above, on the whole prisoners were taken and treated with basic

decency by both sides. It would be ridiculous to suggest that everything went by the book on the Western front, but on the whole the Laws of War were obeyed. This is very much in contrast to the situation on the Eastern Front where the war between Germany and the Soviet Union was fought with extreme savagery on both sides. Unlike in the West, where the war was fought for political supremacy, in the East the intent of the German High Command was effectively genocidal, and the USSR, which was not a signatory of the Geneva Convention, also did not acknowledge that enemy combatants had rights, and regarded those of its own soldiers who were taken prisoner as traitors. Both sides committed mass atrocities and the fate of prisoners of war, initially mainly Russian, later German, was truly appalling.

To a slightly lesser extent the same was true in the Far East. To give a sense of the difference even the imperfect adherence to Geneva made, consider the following statistics on POW mortality: 57.5% of Soviet POWs held by Germany died, as did 35.8% of German POWs held by the Soviet Union; 3.5% of British and 1.19% of American POWs held by Germany died, 0.15% of German POWs held by the Americans died, as did 0.03% held by the British; 33% of American and 24.8% of British POWs held by the Japanese died.[18] The Eastern Front figures are particularly noteworthy given that these figures do not cover those not actually taken prisoner – that is, those killed attempting to surrender. Similarly, the absence of figures of Japanese deaths in captivity reflects the very small number of Japanese prisoners actually taken during the war.

The point about these gruesome figures, and generally the comparison between the Eastern and Western Fronts, is that although the attitude to the Laws of War in the West involved a great deal of pragmatism, with much give-and-take between the formal and the informal rules on the battlefield and more leeway being given to the reciprocity-based soldiers code than would be approved of by most military lawyers, still, the situation for the ordinary soldier in places where even this relaxed approach to the laws of war applied was markedly better than in places where it didn't.

How have things changed since 1945? It is, I think, clear that the kind of pragmatic give-and-take that characterised attitudes to the clash between the laws of war and the soldier's code is increasingly difficult to maintain, at least in western armies. In Britain and America at least, military legal services, Judge-Advocate Generals and the like, play a much greater role in regulating combat operations than they did in the World Wars. Bombing and drone targets are chosen after consultation with lawyers, and the battlefield surveillance of the infantry via video recorders and satellite phones allows for a degree of oversight that is far beyond anything that could be achieved before the last two decades. The ubiquity of real-time reporting using electronic news gathering technology makes the kind of cover-ups that were characteristic of past wars highly problematic (although no doubt they still continue to some extent). The role of public opinion has also changed. Now that a very small proportion of the public in the West has actually served in the military or experienced what it is like to be in harm's way, the kind of practical sympathy with the moral code of the soldier that might once have existed is less firmly based – although, as the case of Sergeant Blackman illustrates, public opinion is on this, as much else, highly fickle, condemning the crime but expressing sympathy for the criminal.

Add all this together, and it seems clear that we are seeing, and are likely to continue to see, an increasing unwillingness to conceive of the laws of war as anything other than a rigid code. Moreover, this approach is reinforced by the rise of revisionist just war theory, which approaches just war from the perspective of liberal individualist analytical political theory. This new approach is arguably more rigorously deontological than the neo-classical just war tradition or even than the Law of Armed Conflict. Whereas the tradition presents the conventional criteria as a series of questions concerning the use of force and violence which

[18] Figures from Ferguson, 'Prisoner Taking' (2004), p. 186.

invite the exercise of judgement – just war theory as espoused by the revisionists attempts to arrange these questions into a series of law-like propositions which will provide definitive answers to these questions.[19] Early statements of this approach include David Rodin's *War and Self-Defence,* which contests the notion that states have a right to defend themselves from attack, and Jeff McMahan's *The Ethics of Killing,* which took war as simply one element of a larger problem about killing, but perhaps the most substantial and influential work is McMahan's *Killing in War* which contests the just war tradition on a number of points, most famously arguing against the view that combatants should be treated as moral equals.[20]

The central feature of the new thinking is a refusal to conceptualise war as a *collective* enterprise; instead, the revisionists argue, war has to be understood in terms of individual responsibility at all levels, from the high command down to the frontline soldier. As a general proposition, this stance involves replacing the idea that there is a specific body of laws associated with war by an assertion of the universal scope and authority of International Human Rights Law.

Conventionally, both the just war tradition and the Law of Armed Conflict are concerned with, and distinguish between, what is usually called *ius ad bellum* (the justice of the resort to war) and *ius in bello* (the justice of the conduct of war). The division of just war thinking into these two categories is relatively recent, but well established nowadays. The clearest expression of the distinction between the two can be found in Michael Walzer's highly influential *Just and Unjust Wars*, where he identifies, and distinguishes between the 'theory of aggression' and the 'war convention'. Walzer's theory of aggression argues that members of international society are entitled to defend their political and physical integrity, and attacks on the same, except in very limited legal and moral circumstances, constitute the crime of aggression and justify a war of self-defence. However, the 'war convention' states that the combatants in such a war, whether on the side of the aggressor or the defender, should be treated as morally equal with the same rights.

Walzer's position is somewhat at odds with Medieval just war thinking, but it is broadly supported by modern international law.[21] The UN Charter outlaws the use of force (Article 2[4]) except in self-defence (Article 51) or as directed by the Security Council, and self-defence is recognised by most conventional just war thinkers as the most obvious example of a just cause for war – indeed, so obvious that it is rarely discussed. As to the 'war convention', the Law of Armed Conflict extends protection to all combatants and non-combatants irrespective of the alleged justice of their cause – the same rules apply to all. The neo-classical just war tradition is a little less committed to this principle, but, as noted above in the example of the difference between the Western and Eastern Fronts in World War II, there are good pragmatic and moral reasons for adhering to it. Pragmatically, it is clear that if either side in a conflict could waive the rules on the basis that their opponent was the wrongdoer, then there would be no rules, to the detriment of troops on both sides.

The moral case for following the War Convention is equally strong: most combatants in a large-scale war are likely to be conscripts, not given a choice whether or not to fight. Such soldiers are responsible for their conduct in the war, but the conventional approach acquits them of responsibility for the actual war.

Revisionist just war theory is critical of both the theory of aggression, the current version of *ius ad bellum*, and the moral equality of combatants, the current core principle of *ius in bello*, predictably criticising the international legal status quo and the just war tradition from an anti-collectivist position, which focuses on the rights and responsibilities of the individual. David Rodin's *War and Self-Defence* presents the core argument with respect to *ius*

[19] Brown 'Just War and Political Judgement' (2013)
[20] Rodin, *War and Self-Defence*, (2002); McMahan, *The Ethics of Killing* (2002) and *Killing in War* (2009).
[21] See Brown 'Michael Walzer' (2018), pp. 205 - 215.

ad bellum, later extended by other just war revisionists.[22] From the revisionist perspective, states do not have an unqualified right of self-defence – such a right is conditional; only just societies have the right to defend their political and territorial integrity. Only just communities are entitled to defend themselves, and, even then, attacks on the sovereignty or territorial integrity of a state are not in themselves justifications for war – they are such if, and only if, individual rights are violated. So, for example, a bloodless invasion would not count as an act of aggression.

Of more direct relevance to this article, Jeff McMahan's *Killing in War* is the most important revisionist work on *ius in* bello, along with a collection on *Just and Unjust Warriors* edited by David Rodin and Henry Shue.[23] Here, the revisionist argument is in agreement with the standard Law of Armed Conflict assertion that all combatants (and non-combatants) are rights-bearers, but posits that they hold different rights, depending on the justice of their cause – there is no moral equivalence between combatants fighting a just war and combatants in an unjust war. Combatants in an unjust cause are not entitled to act aggressively or to defend themselves, and the fact that they were conscripted into the army and may not share the beliefs of their leaders is irrelevant in the context of their moral responsibility. However, they are still rights bearers who possess the right to life, therefore they can only be killed in self-defence by just combatants who *do* have the right to defend themselves. The model here is very much that of domestic policing, where the police have powers of arrest and may use necessary force if they are resisted; the criminal may not resist arrest but may not be subjected to violence in the event of non-resistance.

These positions are counter-intuitive, but, of course, that does not make them wrong – still there are compelling reasons to be concerned at the way in which revisionist just war theory has developed. There are two points here which are basic, and which address the underpinnings of revisionist just war theory: first, war is a collective enterprise that cannot be understood in liberal individualist terms. War is a *social* phenomenon; the idea that all social behaviour can be understood in terms of the behaviour of individuals is something that revisionist just war theorists share with other analytical political theorists and mainstream economics, and is subject to the same critiques that those disciplines attract. Second, revisionist just war theory relies on implausible assumptions about the capacity of the theorist to make authoritative judgements; with enough concentrated brainpower the justice of a cause can be accurately assessed. This assumes too much; human beings do not possess the means to achieve that kind of certainty. The neo-classical just war tradition, rooted in a Christian adaptation of Aristotelian *phronesis*, stresses the centrality of judgement, but does not hold out the possibility of certainty. Classical just war thinking provides questions, while revisionist just war theory purports to provide answers, often expressed with very little humility – consider, for example, McMahan's summary condemnation of Wittgenstein's 'moral stupidity' in supporting Austria-Hungary's case in World War I.[24]

These two, as it were, generic criticisms feed into the specific content of revisionist just war theory, but the important point in the context of this article is that this approach loses contact with the realities of war and the importance of the moral framework of the soldier. Michael Walzer makes the point nicely in a 2012 online interview with Nancy Rosenblum where, contrasting their approach with his own, he remarks that for the revisionists "the subject of just war theory is just war theory [whereas] I think the subject matter of just war theory is war".[25] The point is that it would be next to impossible to fight and win a war that satisfied all

[22] Rodin *War and Self-Defence* (2002); see also Fabre and Lazar, (eds.) *The Morality of Defensive War* (2014).
[23] Rodin and Shue, (eds) *Just and Unjust Warriors* (2008).
[24] McMahan, *Killing in War* (2009), Introduction.
[25] Rosenblum 'A Conversation with Michael Walzer' (2012).

the requirements of the revisionists. It is difficult to imagine what kind of cause would be regarded by the revisionists as fitting this bill for a just cause and assuming that, by some quirk of fate, a just cause that would satisfy the revisionists could be found and therefore a war could be justly undertaken, the kind of *in bello* restrictions that they would impose would make actually fighting the war a practical impossibility. Given an army that is unable to take the initiative, that may not close with the enemy, that is obliged to recognise the right to life of its opponents, the only possible outcome of a conflict would be a pointless stalemate – that is, if both armies were fighting with the same revisionist restraints which, as we will see shortly, is an unlikely state of affairs.

The fact that it would be virtually impossible to fight and win a just war under revisionist terms is a conclusion that the revisionists themselves would probably welcome; the argument would be that if a war could not be fought justly, as they define fighting justly, it ought not to be fought. Revisionist just war theory is, when the chips are down, essentially pacifist, which loses contact with the central aim of the just war tradition, which is to discriminate between cases – just war is an alternative to pacifism on the one hand, and a *Realpolitik* approach on the other. There is a perfectly good set of arguments in favour of pacifism, and therefore no need to approach this position from the direction of the just war tradition; better to preserve the latter for arguments in favour of discrimination. Of course, if everybody adopted revisionist ideas the problem of war would disappear, but it is clear that this is not likely to happen anytime soon, which leads into the topic of the next section of this article, which is the importance of asymmetric conflict and its impact on the norms and rules of war. Here we see the second way in which the breakdown of the tacit understandings that allowed for the coexistence of consequentialist and deontological reasoning has had serious consequences.

Asymmetric Warfare, Reciprocity, and the Ethics of War:

Changes in the way in which the High Command responds to problems such as those outlined above: changes in the LOAC, changes in the ways in which combat is reported, and changes in the theory of the just war, are all changes which have their primary effect on the armed forces of countries which have, in good faith, signed up to international humanitarian law, and we would expect to see wars fought between such armies to be different in future as a consequence. But, mercifully, such wars are no longer fought; the Falklands Conflict of 1982 is, I think, the only instance of such a conflict to have taken place in the years since 1945. During this period there have been many wars (armed conflicts, low-intensity campaigns), but all have been asymmetric or irregular, that is with, at best, only one conventional army engaged. These are conflicts where the contrast between the formal rules of war and the notions of fairness and reciprocity, which contribute to the moral code of the soldier, is particularly striking. This latter code, rather than being essentially shared by both sides is rejected as a matter of principle by the irregular combatants, for whom rules and conventions designed to produce restraint, whether enshrined in the LOAC or supported informally, are counter to their conception of war, or to the circumstances under which they must fight. Soldiers from conventional armies are expected to obey the formal rules laid down in the Law of Armed Conflict in circumstances where these rules will not be obeyed by their opponents, and where the informal norms generated by shared understandings of fairness and a common commitment to reciprocity do not exist.

Soldiers in regular armies will tend to see the behaviour of irregulars as morally disgraceful, but this attitude misunderstands the nature of asymmetric conflict, and plays to the mistaken idea that this kind of conflict is not really ‘war’ but something else altogether. In some cases irregular forces do hold values that are incompatible with any kind of shared

understandings – the opposition to individual rights and belief in the sovereignty of their God exhibited by the Taliban, Al Qaeda or ISIS makes them impervious to arguments that rely on a shared sense of fairness – but this is not necessary or essential to the dilemma posed by asymmetric warfare. The point is that unconventional forces, when fighting conventional armies, are more or less obliged to resort to tactics that go outside of both the laws of war and the professional soldier's understanding of fairness. The requirement that military forces wear some kind of distinctive clothing is fatal to forces whose survival depends on their capacity to merge into the wider civilian population. Insurgent/guerrilla forces frequently use weapons that violate the soldier's understanding of fairness – an excrement-tipped stake in a hidden pit, or an IED in a child's toy – and tactics that are seen as 'unfair' – suicide-murder being the obvious example.[26] Distinguishing between soldiers and civilians, central to *ius in bello* may make it difficult to pursue the political goals of the unconventional forces. At its most basic, the difference in equipment of conventional and unconventional forces leads to situations that are not immediately recognised as based on similar principles. The argument here is summarised with great clarity in Gillo Pontecorvo's brilliant film *The Battle of Algiers*: (1966) a captured FLN leader is paraded before the press and asked whether it is not cowardly to leave bombs in shopping baskets in cafes frequented by civilian women and children – he replies:

> And doesn't it seem to you even more cowardly to drop napalm bombs on unarmed villages so that there are a thousand times more innocent victims? Of course if we had your airplanes it would be a lot easier for us. Give us your bombers and you can have our baskets.[27]

The argument transfers well across time and space. The fact that we, most of us, find it easier to identify with cappuccino-sipping civilians in a *pied-noir* café than with the inhabitants of an Algerian village tells us something about ourselves, but nothing about the moral issues involved.

In short, the moral code of the soldier is challenged by asymmetric warfare on a number of fronts. And yet, the importance of the conventional soldier not responding in kind can hardly be over-emphasised; the first principle of counter-insurgency warfare is that such campaigns can only be won if the population is not alienated by the behaviour of counter-insurgent troops.[28] The question is how correct behaviour can be assured without the support of the moral intuitions of the troops in question. One answer is to re-emphasise the deontological nature of the Law of Armed Conflict and just war thinking, discarding consequentialist reasoning, or redirecting the latter towards internal self-reflection. As noted above, in the afore-mentioned Blackman case, Judge Blackett who presided over the trial, stated in justification of the verdict that the British Armed Forces would become no better than the insugents and terrorists they were fighting if they did not adhere strictly to the rules.[29] In effect, this is an appeal to put all thoughts of reciprocity to one side, and to regard the act of complying with the laws of war as a way of engaging in what might rather harshly be regarded as a kind of 'virtue signalling' – we demonstrate our moral superiority by showing that we are prepared to follow rules that you break without a moment's thought. The problem is that the normal activity of virtue-signalling is relatively costless, whereas this version is not and has to be performed by people under great stress and in high-risk situations. And, of course, the enemy will be singularly unimpressed by

[26] In *Just and Unjust Wars*, Walzer discusses these issues in the context of both the French Resistance to German occupation in World War II and the tactics of the Viet Cong in the Vietnam War; see Walzer *op cit* Chapter 11 Guerilla War pp. 176-196.
[27] *Battle of Algiers* p.116
[28] See the authoritative *Counterinsurgency Field Manual* ed. Petraeus and Amos, (2009).
[29] Blackett, sentencing remarks (2012).

this attitude. Moreover, the implicit appeal to regimental traditions and the soldier's honour, though effective under some circumstances, is difficult to divorce from the wider moral universe of the soldier, which is precisely what is under attack. In the world of asymmetric warfare, the 'warrior's honour' is difficult to activate, although, as Michael Gross argues, some irregular fighters, especially those engaged in national liberation struggles, will be more open to arguments about a fair fight than others.[30] It may be that the ubiquity of video recorders and technologies will ensure that soldiers follow the rules but, as with the similar suggestion that police forces be obliged to film all their interactions with the public, this kind of intrusive surveillance also acts to undermine trust, setting in motion a vicious circle.

Conclusion: The Role of Context-Based Judgment.

Asymmetric warfare poses challenges to the laws and ethics of war, as does the rise of revisionist just war theory and the increasing move to replace the idea of a specialist code of conduct for war with the universal human rights regime. There is a widespread awareness that there is a problem here, not least amongst senior military personnel, as a letter from five former British Chiefs of the Defence Staff indicates. They argue that the government should recognise:

> the primacy of the Geneva Conventions in war by derogating from the European Convention on Human Rights in time of war and redefining combat immunity through legislation to ensure that our serving personnel are able to operate in the field without fear of the laws designed for peacetime environments. The military is neither above nor exempt from the law, but *war demands different norms and laws than the rest of human activity*.[31]

The current Conservative Government in Britain, irritated by the number of cases brought under the European Convention on Human Rights (some 2,000 + relating to the conflicts in Iraq and Afghanistan), has now stated that in future conflicts the ECHR will be suspended, which may remove one source of difficulty (albeit at the cost of some very bad public relations) but will do nothing to address the general problem. In so far as the moral world and sense of fairness of the soldier has been undermined by command decisions which are driven by fear of international condemnation, the situation may improve, but the underlying problem will not go away. In the kind of wars that modern Western soldiers are being expected to fight, notions of fairness based on reciprocity and of restraint based on the Law of Armed Conflict will be put under increasing pressure, and the increasing salience of revisionist, deontological, approaches to the just war will only make matters worse.

Perhaps virtue ethics will help us to escape this dilemma? Here the emphasis is not so much on instilling rules of conduct as on cultivating the capacity for judgement on the part of the individual. In some respects this is compatible with the kind of principle laid down by Judge Blackett, and it is also an approach to ethics that is supportive of, and supported by, the classic just thinkers; Thomas Aquinas was an Aristotelian as well as a Catholic theologian. Cultivating the art of judgement will not solve all problems, but cannot be a retrograde step. Still, there are problems with placing the emphasis on context-based judgements, even apart from the obvious point that the trend legally is towards limiting the kind of discretion that this approach calls for.

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[30] Ignatieff's *The Warrior's Honour* (1996) is sceptical about its applicability in wars such as those in former Yugoslavia; Gross's *The Ethics of Insurgency* (2015) makes the case that some irregulars may fight honourably.
[31] Guthrie *et al* 'Combat Zones' (2015), emphasis added.

A key issue concerns the capacities of the individuals making the context-based judgement. Aristotle argues that such capacities (for the exercise of *phronesis* or prudence) have to be developed over time and:

> [prudent] young people do not seem to be found. The reason is that prudence is concerned with particulars as well as universals, and particulars become known from experience, but a young person lacks experience, since some length of time is needed to produce it. [32]

Unfortunately, in war young people, (junior officers and NCOs), are often the very people who have to make important decisions about targeting, discrimination and tactics in general – i.e. the particulars of a situation – and, if Aristotle is right about the role of experience, it is unreasonable to expect them always, or even often, to get it right. One of the points in favour of a deontological approach to the rules of engagement is that it tries to compensate for this lack of experience by providing hard and fast criteria for the exercise of judgement, eliminating as far as possible the opportunity for soldiers in the field to come to their own conclusions as to what is the right thing to do. From the perspective of virtue ethics this constricting of the opportunity to exercise judgment is both problematic and, if Aristotle's warning is to be taken seriously, necessary.

On top of these considerations, another worry emerges. The increased use of automated weapons systems, and eventually autonomous weapons systems, may well take the conduct of war into a realm in which context-based decision-making will be impossible. Autonomous weapons systems if they are developed, as they probably will be, may well be programmed with normative rules, but these rules will necessarily be algorithm based and instantiate the most rigid check-list version of the LOAC with the aim of eliminating any kind of discretion.[33] When war is no longer what Thucydides describes as 'the human thing', the rules of war will also cease to be human. This is a story that may be of increasing importance in the years ahead, but cannot be followed up within the scope of this article.

What then is to be done? Quite likely there is no solution here. The attempt to strengthen the Laws of War will not produce a positive outcome. Rather than replacing one code with another, allegedly better, code, the result of a more demanding LOAC is likely to be the undermining of any attempt to internalise restrictive rules of conduct – instead the maintenance of any such restrictions will be left to the intrusive, and unreliable, surveillance discussed above. Deontological approaches, which lay down rules that are deemed inappropriate by those who are tasked with implementing them, will be counterproductive. Yet the obvious alternative to such rules, a more consequentialist approach based on the sense of fairness of the combat soldier, is unlikely to restrain conduct in the absence of reciprocity and may be unacceptable to public opinion. And the cultivation of judgement can only take us so far – in short, those who focus on these problems, whether academics or practitioners, will have to live with the absence of any firm principles or theories.

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[32] Aristotle *Nicomachean Ethics* (1999).

[33] Schwarz *Death Machines* (2018) critiques these new technologies from an Arendtian perspective. See also Coker, 'Ethics, Drones and Killer Robots' (2018) pp 247 – 258.

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