

Order and affray: Defensive privileges in warfare

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Just war theory is a difficult, even paradoxical, philosophical topic. It is not just that warfare involves large-scale, organised, deliberate killing, and hence might seem the very paradigm of immorality. The just war tradition sharply divorces the question of whether or not it is permissible to resort to war – the question of *jus ad bellum* – from the question of how and against whom one may inflict harm once at war – the question of *jus in bello*. As Michael Walzer notes,¹ this separation of *jus in bello* from *jus ad bellum* means that we can meaningfully talk of an unjust war being fought justly, and vice versa: soldiers defending against aggression might nevertheless be criminals for the way in which they do it; while soldiers prosecuting an aggressive war, provided they fight it in the right way, are without culpability.

This paper will draw upon the morality of individual self-defence to explain certain important features of the traditional *jus in bello*: the permissibility of killing, even by soldiers who lack justice on their side; the principles that govern surrender and the taking of prisoners of war; and the principle of discrimination between soldiers and civilians. Our explanation will not leave all aspects of the *jus in bello* undisturbed: it has consequences that are revisionary in at least some respects, this being the upshot of trying to explain the *jus in bello* in individualist terms. Partly because of such consequences, approaching the morality of war in individualist terms is neither straightforward nor uncontroversial.² But we are prepared to accept

¹ *Just and Unjust Wars* (New York: Basic Books, 1977), p. 21. Hereafter, all citations to Walzer are to this text.

² Walzer, for example, while characterising the *jus in bello* “among soldiers who choose to fight ... [as] the product of mutual respect and recognition” and among modern soldiers as resting upon the common fact of “military servitude”, holds ultimately that “war itself isn’t a relation between persons but between political entities and their human instruments” (pp.

such consequences as the cost of conceptual unity in our thinking about permissible violence.

As its title indicates, the paper will also explore the way in which the morality of warfare is conditioned simultaneously by the operation of certain institutions and the absence of others. Resolution of this seeming paradox, that warfare is at one and the same time an instance both of order and of affray, is central to the paper, both to its explanation of how mass killing may be morally permissible, even in a wicked cause, and to its explanation of the limits that the *jus in bello* imposes on that killing.

The privileges of defensive violence

Soldiers, being persons, presumably possess a right to life. But traditional just war theory holds that, during warfare, they are legitimate targets of deadly violence. One natural way to try to justify this is by appealing to the right to use violence in self-defence.³ Such an appeal, however, faces two related difficulties.

To see the first of these, consider the following scenario:

SHOOT-OUT: An armed robber is about to shoot a security guard who is blocking his escape. In response, the guard draws her weapon and attempts to shoot first.

This response is morally justified self-defence: the robber poses a deadly threat to the guard, and she may therefore shoot him. Now that the defensive action is underway, however, it would be very strange to conclude, because the *robber's* life has come under threat, that the robber is justified in shooting the guard. Strictly speaking, any such shooting would also be an instance of self-defence – but for some reason we think it to be *unjustified*.

This moral asymmetry can be explained in these terms: the initial aggression by the robber does not merely threaten the guard's life – it is a

34–6). More recently Robert Sparrow has criticised individualism in just war theory, arguing that war is essentially a relationship between states, not individuals: “‘Hands Up Who Wants to Die?’: Primoratz on responsibility and civilian immunity in wartime”, *Ethical Theory and Moral Practice* 8 (2005): 299–319, pp. 209, 303.

³ This paper begins from a presupposition of the permissibility of the defensive use of violence without addressing pacifist objections thereto.

culpable violation of her *right to life*. This is the crucial condition that justifies self-defence in this case:⁴ as a culpable violator of the guard's right to life, the robber *forfeits* his own right to life.⁵ An individual's right to life is a *claim right* in Hohfeld's sense, which is to say it corresponds to a duty on the part of others not to kill that person. Once forfeited, therefore, others are under no such duty to refrain from killing that person, which is to say that they enjoy a *privilege* of using lethal force against that person.⁶ Because the guard enjoys such a privilege against the robber, when the guard attempts to kill him she is not attempting to do something that is a rights-infringement. She is attempting to kill an "outlaw" – someone who lacks the ordinary protection of the right to life.⁷ So the guard's violence does not meet the crucial condition

⁴ See Jeff McMahan, "Self-defense and the problem of the innocent attacker", *Ethics* 104 (1994): 252–90, p. 259.

⁵ Judith Jarvis Thomson, "Self-defense", *Philosophy and Public Affairs* 20 (1991): 283–310, pp. 302–5.

⁶ On rights, claims, duties and privileges, see W. N. Hohfeld, *Fundamental Legal Conceptions as Applied in Legal Reasoning* (New Haven: Yale University Press, 1919). We are closely following Judith Thomson's exposition and revision of Hohfeld's account: *Realm of Rights* (Cambridge, Ma.: Harvard University Press, 1990), chapter 1.

The duties and privileges to which we refer are not absolute. Duties are simply pro tanto reasons to act in a particular way, and thus the existence of a duty not to kill does not entail that the duty must be complied with. So it does not follow, from the mere fact that someone has a right to life, that you ought never to kill him or her. Or less controversially, it does not follow, from the mere fact that someone owns some property, that you ought, under all circumstances, to abstain from damaging that property. There may be cases where infringing a claim-right – that is, breaching the duty associated with that right – is justified. But there need to be especially good reasons in these cases, and that is because duties entail significant pro-tanto reasons. (Here, we follow Thomson, *Realm of Rights*, Chapter 3.) Equally, the fact that a defensive privilege has arisen against an aggressor does not entail the permissibility of killing. Because the right to life has been forfeited, the normally strong pro-tanto reasons against killing to which it gives rise cease to obtain, but permissibility depends upon taking all relevant factors into consideration. The privilege to commit violence in self-defence is only one such factor.

⁷ See Suzanne Uniacke, *Permissible Killing* (Cambridge: Cambridge University Press, 1994), pp. 199–200, for discussion of the idea of outlawhood.

that justifies defensive violence in return.

Here is the first difficulty in attempting to explain the traditional *jus in bello* using the logic of individual self-defence. According to the *jus in bello*, soldiers in warfare enjoy a symmetrical permission to harm one another. That is, every soldier, like the guard in SHOOT-OUT, enjoys the privilege of using violence to defend him- or herself; but like the robber in SHOOT-OUT he or she also, as a perpetrator of deadly violence, has forfeited the right to life. This symmetry does not accord with the moral *asymmetry* present in typical self-defence cases.

Furthermore, the explanation of that asymmetry gives rise to a second difficulty. According to just war theory, opposing soldiers' mutual privileges to use violence against one another are possessed independently of the justice of their nations' respective causes for going to war. As we have just seen, however, in typical self-defence cases the question of whether or not the conflict *began* with an injustice is crucial to determining how one may conduct oneself *in* the conflict. One's status as an unjust aggressor or as an innocent victim is crucial in determining whether or not one enjoys a defensive privilege against others. This is quite at odds with the separation of *jus in bello* from *jus ad bellum*.

Others have noted these sorts of difficulties. Some, such as David Rodin, have argued against extending a self-defence approach to warfare, on the grounds that self-defence is not capable of grounding *symmetrical* individual privileges to commit violence in warfare.⁸ Others, such as Jeff McMahan, have endorsed the attempt to ground the privileges of soldiers to commit violence in self-defence, but have denied that the privileges that thereby arise are symmetrical.⁹ An alternative approach, however, is to explore other, non-standard instances of self-defence, to determine whether they afford a better analogy with warfare.

⁸ David Rodin, *War and Self-Defense* (Oxford: Clarendon Press, 2002).

⁹ Jeff McMahan, "War as Self-Defense", *Ethics and International Affairs* 18 (2004): 75–80, p. 79; "The Ethics of Killing in War", *Ethics* 114 (2004): 693–733, p. 698–718.

Mutual endangerment and affray

Affray

Consider the following scenario:

BAR-ROOM BRAWL: A fight breaks out in a bar-room. A number of patrons of the bar are actively perpetrating violence against one another. Another person, Smith, finds himself in the midst of this fighting.

Is Smith constrained not to harm those who are involved in the fight? Under normal circumstances, the brawling citizens possess rights not to be forcibly pushed, shoved, punched, held, and so forth. You might think that, simply by having become participants in violence, the fighting parties, regardless of who is “in the right” have lost at least some of these ordinary protections, for two reasons. First, because they pose a danger to Smith, so Smith has some privileges arising from self-defence. Secondly, because the fighting parties pose a danger *to each other*, and Smith may acquire privileges to intervene in defence of those already involved (the extent of this right to defend others will be considered further below). So Smith may use some degree of force against those who are fighting, even though that sort of force would normally infringe the rights of those people, were they not engaged in violence.

If that is right, what about Smith’s rights not to be exposed to force? By “getting involved”, does Smith suffer the same sort of forfeiture as the fighting parties? It strikes us that this is likely to be a highly context-sensitive intuition. Differences in status, intention, and character all seem to have the potential to make moral differences here. If Smith is a policeman, for instance, we expect that he is immune to forfeiture. But if we focus on a case where there is very little to distinguish him from the fighting parties, then it does seem plausible that Smith would undergo some forfeiture. Of course, he has the intention of saving himself from harm, whereas the brawling parties presumably want to inflict a reasonable amount of harm on each other. But the very fact that he is in the midst of a fight, that he possesses privileges to commit violence in that fight, and that, given the chaotic nature of the conflict, there is a non-trivial probability that he will need to exercise those privileges in his own defence, means that he is something of a danger to everyone else.

We call this sort of scenario a circumstance of *affray*. We suggest that an individual A finds himself in affray with B if and only if:

- a. A is endangered by his physical proximity to violence perpetrated by B;
- b. B's threat to A is not licensed by A's culpability;
- c. B is not culpable for the danger posed to A; and
- d. A is reasonably perceived to be a threat by B.

It is plausible that, whenever these conditions obtain, they give rise to mutual privileges to inflict harm. There is an existing literature on the whether or not, in individualistic cases of self-defence, we possess a privilege to inflict harm on *innocent threats*. Without giving a complete account of the morality of harming innocent threats, we suppose it is plausible that, in a broad range of cases, it is indeed permissible to harm someone who is non-culpably threatening you, provided you did not wrongfully initiate violence against the other.¹⁰

Granted this assumption, conditions (a–c) give rise to a privilege on the part of A to defend himself against B. As B is morally liable to suffer defensive violence from A, A poses an in-principle threat to B. And condition (d) means that A's behaviour leaves it open that he may be an *actual* threat, hence B acquires privileges of self-defence to use violence against A.

It may be possible, by one's behaviour, to ensure that one is not reasonably perceived to be a threat. Smith might cower under a table, in

¹⁰ For some of the relevant literature on innocent threats see Thomson "Self-Defense", p. 287, and Michael Clark, "Self-Defence Against the Innocent", *Journal of Applied Philosophy* 17 (2000): 145–55, at p. 152, both of whom support a privilege to harm innocent threats; see also McMahan "Self-defense and the problem of the innocent attacker", p. 269, although in later work, McMahan seems to retreat from the permissibility of killing innocent threats: *The Ethics of Killing* (New York: Oxford University Press, 2002), p. 405. Judith Lichtenberg has recently appealed to the legitimacy of defensive force against innocent threats to explain why at least some soldiers may be justified in using force, independently of the justice of their cause: "How to Judge Soldiers Whose Cause is Unjust", in *Just and Unjust Warriors*, ed. D. Rodin and H. Shue (Oxford: Oxford UP, 2008), 112–30, at pp. 114–8. For a prominent advocate of the view that we may not harm innocent threats in self-defence, see Michael Otsuka, "Killing the Innocent in Self-Defense", *Philosophy and Public Affairs* 23 (1994): 74–94.

which case it seems absurd to suppose that he is in affray with the brawlers. And no doubt there will be other, contextually variable, means by which to exit an affray by such signalling of non-violent intent.

The defensive privileges that arise in a circumstance of affray are not necessarily unlimited. In the case of a bar-room brawl, provided that the conflict is not too serious, any participant is presumably under a duty not to *kill* other participants, and hence lacks the privilege to inflict lethal force. But if the conflict became one in which lethal threats were posed by one side or the other, then participants may well acquire the privilege to inflict lethal violence. A typical explanation of this variable degree of privilege is in terms of what degree of force is *necessary* to prevent harm and *proportionate* to the degree of harm threatened.¹¹

The exact specification of the necessity and proportionality constraints is beyond the scope of this paper, but we note that – in our view – the necessity constraint would certainly not compel Smith to *retreat* from the conflict – by cowering under the table for instance – on all occasions where that option is available to him. For instance, if Smith has reason to think that he personally will be exposed to a greater risk of harm by retreating than by engaging in the conflict, he almost certainly is not obliged to retreat. And even in cases where Smith is *more* likely to suffer harm by engaging in the conflict, he may be warranted in doing so, for a variety of reasons. Perhaps, by engaging, he is better able to assist those more vulnerable than himself, or he may be better able to protect some property in the room – be it an artwork or a bar-stool. Perhaps he would be warranted even by less important concerns, such as a fear of appearing cowardly or undignified if he retreats.

Note also, that judgements of proportionality are particularly subtle in cases such as this one, where what we might consider the appropriate proportional response could very likely be met by a grossly disproportional counter-response. For instance: suppose Smith is in a position where, relative to the danger he faces, it is clearly proportionate to *push* a very burly, baseball bat-wielding man out of the way, to avoid being roughly trod upon by him while he pursues others. More violent action, such as knocking him unconscious, may appear to be disproportionate to the immediate threat of

¹¹ See Thomson, *Realm of Rights*, p. 362.

being roughly trod upon. But Smith might have very good reason to believe that pushing the burly man *may not work*: it could very likely enrage the burly man who will then use his baseball bat violently against Smith, with very serious consequences. In this case, if we insist that Smith may not knock the man unconscious, and that the only permissible options are cowering under the table or pushing – but that the latter is quite likely to lead to Smith suffering very serious injuries – then being put in the affray has effectively reduced Smith’s available options to cowering. And this seems inappropriate, given that Smith is not culpable for the existence of the conflict. Accordingly, we hold that the requirement of proportionality may leave Smith some room to pursue options that are disproportionate to the *immediate* threat, because they are proportionate to extraordinary danger that may come about in response to Smith’s actions.¹²

In effect, being stuck in a fight endangers A, which gives him the right to defend himself. But, if he manifests the possibility that he will exercise that right, he becomes a danger to everyone else, which gives them the right to use force against A also. That is the nature of affray, and is summarized in the following principle:

Affray–privilege principle: Where two parties A and B are in affray with respect to one another, then each of A and B acquire symmetrical privileges to commit harm to each other, subject to requirements that the harm be necessary and proportionate.

Walzer as an affray theorist

Walzer says that a soldier

can be personally attacked only because he already is a fighter. He has been made into a dangerous man, and though his options may have been few [eg he may have been conscripted], it is nevertheless accurate to say that he has allowed himself to be made into a dangerous man. For that reason, he finds himself endangered.

Walzer here invokes notions of mutuality (having “allowed himself to be made into a dangerous man ... he finds himself endangered”). When soldiers

¹² McMahan makes a similar point about proportionality in the context of war – though more tentatively than we do: “War as Self-Defense”, pp. 77–8.

from opposing armies encounter one another, each encounters the other as an agent attempting to perpetrate deadly violence. Each therefore poses a threat to the other, which gives the other a defensive privilege. Walzer's notion of the soldier as a self-chosen "dangerous man" appears to echo, then, our notion of affray.¹³

Certainly, if a war is taking place, then any given soldier S on the battlefield is endangered by his or her physical proximity to violence perpetrated by opposing soldiers, and (being a soldier on a battlefield) is taking no steps to ensure that enemy soldiers may not reasonably perceive him as a threat to them. It follows that criteria (a) and (d) of the criteria for affray, elaborated above, are satisfied. But what about criteria (b) and (c), pertaining to the culpability of S and his enemies? Central to the existence of affray is an absence of culpability for the posing of a threat, and only when this absence obtains will there arise the sort of symmetrical privileges to commit violence found in traditional just war theory.

It therefore remains to be shown that an account of warfare as affray has the resources to explain the separation between *jus ad bellum* and *jus in bello*. Our argument on this point involves two contentions. The first is that warfare is characterised by a certain institutional lacuna, resulting in the *typical* soldier not being culpable for the threat that he or she poses. The second is that it is possible for the symmetrical defensive privileges characteristic of affray to arise even where one (atypical) party is *culpable* for the existence of the conflict.

Institutions, warfare and affray

The importance of institutions

In our discussion of BAR-ROOM BRAWL, we assumed that Smith – the third party – did not enjoy any special status relative to the other participants in the

¹³ Paul Kahn ("The Paradox of Riskless Warfare", *Philosophy and Public Policy Quarterly* 22 (2002): 2–8) also suggests that warfare should be conceived as something like an affray, but characterises this as "its own first principle within a circumscribed context in which individuals act in politically compelled roles" (pp. 2–3). As we have indicated, we believe the affray conception follows from more basic principles of individual self-defence against non-culpable threats.

conflict, such as being a policeman. If Smith was a policeman then he would not enter into affray with the other fighters, because condition (c) – requiring absence of *culpability* for the threat posed – would not be satisfied: given that a police officer enjoys particular rights to take action without hindrance to keep the peace, the other fighters would be culpable for any threat they posed to a policeman who tried to break up the fight.

This section of the paper will further consider the way in which institutions determine culpability for the use of violence, both directly and by establishing the social context in which behaviour occurs. The following subsection will then address the importance of institutions – the absence of some and the presence of others – to the affray conception of the *jus in bello*.

Consider the following three scenarios:

ROBBERY 1: A pushes B to the ground in order to take B's bag from her.

ROBBERY 2: AS ROBBERY 1. In addition, A knows that inside B's bag is an antibiotic that A needs if he is to recover from an illness. B is intending to take the antibiotic to ensure that she does not develop any secondary infections as a result of a minor throat ailment.

ROBBERY 3: AS ROBBERY 2. In addition, B obtained the antibiotic by taking it from the pharmacy counter after A had purchased it, and while A was distracted putting his change into his wallet.

Does B enjoy a privilege of self-defence against A?

In the first scenario, it is natural to intuit that B has a privilege of self defence against A, as A's violence strikes us as culpable, being aimed at depriving B of her property (namely, her bag). The additional information introduced into the second scenario, however, has the potential to change that intuition – or at least to make it less certain. While we may still feel that B has a claim right against A not to be pushed to the ground and have her bag taken from her, the additional information about consequences makes matters more complicated. If there is a way for A to get the antibiotic that he requires without attacking B (or anyone else), then most of us will think that B is entitled to resist A's attack. But what if there is not: is B nevertheless entitled to stand on her claim right whatever the consequences? Perhaps

Nozick thinks so, but not everyone may agree.¹⁴ An answer to the question about culpability may require us to consider the institutional framework in which A's lack of the antibiotic he needs, and B's ownership of a dose of the same medicine despite her lesser need, has come about.

Similar considerations may arise in relation to the third scenario. The roles of A and B are now seen to be the reverse of what they seemed at first – B is the thief, not A, and A is engaged in an act of self-help. If such self-help is the only way for A to gain access to his needed medicine, then most of us will probably think that A is not culpable and hence that B has no right of self-defence. But if it is not then we may want to know more about the institutional situation before we can form a considered judgement. For example, if A could have called on the police to help him, ought he to have done so? Even if, in the end, the police ended up using the very same sort of violence against B, it might be thought that there are good grounds for the use of such force to be confined, where possible, to the identifiable members of a publicly designated agency. Or suppose that A could have easily afforded another dose of the antibiotic, whereas B had no other way to acquire the antibiotic for prophylactic use. Again, institutional evaluation may then be required in order to answer the question about self-defence.

There is a variety of philosophical accounts of the nature of the rights typically at stake in cases of self-defence, of what would count as their culpable infringement, and of the relationship of such matters to institutions. These range from *natural rights* accounts – according to which such rights arise independently of any institutional order, and the legitimacy of an institutional order is to be determined in part by its recognition and enforcement of such rights – to purely *conventionalist* accounts – according to which such rights arise only within some or other institutional order.¹⁵ We

¹⁴ Robert Nozick, *Anarchy, State and Utopia* (Oxford: Blackwell, 1974), especially pp. 179–81.

¹⁵ For a paradigmatic natural-rights account, see John Locke, *Two Treatises of Government*, ed. Peter Laslett, (New York: Cambridge University Press, 1963), Book II. For a paradigmatic conventionalist account, see Hobbes, *Leviathan*, ed. Richard Tuck (Cambridge: Cambridge University Press, 1991). Freeman characterises Rawls as adopting an intermediate account of economic rights as “institutional but not conventional”, arising only within an institutional framework, but with there being a pre-institutional entitlement to have that framework satisfy particular moral constraints: “Introduction” to Samuel Freeman, editor, *The Cambridge*

accept that there is at least a degree of truth to the natural rights account, and that one important role institutions may play is not the creation of *new* moral reasons, but rather the provision of *authoritative judgements* as to what is and is not permitted by *pre-existing* moral reasons. (An institution acquires this sort of authority when, in virtue of its superior epistemic access to the moral or – perhaps more typically – to the relevant empirical facts, it is the case that compliance with its directives increases the likelihood of a putative subject of the authority acting in compliance with the requirements of morality, than would be the case if she attempted to comply with moral requirements directly.)¹⁶

Even the most thorough-going natural rights theorist, however, must concede that institutions sometimes play a crucial role in creating facts of culpability, and hence conversely that the absence of institutions can mean that what might strike us as culpable, when we presuppose a typical institutional context, is in fact non-culpable. Thus, were something like ROBBERY 2 to occur in a Lockean state of nature lacking the institutions necessary to effectively resolve questions of justice in acquisition and in possession, and if violent means really were A's only way to acquire the antibiotic, then were B to defend herself it is not absurd to think that A and B would find themselves in affray, each non-culpably using force in self-help against the other. Reflection on ROBBERY 3 similarly shows that the permissibility or otherwise of self-help may depend upon the existence and effectiveness of law-enforcement institutions. Such reflection also illustrates that the role that institutions are able to play in determining culpability for violence is not limited to circumstances in which proprietary entitlement is at stake. This is further illustrated by the following scenario:

RIGHT-OF-WAY: A is driving along a road just wide enough for one car. Around the corner just ahead of A comes another car, driven by B. The two are about to collide head-on, with likely fatal consequences. But each of A and B is armed with a ray gun, and either may save his or her life by zapping and

Companion to Rawls (Cambridge: Cambridge UP, 2003), p. 7.

¹⁶ Raz, "Authority and Justification", *Philosophy and Public Affairs* 14 (1985): 3–29, pp. 13–16, 18–19.

disintegrating the oncoming car and driver.

May either of A or B zap in self-defence? This looks like a case of two innocent threats, simultaneously endangering each other, suggesting that both may. But if we are also told that the road is a designated one-way street, and that A is proceeding the wrong way down it, then it is rather more plausible to suppose that only B enjoys the defensive privilege, in virtue of the culpable threat posed to her by A. By providing a solution to this particular co-ordination problem, the institution of road-traffic laws changes the parameters of culpability for rights-infringement. The point being made here is, therefore, not just the trite one, that some threats of violence do not give rise to a defensive privilege on the part of the victim. The point is that institutional arrangements matter to the *culpability* of violence.¹⁷ Any institutional resolution of actual or incipient conflict – be it via a regime of property law, via a (near-)pure co-ordination solution such as the promulgation of road traffic rules, or via the provision of law-enforcement services as part of a comprehensive system of criminal justice – has the potential to change the parameters of culpability for violent behaviour, and hence to play a role in determining whether or not a privilege of defensive action has arisen.

The potential implications for facts of culpability of the provision of a criminal justice system is particularly important to note. It shows that this role of institutions in shaping the moral terrain can extend well beyond such comparatively trivial matters as the regulation of road traffic. It also illustrates why we have chosen to talk of *institutions* rather than simply *authorities*. Potentially conflicting behaviour will not normally be brought into harmony simply because someone somewhere states the moral truth, or even if that someone is known by the potentially conflicting actors to have stated the truth. (Indeed, when the problem is purely one of co-ordination, there

¹⁷ McMahan suggests that, in at least some cases, the existence of just and important institutions may give rise to a permission, or even in some cases an obligation, to do wrong, if doing so is necessary to sustain the existence and operation of the institutions in question, and if the wrong acts were not so egregious as to outweigh the good of upholding those institutions: “The Ethics of Killing in War”, p. 705. Whether or not this point is true, it is different from the point being made in the text, which is that institutional arrangements can be (to a greater or lesser extent) constitutive of what would constitute a wrong act.

may be no prior moral truth to be stated). The resolution of conflict depends upon *effectiveness*, upon the use of power by social actors to actually bring otherwise conflicting behaviours into harmony.¹⁸ Effectiveness can be the result not only (or even primarily) of coercion, but of establishing a particular sort of social order in which certain *default expectations* as to permissible behaviour obtain, such that individuals shape their expectations for behaviour (both their own and that of others) around particular institutional arrangements;¹⁹ social life, indeed, depends upon the existence of and reliance upon these sorts of default expectations.²⁰

There is no doubt that, considered overall, the relationship between institutions, the default expectations to which they give rise, and the moral permissibility of violence is a complex one. Indeed, it may sometimes be the case that multiple institutional actors are involved in generating, reinforcing or transforming default expectations, sometimes in contradictory ways. The rest of this sub-section will consider some of these complexities; the following sub-section will then apply those thoughts to the case of warfare, in order to show that warfare is plausibly understood as an instance of affray.

Consider again ROBBERY 1. It is plausible to think that our intuitive response to that scenario is heavily shaped by default expectations of the sort just described: our social order being what it is, if all we witness is A tackling

¹⁸ Raz attempts to assimilate the provision of co-ordination solutions to the exercise of epistemic authority by appealing to the fact that, if some particular social situation has the features of a prisoner's dilemma, then every individual in that situation has a reason to change it to one in which a co-ordination solution obtains: "Authority and Justification", pp. 17–18. This is not sufficient, however, to avoid the concern we are raising: were RIGHT-OF-WAY to occur in a Lockean state of nature, each of A and B has a reason to submit to a co-ordination solution, but given that such a solution does not exist no moral reason obtains which would change the situation from one of mutual endangerment to one in which either A or B is culpable.

¹⁹ Applied to the criminal justice system, this suggests a Lockean-cum-Hobbesian account: the institution of a criminal justice system overcomes the limitations of the state of nature by providing – in Lockean vein – an authoritative judgment as to the occurrence of, and the appropriate degree of punishment for, a crime, and also by creating – in Hobbesian vein – the default expectation that crime will be punished and the peace will be kept.

²⁰ Cf. H. L. A. Hart, *The Concept of Law* (Oxford: Clarendon Press, 1961), chapters 4–5, on the difference between a socially effective system of norms and mere coercion.

B to the ground and snatching at her bag then we have good grounds to judge that A is an initial culpable threat and thus that B enjoys a defensive privilege. Default expectations of this sort are also important to some instances of affray, but in such cases they push in the opposite direction. For example, if the police made it a practice not to interfere in bar-room brawls then this might well create or reinforce an existing default expectation about the threat one faces in such a situation, which is in turn relevant to whether or not the defensive privilege arises pursuant to the Affray–privilege principle. In this case, indeed, such default expectations might be further reinforced by the fact that there is a single institutional actor (the police force) which not only has the function of enforcing the law and is choosing not to exercise that function, but which may be regarded by many as providing, in part by example, authoritative judgements as to the moral permissibility or impermissibility of violent behaviour.

It is an interesting feature of our present social order that, over time, default expectations about the appropriate use of violence have narrowed.²¹ Thus, and conversely to the situation just described, rather than accepting non-intervention by the police or similar actors as authoritative evidence of the permissibility of violence, there is likely to be an expectation that those institutional actors whose role it is to provide protection against wrongdoing have a duty to prevent that violence. Should such an institution not fulfil this expectation, then two consequences may well ensue. First, it may be that new institutions arise which intervene in the violence. If such institutions implement an effective and morally permissible resolution of the conflict in question, this is likely to mean that there is no scope for an affray to arise in that situation, as the question of culpability will be settled one way or the other by the newly emerged institution. Second, the capacity of the original, non-intervening, institution to act as an epistemic authority may be undermined, for its judgements – even if (and contrary to socially widespread belief) morally sound – will not be taken as such by those holding contrary expectations. To the extent that this has the effect of changing default expectations about the behaviour of that institution, the scope for affray may

²¹ For example, fewer people would regard disciplinary violence against children, domestic violence perpetrated by men against women, or violence between men in sporting or other “masculine” social contexts as *prima facie* permissible.

(somewhat paradoxically) be increased. Consider, for example, this scenario:

INSTITUTIONAL FAILURE: AS BAR-ROOM BRAWL. Furthermore, Smith *is* a policeman. However, for whatever reason (perhaps a systematic failure to intervene of the sort described above), the police have come to be widely seen as ineffective. This change in default expectations has significantly undermined the police's role as effective law-enforcers.

If Smith is no longer an effective law-enforcer, then he would have no special right to use force, and others would have no special duty to refrain from defending themselves against any force he used. Consequently, he would enjoy no special status in the brawl, and would simply find himself in a condition of affray with the rest.

Warfare as affray

There is a marked difference between BAR-ROOM BRAWL – our paradigm of affray – and warfare. The brawl is characterised by an absence of institutional determination of culpability for violent behaviour, giving rise to the ubiquity of the defensive privilege for participants. Unlike bar-room brawlers, however, soldiers from opposing armies encounter one another as participants in highly organised social institutions having two distinctive features: military institutions are (i) organised by the government (typically the state, but in some cases by the “governing authorities” of non-state collectives), and are (ii) designed to deploy violence in the pursuit of political or other public purposes (e.g. collective self-defence), rather than purely personal or private purposes. When soldiers are acting as soldiers, then, they are not perpetrators of purely private violence,²² but rather are deeply

²² In cases where both features are absent – e.g. individual soldiers who murder or rape while on leave from their base – then we can say that a soldier's violence is purely private, and such a soldier is not treated in any particularly special fashion. This is what the military police are for. In cases where the second feature only is absent – e.g. soldiers who murder or rape in the course of military operations, or who engage in military operations to drive peasants off the land in order to monopolise control over natural resources so as to personally profit from selling them – then it is less clear whether or not we should say that the soldiers were acting as soldiers. This ambiguity about the classification of such acts of violence is reflected by the existence of the special categories of war crimes (such as murder and rape committed during

embedded in just the sorts of institutional arrangements which we have seen play a key role in determining facts of culpability for the use of violence.

Nevertheless, it is our contention that the current international institutional order does not contain any single body of institutions able to play this role for all of the soldiers involved in warfare. There is no single, effective set of institutions that is common to the soldiers on both sides and that is able to play the sort of role that (for example) a police officer might play in relation to BAR-ROOM BRAWL or that a road traffic regulator might play in relation to RIGHT-OF-WAY. In fact, not only is there an absence of institutional determination of culpability at the international level (analogously to BAR-ROOM BRAWL), but the situation is in many respects analogous to that of INSTITUTIONAL FAILURE. For each soldier, the pre-eminently salient and effective institution is his or her national government, which has constituted the military and ordered it into battle. As a result, any institution other than a soldier's own national government that might attempt to intervene in the conflict will (like the police in INSTITUTIONAL FAILURE) be ineffective, because unable to generate the requisite default expectations. (Pronouncements from the enemy government will be particularly ineffectual, because in circumstances of warfare neither government is a remotely effective institution in relation to the soldiers on the other side.) In the absence of any institutional creation of relevant facts of culpability or non-culpability, then, the typical soldier S lacks any culpability that would license the threat posed to him by enemy soldiers. And exactly symmetrical reasoning establishes that the typical enemy soldier is not culpable either: the danger that the enemy poses to S is simply the result of acting upon a defensive privilege enjoyed against S as a consequence of being threatened by S. Thus criteria (b) and (c) of the criteria for affray are satisfied. We already saw above that the other two criteria are satisfied. Hence S – or any other given soldier who is a participant in the conflict – indeed finds him- or herself in a circumstance of affray with respect to the soldiers on the other side. Thus the Affray-privilege principle stated above applies, and each of those soldiers enjoys the privilege of the use of defensive violence against enemy soldiers.

the course of military operations) and crimes against humanity (such as the forceful expulsion of a population): *Rome Statute Of The International Criminal Court* U.N. Doc. 2187 U.N.T.S. 90, entered into force July 1, 2002.

Three comments on this conclusion: First, it is true only of the typical soldier. The next section considers the case of a soldier who knows that he or she is fighting in an unjust cause (and whose culpability, if any, can therefore be gauged independently of the workings of institutions). Second, this conclusion cannot be refuted by appealing to the moral authority of the United Nations (or some other international body) to determine questions of right or wrong in international matters. For even if the United Nations does enjoy such authority, we contend that it is not an *effective* institution. Rather, it is analogous to the police in INSTITUTIONAL FAILURE – that is, there is an absence of the widespread default expectations that would be necessary to make it an effective law-enforcement agency.²³ Third, and following on from this point, it must be emphasised that our claim is one of empirical fact. Thus we can conceive of different sorts of institutional arrangements which would make this claim false. For example, if there did exist a single international institutional order that was effective in relation to the soldiers on both sides of a conflict – something like an effective world government, for example – then traditional just war theory, with its doctrine of symmetry in the *jus in bello*, would be mistaken.²⁴ At a minimum, such an effective world government might include the compulsory jurisdiction of the International Court of Justice to resolve disputes between states,²⁵ the establishment of permanent armed forces under the control of the United Nations Security Council to enable it to take effective action when necessary to preserve international order,²⁶ and the reconstitution of the Security Council to make it

²³ This paper will not attempt to explain why such expectations are not widespread. Possible causes, however, might include the widespread dominance of nationalist ideology, perceptions of bias on the part of the United Nations, or simply a lack of power that results in the United Nations being unable to give effect to whatever authority it enjoys.

²⁴ Cf. Janna Thompson, “Terrorism and the Right to Wage War” in Tony Coady and Michael O’Keefe, eds, *Terrorism and Justice: Moral Argument in a Threatened World* (Melbourne: Melbourne University Press, 2002), 87–96, at pp. 91–92, 95–96.

²⁵ At present the Court enjoys jurisdiction only by consent: *Statute of the International Court of Justice*, 59 Stat. 1055, T.S. 993, 3 Bevens 1179, Article 36.

²⁶ As anticipated by Articles 42–47 of the *Charter of the United Nations*, 59 Stat. 1031, T.S. 993, 3 Bevens 1153.

a more representative body, and hence a more credible authority to all the nations of the world.²⁷ An international institutional order of that sort might be able to play the sort of role that is at present played by national institutions in creating facts of culpability and non-culpability.²⁸

Military operations within an affray

Before turning to consider the moral status of culpable soldiers, however, it will be helpful to say more about the way in which the conception of warfare as an affray between the soldiers of opposing nations yields an understanding of the morality of warfare that is largely consistent with the traditional *jus in bello*. The traditional view regards soldiers as permitted to use lethal violence against their enemies in the pursuit of military objectives; the privilege granted under the Affray–privilege principle arises only in response to those who are threatening, however, and furthermore is subject to requirements that the harm inflicted be necessary for the purposes of defence of self or others, and proportionate to the degree of harm threatened. It must be shown, therefore: (i) that those who *threaten* a soldier are more-or-less identical with those who are *enemies* of that soldier; and (ii) that the nature of those threats is such as to permit the infliction of lethal harm, by way of military operations, as a necessary and proportionate response. The role of military institutions is central to the affray conception’s account of both of these matters.

We take it that, typically, it is fairly obvious that (i) obtains. That is, mobilized soldiers are, in virtue of being engaged in a military campaign, an ongoing and serious threat to the lives of their enemy soldiers.

Against this, however, it might be argued that there is a sense in which each nation’s military force is a standing threat to every other nation. That is

²⁷ See also the discussion in Kahn, “The Paradox of Riskless Warfare”, pp. 4, 8.

²⁸ An alternative scenario in which warfare might lack the character of affray would be that in which the national institutions on one side of a conflict ceased to be effective. This might make it easier for some other set of institutions to become effective with respect to all the participants in the war, and thereby to determine questions of culpability for the use of violence, thus bringing to an end to the circumstances of affray. This is not the typical sort of case with which just war theory is concerned, however.

true, but we maintain that it is not the relevant sense of threat. While it is difficult rigorously to characterise the sense in which the threat is different, it is surely relevant that the soldiers of the non-belligerent nation are members of an effective military institution, and that that institution has not been directed by the national government to go to war. This makes a very big difference to the sort of threat posed by a non-belligerent nation's army. There is therefore no affray, and other soldiers enjoy no defensive privilege against the soldiers of the non-belligerent nation.²⁹ The affray conception therefore preserves the traditional view, that the permissibility or otherwise of using force to respond to the threat posed by the soldiers of a non-belligerent nation is a question of *jus ad bellum*, not *jus in bello*. (If the control of the government over its military, or of the military over its members, is weak or non-existent, then on the affray conception matters might be different. This is not the typical case, however.) Conversely, once war has broken out, then to the extent that military institutions are effective they are directed towards the delivery of lethal force to enemy soldiers. The soldiers on each side therefore do pose an immediate threat to enemy soldiers, and (in accordance with the Affray–privilege principle) mutual defensive privileges arise.

What about (ii) the questions of necessity and proportionality? Must each soldier ponder each bullet, to consider whether firing that bullet is immediately necessary to his or her defence? Surely it could wait a little longer? Perhaps a peace will be negotiated? The mere *possibility* of peace, however, does not bring the affray to an end. Until a peace has actually been negotiated, the affray is still ongoing, and the general character of that affray is that it is lethal. It is this that results in each soldier enjoying the defensive privilege to its full extent.

Against this, it might be objected that it only explains the permissibility of explicitly *defensive* operations. Some military objectives are less plausibly characterised in these terms. Imagine a company – not currently under direct attack – is given an order to capture a strategic position on a nearby hill. This operation will risk the lives of the company members, and it will involve

²⁹ On this point, we agree with McMahan that no defensive privilege arises in respect of such “conditional threats”: “The Ethics of Killing in War”, p. 697. See also the discussion below of sleeping soldiers.

initiating fire at enemy positions. How can this be analogised to someone possessing defensive privileges, in virtue of finding him or herself in an affray? How can it be argued that it is *necessary*, for defensive purposes, to undertake this operation? Similarly, if the company is fighting for a cause of dubious justice, how can the ‘good’ of capturing the hilltop position be *proportionate* to the harms that will be inflicted on the enemy soldiers?

To which we respond: first, although soldiers fighting for an unjust cause are not warranted in taking violent action by the possibility of victory, they may be warranted by the possibility of defending themselves and their comrades, who are typically non-culpable for the existence of the affray. That is the essential basis of the Affray–privilege principle, and its applicability to warfare.

Second, as we observed with respect to Smith in the case of BAR-ROOM BRAWL, the exact requirement of ‘necessity’ does not mandate that one must retreat or surrender, under any circumstance where that is possible. In circumstances of affray, where the threats posed by the parties are non-culpable, there is considerable scope for individuals to risk greater harm to themselves or others, provided there is a proportionately important good to be pursued in exchange for that risk.

Third, in cases like that considered, there is no immediate threat to the lives of the company of soldiers. So it might appear implausible that we can use the Affray–privilege principle to justify a military operation which increases the risk of immediate harm to both sides. However, as we observed with respect to Smith, identifying a proportionate response to the *immediate* threat does not always suffice to determine the range of permissible options to a participant in an affray. The company faces no immediate threat that warrants taking the hilltop – but they are subject to an ongoing and serious threat until a peace is negotiated. This suggests the permissible options are: to surrender or to wait and see what happens. But waiting to see what happens – although a proportionate response – may lead to vastly greater risk for the company. Analogously with merely pushing the bat-wielding man, it may be proportionate to the immediate threat, but possibly leading to far more serious and lethal danger in future. We maintain that this interpretation of proportionality is implausible: it cannot be right that the company’s only just options are to surrender or to expose themselves to an increased risk of death

in future.³⁰

Separation of jus ad bellum and jus in bello

Crucial to the argument that warfare is an instance of affray is the claim that the typical soldier is not culpable for the existence of the threat that he or she poses to other soldiers. To assert this is not to deny the traditional doctrine of the *jus ad bellum*. Indeed, our paper says nothing about those situations in which it is permissible for a nation to use violence.

Not every soldier, however, will fit the typical picture. Consider F, the very first soldier to take action in a conflict. Depending on what F knows and believes about the justice of his or her nation's cause, he or she may at best have an excuse, arising out of the orders given by the military, for threatening the soldiers on the other side. (In the absence of overarching institutional determination, however, these questions of justice – and hence of culpability – may be difficult to settle.) Does this preclude F's situation – or that of his or her comrades – being characterised as one of affray?

Conflicts involving culpable parties

Consider the following variation on SHOOT-OUT and BAR-ROOM BRAWL:

WRONGFUL ATTACK: Wrongdoer (W) culpably attacks Victim (V).

Consequently, W forfeits his rights not to be harmed. V proceeds to fight back. Inadvertently, bystander Smith becomes involved in the conflict. That is, Smith is endangered by his proximity to the conflict between W and V.

In this situation there are a number of courses of action open to Smith. As we noted above in relation to BAR-ROOM BRAWL, a bystander such as Smith could attempt to make it clear that he is no threat to anyone. If Smith succeeds in this regard, then although he presumably enjoys the privilege to use force against both W and V to protect himself, he does not enter into affray with either, because he does not satisfy condition (d).

³⁰ For these reasons we believe that McMahan is too hasty in assuming that soldiers fighting for an unjust cause are obliged to surrender if they possibly can: "The Ethics of Killing in War" pp. 712, 717.

A second alternative is that Smith responds to the danger merely by threatening the culpable party, W. In this scenario, with respect to V, Smith does not satisfy criterion (d), and is not in affray. Nor are Smith and W in affray, because criterion (c) is not satisfied. So the conflict simply becomes an extension of a traditional self-defence case, where Smith and V are together fighting off the unjust attacker W, and W fails to obtain any privilege to commit violence against either.

A third alternative is that Smith responds in a way that threatens V. This could happen because he aligns himself with W or because he responds in a relatively indiscriminate fashion, using force, or threatening to do so, against both W and V. Whatever the case, we assume that Smith is not culpable for threatening V. Smith is excused of culpability, either in light of duress or ignorance. Consequently, Smith becomes a non-culpable threat to V, much as V is a non-culpable threat to Smith. A situation of mutual endangerment has arisen, and Smith and V are in affray with respect to each other.

Not only does this give rise to privileges to commit violence on the part of both V and Smith, we believe it also gives rise to privileges to commit violence on the part of W. This is because, in addition to privileges to inflict harm which arise from the opportunity to defend *oneself*, there are also privileges to inflict harm arising from the opportunity to defend *others*. For instance, suppose that W can see that V and Smith will kill each other unless W intervenes to shoot Smith first. If W were struck by a pang of remorse and wished to minimize the harm that he will cause, may he shoot Smith? We suggest he may.

We are not suggesting that the criminal law does or should permit such behaviour – but we are suggesting that, in the absence of a suitable institutional framework to limit the use of violence (in a Lockean state of nature, for instance), this last act would be permissible. After all, the wrongdoer's deed does have the effect of saving an innocent party from death.

We suggest the following principle as a rough attempt to identify the privilege to defend others in these sorts of circumstance:

- P. Anyone who is witness to one party A threatening another party B, provided B is not herself culpably threatening A, acquires a privilege to use harm against A to defend B, subject to certain proportionality and necessity constraints.

A potentially alarming feature of this principle, however, is that it appears to entail that the wrongdoer *W* may kill *V*, against whom he initiated the initial unjust threat! We stand by this feature, despite its counterintuitive nature. We do, however, wish to stress the distinction between the *permissibility* of killing, as opposed to *blameworthiness* for the eventual harm that comes about. *W* is to a large degree culpable and blameworthy for the deaths of either *V* or of Smith, if either should happen to die – even if it is at the hands of each other, rather than by the deed of the wrongdoer. But because of the circumstance of affray that has arisen between Smith and *V*, the wrongdoer *W* – in virtue of *P* – obtains privileges to kill either party, subject to suitable proportionality and necessity constraints. And it is this fact about the rights that is of most relevance when determining permissibility.³¹ (See the next sub-section for further discussion of potential concerns with this view.)

So, generalising from these minimal cases, a conflict that is characterised by a culpable threat on one side and a righteous defender on the other can be transformed into an affray, where there are symmetrical privileges to perpetrate harm on both sides, provided that a third party non-culpably enters the conflict, and thereby *threatens the righteous party*. The affray is thereby created, because of the non-culpable mutual endangerment between the third party and the righteous defender. Even culpable threats can thereby obtain privileges to harm the righteous, in their capacity as adjuncts to the affray, in the name of defending the non-culpable third party.

The privilege of defence of others

For those who remain unconvinced that a culpable wrongdoer such as *W* can acquire the privilege to harm his original target, we suggest that the dispute will primarily turn on our principle *P*. Someone who rejects *P* might maintain that the stain of the wrongdoer's initial culpability remains with him, even if he later has the opportunity to minimize harm by inflicting harm on some of the parties to an affray. Such a person would presumably put forward a revised version of *P* which licences intervention only to parties that are not

³¹ This highlights that the apparatus of rights, while still of use in determining the permissibility of harming, is of diminishing utility in complex multi-party scenarios when we are attempting to apportion blame and liability for eventual harm.

culpable for the existence of the conflict; or would licence intervention only with certain intentions. Suppose that, in consequence of some such revision, it remains impermissible for the wrongdoer to kill a party against whom he culpably initiated an unjust threat. Pushed to more extreme cases, this seems absurd. Suppose the conflict between W, V, and Smith develops into a much larger battle, involving many more parties. If W has the opportunity to prevent a massacre of dozens by killing V, whom he originally intended to murder, then this is surely permissible. P supports this claim, and we ask those who would deny it to supply a more plausible alternative.

A second possibility is that we might think using violence in defence of others, in the absence of a motive of *self*-defence, places one under greater restriction to use force only against those who are culpable for the threat they pose. According to this view, P would have to be revised to only apply when witnessing one party *culpably* threatening another, rather than to the broader category of non-righteous threats which we have favoured. Again, this will lead to the absurd outcome that outside parties will be unable to intervene to prevent a massacre between non-culpable parties to a conflict.

It is plausible, however, to suppose that a principle like P is subject to more stringent proportionality constraints than a principle of self-defence. If someone attempts to cut off your arm, one presumably obtains the privilege to inflict lethal harm in self-defence, if that is necessary to prevent the attack. But if Smith is only endangering V's arm, and not V's life, then it seems improper for W to kill Smith in order to protect V, even if that is necessary to prevent the attack.

In the context of warfare, it might be thought that this makes for very serious trouble. If parties who are culpable for their presence on the battlefield possess a privilege to inflict harm that is subject to rather different proportionality constraints than those who are non-culpable, then it seems to undermine the symmetry of the privilege to commit violence. However, this problem is largely overcome by the lethal nature of modern warfare. Warfare involves pervasive *lethal* threats. Therefore, even a more constrained privilege to inflict violence, as described by P, is likely to be sufficient to generate a privilege to inflict lethal harm to avert lethal threats.

We therefore propose to proceed on the stronger assumption that P as it stands is roughly correct, simply because we cannot accept the implications of the weaker versions canvassed above, and we are unaware of any obviously

superior refinement.

Culpable soldiers and affray

Return now to the case of F, the very first soldier to take action in a conflict. When F fires on the soldiers of another nation – call it N – he is not yet in physical proximity to violence. Furthermore, depending on his knowledge of the (in)justice of his own nation's cause, F may be a culpable aggressor, in which case F does not enjoy a defensive privilege on his own account. Nevertheless, once his comrades become involved, F may come to enjoy the defensive privilege in accordance with P. This will depend on further details of the situation.

In the typical case, F will be initiating violence under orders. Hence, F's comrades will typically be non-culpable in joining F in the use of violence, because of the institutional considerations we have already described. So, once the conflict is underway, F will (like W above) be entitled to exercise the defensive privilege in defence of his or her non-culpable comrades (themselves in affray with the enemy soldiers), in accordance with P. This non-culpable use of violence will also likely bring F into affray with other enemy soldiers, even if F is not in affray with those enemy soldiers who were the victims of F's initial culpable attack. (Of course, that F enjoys the defensive privilege in these circumstances says nothing about the moral culpability of his military and political superiors for initiating an unjust war.)

Matters may well be different if F initiates violence against the soldiers of N purely of his own accord. This would be an act of (more-or-less) private violence.³² F, being culpable, would enjoy no defensive privilege in his own respect. Any comrades who joined with F knowing that he did not act under orders would very likely be culpable also, and so would enjoy no defensive privilege on their own accounts either. Furthermore, no privileges of defence of others would arise under P, there being no non-culpable third parties. (This is consistent with our intuition that in such circumstances F and his comrades are not acting in their capacity as soldiers, and so do not enjoy the privileges that are part of *jus in bello* – see further n. 22.)

What if F initiates violence of his own accord, but the comrades who

³² See above n. 22.

subsequently join with him believe that he is engaged in militarily authorised action against N's soldiers? Such a case then resembles the typical case – F's comrades being non-culpable, they enjoy the defensive privilege on their account under the Affray-privilege principle, and F will enjoy the privilege of defending them under P. Again this is the intuitively correct outcome – the unauthorised exchange of fire which escalates into full-fledged military confrontation, with N enjoying a just defensive cause, is one typical instance of warfare in which we expect mutual defensive privileges to apply. (One purpose of military discipline is to make it difficult for F, an individual soldier, unilaterally to start a war in the manner described here.).³³

The affray account of warfare therefore preserves the separation of *jus ad bellum* and *jus in bello* as a matter of moral principle, flowing from the independently plausible Affray-privilege principle together with P.³⁴

Having considered the situation of the first soldier F, turn now to a later soldier, L, who finds an affray underway, but doubts the justice of his nation's cause. Unlike F and W, L already has non-culpable comrades under threat. Hence, P certainly gives L a privilege to defend these comrades. L's

³³ Both Christian Barry and an anonymous referee have queried whether the affray account permits F to "bootstrap" himself into permissible violence, by first launching an unjust attack, and then (knowing that non-culpable comrades will join him, and intending to exploit P) gaining the defensive privilege in respect of those comrades. This is possible, but only when F is able to trick his comrades into believing that he acted under orders. Another purpose of military discipline is to prevent this from happening.

³⁴ Contra recent theorists such as Larry May and Christopher Kutz, who suggest that the distinction rests simply on the practical difficulty of distinguishing just from unjust uses of collective political violence: May, *War Crimes and Just War* (Cambridge: Cambridge University Press, 2007), pp. 29–30; Kutz, "The difference uniforms make: Collective violence in criminal law and war", *Philosophy and Public Affairs* 33(2005): 148–80, pp. 173–6.

McMahan argues that, once we allow that a culpable first soldier does wrong in attacking enemy soldiers, the distinction between *jus in bello* and *jus ad bellum* is undermined, because we can no longer hold that a soldier does no wrong as long as the principles of *jus in bello* are upheld: "The Ethics of Killing in War", pp. 696–97. What the affray account shows, when P is taken into account, is that the degree of undermining will in most cases be comparatively slight. (As the introduction noted, the affray account is not concerned to preserve the traditional just war theory in its entirety, but only to show that its basic features can be derived from the principles governing individual self-defence.)

participation in the affray may be tainted by his knowledge of the originating wrongdoing – although L’s violence is permissible, we might nevertheless hold him blameworthy for it. We deliberately leave this question of L’s blameworthiness indeterminate in this paper. This indeterminacy echoes the discomfort some contemporary theorists feel in the face of the doctrine – traditionally part of *jus in bello* – that even those soldiers who knowingly participate in a wicked cause are not war criminals.

Further features of the jus in bello

The conception of warfare as affray, explained and defended above, explains the symmetry of the defensive privilege enjoyed by soldiers at war. This final section of the paper will go on to show how this account is able to explain two other important features of the traditional *jus in bello*, namely the principles surrounding surrender and the taking of prisoners of war, and the immunity to attack enjoyed by civilians. It will also consider the potentially revisionary implications the account has for the extent of the defensive privilege that soldiers enjoy against one another.

Surrender

Although affray is a paradigmatically chaotic affair, it may still be possible to draw a distinction between those who are, and those who are not, “involved” in an affray. This is the essence of criteria (a) and (d) of the criteria for affray set forth above: two individuals enter into affray with one another only if each poses a *danger* to the other. Surrender, then, is a device whereby a soldier is able to bring his or her participation in an affray to an end – thereby bringing an end to the defensive privilege of enemy soldiers in respect of him or her – by signalling that he or she is no longer a threat to the enemy, and hence that he or she no longer satisfies criterion (d). It follows from this that the principle that surrendering soldiers may not be attacked does not rest upon any convention among states. The existence of conventions governing the method of surrender (such as the use of a white flag) is nevertheless important, however, as these make it easy for any soldier to signal his or her surrender to the enemy.

Once a soldier has surrendered, becoming a prisoner of war, he or she is not only protected from attack, but thereby loses the defensive privilege in

respect of enemy soldiers. This is because those soldiers no longer have to defend themselves against the surrendering soldier, and hence are no longer a threat to him or her. The affray conception thus explains the impermissibility of the killing of enemy soldiers by prisoners of war.³⁵

Discrimination and the importance of military institutions

The affray conception's explanation of the principle of discrimination, according to which civilians are immune to military attack, is similar to what we have just seen. Affray depends upon mutual endangerment, and in warfare it is military institutions that play a crucial role in constituting these facts of endangerment, and hence in shaping the defensive privileges that arise. In particular, where effective military institutions exist, they constitute soldiers into cohesive, visible and distinct "sides", each of whose members poses an organised threat to the members of the enemy military. It is therefore the members of those military institutions, and only them, who enter into circumstances of affray. Civilians, on the other hand, in virtue of their non-participation in military institutions, make it clear that they pose no threat. They therefore do not satisfy criterion (d), do not enter into affray, and therefore do not forfeit their rights to life.

Thus (and similarly to the principles governing surrender and the taking of prisoners of war), the principle of discrimination does not depend upon any conventional understanding among states that military institutions shall be distinguished from civilian ones. Indeed, a state which created distinctive military institutions, whose members could thus be identified as the sole participants in any ensuing affray, would thereby ensure that its civilians enjoyed the protection of the principle of discrimination, even if no other state did the same.

A further implication of this explanation of the principle of discrimination is that, in circumstances in which the institutional distinction

³⁵ Walzer characterises surrender, and the "benevolent quarantine" of prisoners of war, as an explicit agreement and exchange, of peace in exchange for a renunciation of the right to fight; and in his view, it is because it breaches this agreement that it is murder for a prisoner of war to kill a prison-camp guard: *Just and Unjust Wars*, p. 177. As explained above, we think these features of the *jus in bello* follow from the basic principles of affray, rather than from any sort of convention or agreement.

between the enemy military and enemy civilians breaks down, the question “Who is a participant in the affray?” becomes more difficult for a soldier to answer, and thus the retention by those civilians of their right to life becomes more doubtful. We think that this explains some of the difficulties inherent in applying the traditional just war doctrine to guerrilla conflict or conflict against non-state terrorist organisations that are tightly integrated into a civilian population. (Conversely, if a non-state actor has an institutionally distinctive military force then these sorts of difficulties should not arise.)³⁶ Even in contexts less ambiguous than guerrilla warfare, it may be necessary to draw essentially ad hoc distinctions at the fringes. Is it possible to distinguish in a non-arbitrary fashion between a munitions worker and an IT technician who repairs a computer that controls an unpiloted weapon system? What about those working in a food factory to produce rations for the troops? These may be examples where conventional agreements between warring parties may be necessary to ensure a more robust principle of discrimination.³⁷

Military institutions not only delineate the enemy soldiers (who are participants in the affray) and the enemy civilians (who are not). They also delineate those participants in an affray who pose a threat – one’s enemy – and those who do not – one’s comrades. Indeed, this is the only inherent significance of the existence of sides in an affray: they are simply a good practical guide as to who is a danger to you. Of course warfare involves

³⁶ Robert Sparrow contends that “[w]ar is fundamentally a state-centric concept”, and that it is this that explains the difficulty of applying just war principles to guerrilla warfare: “Hand Up Who Wants to Die”, p. 303. Our claim is that the *jus in bello* rests upon moral relations between individuals who have been organised by military institutions (whether state or non-state). We are therefore in agreement with Sparrow at least to the extent that “[v]iolence only becomes war when it occurs between organized social groups” (ibid.).

³⁷ Jeffrie Murphy suggests a notion of combatants as those whom “it is reasonable to believe are engaged in an attempt to destroy you” (“The killing of the innocent”, in Malham M. Wakin, ed., *War, Morality, and the Military Profession* (Boulder: Westview, 1986), 341–64, at pp. 345–48). As with the affray conception, he notes that this leads to borderline cases. As he uses notions of agency rather than causal or functional role, however, his notion is more expansive than ours, for the reason that harmless individuals (such as an aged but virulent supporter of the war effort) can nevertheless engage in an attempt at the impossible. Here again, the affray conception better captures the traditional *jus in bello* principle of discrimination.

affray, not simply between the members of ad hoc sides, but between the members of distinct military institutions and (at least typically) distinct nations. It will frequently be the case that those institutions – depending upon their particular forms – give rise to more robust duties of loyalty and of obedience, either to military discipline or to national law. But any such duties are not, on the affray conception, *inherent* to the morality of warfare.

This has revisionary implications for *jus in bello*, for it follows that if one's comrades threaten one's life, for example by engaging in "friendly fire", then they are morally equivalent to the enemy, and the privilege of using violence against them comes into being. Likewise, if the military institutions of a warring nation were to collapse, then that nation's soldiers would find themselves in a situation much closer to that of BAR-ROOM BRAWL, for their (former) comrades would no longer be organised in such a fashion as to not threaten them. It would therefore become much less clear which participants in the conflict did and did not pose a danger to them, and hence the defensive privilege might well arise in respect of those (former) comrades. (As noted above, such a collapse of military institutions would also have potential consequences for the right of that nation's civilians to immunity, as its soldiers and civilians would no longer be institutionally demarcated from one another.)

If obedience to one's military superiors is not inherent to the morality of affray, and one is permitted to attack those who expose one to a lethal threat, may a soldier therefore attack his commanding officer who sends him into battle?³⁸ Certainly, this is a *possibility*, on our account. But as we indicated above, there may be, concurrently with the operation of the principles of affray, an institutional structure which blocks this consequence. For anyone other than a philosophical anarchist, it is presumably possible for there to be political norms which citizens are obliged to obey, even when obedience exposes those citizens to risk of harm. Admittedly, one's obligation to obey military orders that lead to imminent threat to life put any theory of political obligation to a very severe test, but we maintain that it is at least conceivable that one's obligation to a polity could extend this far. In our view, then, whether or not the commanding officer is liable to violent resistance will

³⁸ This objection was raised by an anonymous referee.

depend upon whether that officer has the suitable authority, in the particular institutional circumstances of that soldier, to oblige him to risk his life.³⁹

Limitations on the use of violence in warfare

Traditionally, soldiers are regarded as permitted to attack enemy soldiers whether or not those enemies are currently attacking. Even sleeping soldiers, or those who are otherwise manifestly non-threatening, are regarded as legitimate targets.⁴⁰ On the affray conception of warfare, however, this would be so only if the character of the affray were such that these enemy soldiers, despite their passivity or ineffectiveness, could nevertheless be said to be participants in the affray in virtue of the lethal threat they pose to their enemies. Is this a plausible characterisation of the affray? The answer to this question seems highly contextual. If something like the traditional just war theory is to be preserved, however, that answer must permit us to distinguish sleeping enemy soldiers from soldiers serving in the armed forces of non-belligerent but potentially hostile nations (who, as was discussed above, are not participants in any affray). We might say, for example, that the soldier of the non-belligerent nation is a potential threat not yet activated, whereas the sleeping enemy is an activated threat temporarily at rest. It is therefore not

³⁹ It might be objected that the political authority of commanding officers cannot extend to ordering soldiers to fight in an *unjust* cause (this point was suggested by an anonymous referee). It is generally accepted, however, that a duty to obey political authority can extend even to obedience to unjust directives, provided that such obedience is necessary to support the efficacy and viability of an authority that is, on balance, legitimate: John Rawls, *A Theory of Justice* (Oxford: Oxford University Press, 1971), pp. 353–55; John Finnis, *Natural Law and Natural Rights* (Oxford: Clarendon Press, 1980), pp. 361–2. Given that many political directives – whether just or unjust – have life-or-death consequences for those affected by them, a commanding officer’s order to fight does not seem particularly distinctive in this respect.

It might seem that, were one to accept such an account of political authority, it might undermine the affray conception of warfare altogether, on the basis that soldiers enjoy their right to use violence as an extension of the legitimate authority of political communities. As we have already argued, however, when it comes to relations *between* political communities, governments lack the institutional capacity to create these sorts of entitlements.

⁴⁰ Walzer, pp. 138–43.

clear that the latter fails to satisfy criterion (d) of the criteria for affray (for example, his or her ongoing membership of the military makes her quite unlike Smith cowering beneath a table-top in BAR-ROOM BRAWL). Nor is it clear, however, that he or she satisfies that criterion. This is another matter in respect of which the affray conception may have revisionary implications.⁴¹

While the traditional *jus in bello* is permissive in many respects, it also imposes restrictions that we have not considered, in particular concerning the means of violence (such as prohibitions on the use of poisonous gas). Many of these restrictions must be regarded – on the affray conception – as purely conventional.⁴² However, the obligation of soldiers to use force only against those who pose a threat may exclude the use of weaponry which is inherently incapable of discrimination, such as nuclear weapons.

A final respect in which the affray conception may entail revisions to the traditional just war theory also pertains to the means of waging war, and in particular to high-altitude bombing, remote-controlled weapons systems and other such techniques for deploying force without risking injury to military personnel. At least where these techniques are available to only one side of the conflict (such that there really is no risk to the soldiers of that side) it seems plausible that the soldiers deploying them are not themselves participants in an affray, because not exposed to any threat, and therefore may not enjoy the defensive privilege in respect of their own persons. Consistently with P above, however, they may still be able to appeal to a privilege of defence of others.⁴³

⁴¹ Larry May expresses doubts that the sleeping soldier is a legitimate target, given that he or she poses no threat. He rejects the suggestion that the sleeping soldier is a threat simply in virtue of continuing to play a role in “the state’s collective war effort”; this is equally true of many civilians. As noted in the text, however, the sleeping soldier remains a ready member of those institutions which are the distinctive means of conducting warfare, suggesting it may not be as straightforward as May suggests: *War Crimes*, chapters 5 and 8.

⁴² Walzer agrees: p. 42.

⁴³ Paul Kahn also notes: (i) that soldiers who face no threat may not enjoy the defensive privilege, and (ii) that they may appeal to the privilege of defence of others. However, he claims that, when acting to defend others, the intervening party “assumes the moral obligation to make the *right* choice” (“Paradox of Riskless Warfare”, p. 7). As indicated above, such a restriction of P leads to untenable outcomes.

Conclusion

The model of affray, combined with an understanding of the role that institutions play in determining whether the privilege of defensive violence arises, allows us to understand much of the traditional just war conception of the *jus in bello*. Being in affray with one another, with no overarching set of institutions able to settle questions of culpability, soldiers on each side of a conflict enjoy the defensive privilege against one another. At the same time, the existence of military institutions, which make clear to each side the source of threat, explain why civilians are immune to attack.

The model also explains the reason for the distinction between *jus in bello* and *jus ad bellum*. And it is silent on the latter – indeed, it is quite consistent with our account of warfare as affray that the circumstances in which nations may justly go to war are very few, or even non-existent. Our analysis, accepting as it does that the use of violence in self-defence is sometimes permissible, is not pacifistic. But it may nevertheless be consistent with anti-militarism. Its identification of the central role played by military institutions in constituting the special circumstances of the *jus in bello* might be seen to have laid the foundation for a defence of the role of those institutions in national life.⁴⁴ Equally, however, it might be seen to have provided a clear target for the critique of those institutions: for if they did not exist, there would be no comparably effective social mechanism for bringing the members of different nations into large-scale affray with one another.⁴⁵

Raimond Gaita also questions the permissibility of the use of violence by soldiers when, in virtue of the means of warfare that they adopt, those soldiers face no threat, but not for the same reasons as the affray conception. Rather, he is concerned that such fighting displays an immoral contempt for the enemy's humanity: "A 'War of Good Against Evil'" in Tony Coady and Michael O'Keefe, eds, *Terrorism and Justice: Moral Argument in a Threatened World* (Melbourne: Melbourne University Press, 2002), 113–25, at pp. 116, 118–19.

⁴⁴ This might be particularly so for those who accept Walzer's account of the *jus ad bellum*: pp. 53–4.

⁴⁵ The authors would like to thank Natasha Guantai, Terry MacDonald, Robert Sparrow, and two anonymous readers for *PPA* for helpful comments on earlier drafts of this paper. We also thank Dale Smith and audiences at CAPPE (ANU) and at Monash for helpful discussions.