FORCE SHORT OF WAR IN MODERN CONFLICT

JUS AD VIM

EDITED BY
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Force Short of War in Modern Conflict

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There is little in the discipline of philosophy with which all agree. Some philosophers maintain that there is a God, others do not. Some say that space and time are something real outside our minds, others maintain the opposite. These divergences are just as common within moral philosophy. Surprising and sometimes dumbfounding divergences occur among the moral beliefs of different societies, and some would say acceptably so, while others might argue that some actions or inactions are objectively right or wrong. And there are, of course, fundamental moral disagreements within individual societies as well. Within the Western liberal democracies, people hold radically opposing views on abortion, euthanasia, sexual relations, the right to bear arms, the fair distribution of wealth and many other such issues. These differing conclusions can come about for many reasons. Sometimes it is something such as pride or stubbornness, habitual attachment to certain ideas and ways of thinking, or a distrust of another thinker who has not had an adequate opportunity to realise the benefits of other modes of thought. Sometimes one philosopher simply has not taken the time to read the other philosopher carefully enough. Of course, if such deficiencies were the primary reason for disagreement amongst philosophers, this would be particularly unfortunate. Nor is the chief intellectual cause of disagreement among philosophers that there is no truth or certainty possible within philosophy, but rather that the human path to wisdom concerning core moral principles necessarily passes through disagreement about them. It is difficult work simply to form the right disagreements in philosophy, and so not all contentious issues get as far as to the resolution of those
disagreements, or a set of commonly recognised principles to guide them, which finally bring us to wisdom. But there is at least one contentious moral issue for which there is a widely accepted moral theory, where the path to wisdom has been largely walked by others, an issue that has been embraced for many centuries by both religious and secular thinkers, pervading Western thought. Military ethicists will know that the issue is war and the theory is just war theory.

‘Just war theory’ refers both to a tradition of thought and to a doctrine that has emerged from that tradition. At the summary level, just war theory maintains that war is both morally justifiable in principle and often morally justified in fact. In other words, the basic notion that underlies the just war framework is that war is sometimes morally acceptable. Of course, if we grant this, we need some account of when war is permissible and when it is not, and of what is permissible in war and what is not. The principles of just war theory provide that account and are supposed to distinguish just from unjust wars and just from unjust means of waging war. Their function is to restrain both an over-eager and overactive interest in participation in war and in the means of war once war has commenced. There is no one theory of the just war, nor one canonical statement of the just war doctrine, but a core set of principles that has emerged over the course of centuries, with an endless number of slight variations in the countless books, articles and opinion pieces that discuss the ethics of war in general, the morality of specific wars or acts within specific wars. Typically, the theory distinguishes between the justification for the resort to war (jus ad bellum) and justified conduct in war (jus in bello). In most presentations of the theory of the just war there are six principles of jus ad bellum, each with its own label: just cause, legitimate authority, right intention, necessity or last resort, proportionality and reasonable hope of success. Jus in bello comprises two principles: discrimination and, again, proportionality. For some decades, the most influential defence of the philosophical assumptions of the traditional theory and the best elucidations of these principles have originated from Michael Walzer’s classic book, *Just and Unjust Wars* (2006), which also presents his understanding of the theory’s implications for a range of issues, spanning pre-emptive war, humanitarian intervention, terrorism and nuclear deterrence.
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Just war theory, allied as it has been with international humanitarian law, and implicit in the rules of engagement of most nations, has sustained a remarkable consensus in modern times and traditionally experiences a resurgence of interest every time an actor resorts to the significant use of armed force. These principles articulate a common understanding of the morality of war and, over many centuries, have been adapted to deal with the challenges posed by new military technologies, tactics and strategies, signalled by the development of spears, bows and arrows, trebuchets and other mechanical artillery, to the creation of gunpowder, cannons, firearms and other modern weaponry, all of which increased the range between the attacker/s and the attacked. The theory, owing to its evolution in tandem with the body of law that has states rather than individual persons as its subjects, and the fact that it deals with large-scale warfare, is routinely invoked in public debates about wars and military policies. When both the Episcopal Church and the United States Catholic Bishops released their written opinion in the early 1980s on the morality and religiosity of nuclear deterrence, they judged the practice primarily by reference to just war principles, unsurprising given their Greco-Roman and Judeo-Christian roots, but which the Catholic Bishops expounded and analysed in academic detail. The soldiering profession also take the theory quite seriously, with just war theory taught in United States’, United Kingdom’s and Australia’s principal military academies, often by officers who themselves publish scholarly work that seeks to elucidate or apply it. Furthermore, it has historically benefitted from high profile political support, including from such luminaries as Winston Churchill, with his lofty rhetoric and appeals to terror, proportionality and the probability of success. This popular support extends to the current day. Shortly before the United States invaded Iraq in 2003, former President Jimmy Carter argued in an international newspaper that an invasion would be wrong because it would violate the just war requirements of last resort, discrimination, proportionality and legitimate authority. Days later, when President Bush announced the commencement of hostilities as something akin to a declaration of war, his speech embodied just war principles, as did Bush Senior’s when he launched the first Gulf War in collaboration with coalition forces. When Barack Obama delivered his Nobel Peace Prize acceptance speech, he too referred convincingly to the concept of
a just war. It has also since been utilised by the US administration to justify drone killings and special forces raids.

But the consensus behind just war theory is slowly beginning to wane and the relevance of the theory gradually eroding – we are returning to the human path of deriving wisdom through a reassessment of the relevant moral principles, that is, passing through serious disagreement about the applicability of just war theory for the first time in recent thought. Military and political leaders, as well as those practitioners on the ground, have begun to find that there is limit to the extent to which the traditional principles and usual rules of war found in just war theory and related normative instruments can be stretched to cover modern conflict. Many will suggest that this is in large part, or in its totality, due to the changing character of war. Most wars fought in recent times have not been of the kind to which the theory most readily applies, namely those between regular armies deployed by developed states. Many have instead been between the regular army of a state and non-state or rogue forces. This description fits the major segments of the United States’ wars in Vietnam, Afghanistan and Iraq, as well as the recent smaller-scale civil conflicts in Libya, Syria and disturbances elsewhere. There is also the continuing threat posed by decentralised terrorist organisations such as Islamic State. The use of force short of war is now commonplace in response to these threats, in large part owing to casualty averseness and the explosion of emerging technologies, most notably drones, lethal autonomous weapon systems and cyber. These responses often involve the selective or limited use of military force to achieve political objectives, which can assume many forms. This volume is particularly concerned with those that involve the use of kinetic force, rather than soft war tactics that might also be governed by just war theory. These include the deployment of emerging technologies for precision targeting, targeted killing/assassination, special-forces raids, limited duration bombing campaigns or missile strikes, and ‘low intensity’ counterterrorism and counterinsurgency operations that involve the use of lethal force.

These types of conflict, especially those that tend to focus on individuals rather than categories of people and involve the employment of emerging military technologies, are somewhat resistant to moral evaluation within the state-centric framework of the traditional just war theory. However, there is another reason for
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just war theory’s decline. This derives from the fact that the wars in Vietnam, the Persian Gulf, Yugoslavia, the Middle East and Central Asia, as well as the development of the emerging technologies, have provoked a resurgence of work critical of just war theory by philosophers trained in the analytic tradition. When these philosophers consulted the traditional theory to evaluate these wars and uses of emerging technologies within them, they discovered problems and challenges that had somehow eluded classical just war thinkers. They have subsequently sought to develop a more plausible theory of the just war along parallel but diverging lines. One of these, the ‘revisionist’ account, though not yet fully coherent or defended, is in certain respects justified by a reversion to the classical theory that was superseded by the traditional theory several centuries ago, say its proponents. It returns, for example, to the idea that it is individual persons rather than states who kill and are killed in war, and that they, rather than their state, bear primary responsibility for their participation and action in war. It is based on the idea that the actions of an individual fighting for what is an objectively unjust cause cannot possibly be separated from the justice of the individual’s cause. The revisionist approach has gained considerable support among contemporary just war theorists and its advocates suggest that what is needed for it to become the dominant mode of thought in assessing the morality of war is (1) for the relevant academic community to cease its habitual commitment to what Walzer labelled the moral equality of combatants: the idea that combatants on all sides in a war have the same rights, immunities and liabilities, and (2) a reformulation of the principles of *jus in bello* in a way that aligns with the individualist, liability-based account proposed by the revisionists. But the revisionist account is yet to be adopted beyond the small community of academic philosophers and scholars who have devoted themselves to it, seemingly because the theoretical underpinnings of the school of thought are not reflective of the real world of warfare. In actual practice, the kind of changes the revisionist camp seek to impose are viewed by many as unworkable and idealist. Indeed, maintaining a line between objectively just and unjust causes is nigh impossible, except in a range of circumstances that is much smaller than revisionists willingly admit.

For the traditional just war theorist, what the revisionists think is a framework for liability in wartime is a framework for
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liability in something much nearer to peacetime. Nevertheless, defenders of just war theory were being challenged to provide an explanation of how the overarching phenomenon represented by the use for force short of war might be accommodated within the just war framework. In response, the preface to the fourth edition of Walzer’s Just and Unjust Wars (2006: xiv) revolves around the important distinction between ‘measures short of war’ like those already described and those that represent ‘actual warfare’. Even though the former are typically judged as acts of war according to international law, it is ‘common sense to rec-
ognize that they are very different from war’, and the argument which follows is that such acts may well be differently and more frequently justified on account of the fact means short of war will often come without ‘war’s unpredictable and often catastrophic consequences’ (Walzer 2006: xiv).

Walzer (2006: xv) goes on to argue that:

The argument about *jus ad bellum* needs to be extended, therefore, to *jus ad vim*. We urgently need a theory of just and unjust uses of force. This shouldn’t be an overly tolerant or permissive theory, but it will certainly be more permissive than theory of just and unjust war.

The permissions associated with the just use of force short of war, he suggests, will be closely tied to questions about prevention. Such war is not morally sanctionable under either just war theory or international law, but the exercise of preventative force short of war seems anecdotally justifiable when faced with particularly brutal regimes and threats. Nevertheless, common sense also dic-
tates that when force short of war is utilised, it must be limited in much the same way that the conduct of war is limited, namely to shield civilians. But in comparison with acts of war, acts of force short of war will also typically entail a reduced risk of harm to one’s own troops and therefore a lower military-economic burden to a nation’s citizens and statesmen. The correlate is that use of force short of war will be easier to justify than the normal means and measures of warfare, though this does mean that all morally justifiable actions are morally obligatory and that said actions are without potentially compounding consequences.

This volume brings together original research on the ethics of war from leading international authors and combines them with
the relevant landmark papers on force short of war in one convenient volume to question the moral, legal and political status of the use of force short of war, the strategic situations in which such force is best used and, most importantly, whether existing traditions and rules are sufficiently robust to deal with the challenges that the use of limited force entails. More specifically, one of the aims of this collection is to assess and analyse the challenges and opportunities for conceptualising and operationalising Michael Walzer’s theory of *jus ad vim*, which will require significant restructuring and the adaptation of the existing just war framework principles of *jus ad bellum* and *jus in bello*. The first part will concern itself with the need to recalibrate just war theory, while the second and third parts will demonstrate that while it is undoubtedly possible to create a framework of *jus ad vim* or something similar, it is not without difficulty, especially in the tension of how permissive the framework ought to be if it is to be of value. The difficulty notwithstanding, it hoped that this volume provides new avenues for thinking about new modes of achieving political outcomes and the ethics of robotic, cyber and other novel military technologies in the context of military and political decision-making.

Leading the first section on the need to recalibrate just war theory, Jai and Cassitie Galliott seek to explain the inadequacy of the war paradigm’s *jus ad bellum* and *jus in bello* in terms of dealing with the asymmetry problem in modern technological conflict. The main argument is that the use of technological force short of war generates a morally problematic ‘radical asymmetry’ which brings justice and fairness into conflict, or at least into competition, with the aims of just war, even in the face of revisionist challenges, and must therefore be resolved by a new just war tenet and related principles. Danielle Lupton and Valerie Morkevičius follow, arguing that a lack of conceptual clarity within ethics regarding how to categorise and define challenges hinders the just war tradition’s ability to elucidate which ethical standards apply to these alternative situations and consequently argue that the category of *jus ad vim* is essential. Their contribution to the volume is to demonstrate how this might be a move back to the past in certain ways, and in so proving, bridge the gap between international relations theory and just war thinking. They establish clear conceptual categories of conflict, drawing extensively on the existing international relations literature to show that the line between
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war and peace is murkier than the tradition would suggest. Drawing on research from across international security, they show that many acts within international relations do not clearly fall into the simple categories of war and peace. Eamon Aloyo then argues that the norms contained in the responsibility to protect (R2P) permit and, in some cases, require uses of force short of war under the first, second and third pillars. This holds both in times of peace and as alternatives to war.

Daniel Brunstetter and Megan Braun’s landmark paper on *jus ad vim* appears at the head of the section exploring options for the recalibration of just war theory. Together, they ask, what would a theory of *jus ad vim* that counters the shortcomings of the *jus ad bellum* framework look like? In the second part of the article they contend that a viable theory of *jus ad vim* can be constructed by recalibrating *jus ad bellum* criteria and adding a new principle – the probability of escalation. However, they warn that *jus ad vim* raises a host of tensions that just war theorists must be mindful of, and point to some challenges to which thinking in terms of *jus ad vim* may itself give rise. Next, Christopher Ketcham argues that John Rawls’s ‘The Law of Peoples’ can serve as a place to begin to develop a framework for an ethics for force short of war in the context of human rights (Rawls 1993). Seumas Miller then compares police use of force and military use of force and in so doing constructs what he refers to as the law enforcement model (LEM) and the military combat model (MCM) (respectively) and then applies these models of the use of force to a number of non-standard, but by now all too familiar, contexts of armed conflict involving insurgents. He argues that neither model is entirely fit for purpose in these contexts. In such context, he suggests, the notion of *jus ad vim* gets some purchase since they may well call for a ratcheting down of military force and a ratcheting up of police use of force. John Lango follows, arguing against Brunstetter and Braun’s contention that a new principle – the probability of escalation – is required. More specifically, he argues that received *jus ad bellum* principles should be revised, but that such an escalation principle should not be added. Concluding the section, Christian Braun and Jai Galliott suggest that the concept of *jus ad vim*, which triggered the most recent battle between Walzerians and revisionists, may start a conversation between the two camps. Especially because *jus ad vim* imagined as uses of force short of war seems to be situated
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in-between the moralities of war and peace, between military conduct and policing, it may function as jumping-off point where Walzerians and revisionists meet on neutral ground. Critiquing Walzerians for their legalist reading of casuistry and revisionists for their ahistorical and impractical reasoning, the article argues for a return to a traditional casuistry.

In the final section examining the problems for recalibrating just war theory and dealing with force short of war, Helen Frowe controversially argues that the set of principles proposed by Brunstetter and Braun is redundant, and that the *jus ad vim* project stems largely from an implausible understanding of the principles of *jus ad bellum*. She begins by outlining Brunstetter and Braun’s arguments in favour of *jus ad vim*, and then goes on to show that each of these arguments fails, and that properly understood the traditional principles of *jus ad bellum* do the necessary work in restricting and permitting force. Shawn Kaplan then aims to show how *jus ad vim* advocates fail to demonstrate, from the standpoint of the ‘legalist paradigm’, the need to adopt novel *jus ad vim* principles that are conceptually distinct from those contained in *jus ad bellum* and *jus in bello*. Though the introduction of precision technologies may potentially influence proportionality calculations, they do not in themselves, he says, alter the conditions of just cause, proper authority, proportionality, necessity or right intention. As of a change of pace, James Gillcrist and Nick Lloyd then focus on the psychological toll of killing without clear and convincing justification, the predominance of this toll in relation to force short of war, and why both just war theorists and decision-makers must account for this facet of warfare. Nicholas Parkin then takes us to the extreme, asking not whether traditional principles or *jus ad vim* are necessary to accommodate things like targeted killing, or indeed whether *jus ad vim* may result in increased harm, but whether force short of war can be justified in the first place.

To conclude the volume, Daniel Brunstetter responds to the many criticisms of his account of *jus ad vim*. He begins by briefly tracing the initial development *jus ad vim* principles as distinct from *jus ad bellum* principles, offering insight into what the initial attempt to theorise about *jus ad vim* set out to accomplish. In the process, he identifies the three criticisms levied against *jus ad vim* – that we do not need a new theory, that it is too permissive and that the probability of escalation principle is contained within
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other just war principles. To push the debate forward, he responds to these criticisms with a defence of *jus ad vim* as a broad research agenda that investigates the specific moral dilemmas associated with limited force and the threat of escalation. He concludes by suggesting that *jus ad vim* can be not only a language of evaluation, but also a precise language of critique as states use and abuse the weapons available in their arsenals to respond to ever-evolving global threats.

References

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