Introduction

This paper explores the way in which war is a socially constructed phenomenon. It examines the major contemporary debate within the just war tradition about the principle of the moral equality of combatants and uses an interpretivist and constructivist approach to consider the implications of these arguments for the practice of war. Specifically the paper examines how certain parts of the just war tradition constitute war as an institution by constituting a normative structure or framework of war, the deep morality of war, that grounds the principle of the moral equality of combatants. The challenge to this principle posed by the revisionists in the contemporary debate seeks to create a new normative structure of war, with profound implications for the practice of war. A brief consideration of the wars in Iraq and Afghanistan demonstrates some of the consequences of a breakdown in the intersubjective understanding of war as being an institution constituted by the principle of the moral equality of combatants.

The paper begins with a consideration of the principle of the moral equality of combatants and then surveys the moral arguments on each side in the contemporary important, though inconclusive, debate. It then expands upon the idea of the normative
structure, or deep morality, of war and demonstrates how the principle of the moral equality of combatants has been institutionalised in the laws of armed conflict and how this forms the basis for the way in which war is generally understood and interpreted. Subsequently the paper considers the way in which the principle of moral inequality proposed by the revisionists seeks to change the very meaning of war as an institution. Finally, the wars in Iraq and Afghanistan are briefly considered in order to illustrate some of the implications of such a challenge to the normative structure of war.

The Moral Equality of Combatants

The principle of the ‘moral equality of combatants’ holds that combatants on both sides are morally and legally equal. The principle is based on two linked theses: the symmetry thesis, which states that the rights of combatants in war are the same on both sides; and the independence thesis, which states that the *jus in bello*, the rights of combatants in war, is independent of the *jus ad bellum*, the justice of the war as a whole. These often, but not always, are understood together and they reflect the mainstream position in the just war tradition and international law. Recently, however, a number of revisionist just war scholars, led by Jeff McMahan and David Rodin, have begun to challenge the principle of moral equality. The argument made by the revisionists rests primarily on a rejection of the second thesis, of the independence of the *jus in bello* from the *jus ad bellum*. They argue that it does not coincide with basic moral principles and that, in fact, combatants should be held individually accountable for participation in war. Much of the debate, however, has

---

2 Ibid.; pp. 2 - 3.
focussed on the implications of this for the first thesis, regarding whether or not the laws of war should be changed and considering the difficulties of attempting to institutionalise non-symmetrical laws of war.\(^5\)

The principle of moral equality takes its contemporary canonical form in Michael Walzer’s ‘Just and Unjust Wars’. The two key statements he makes are that “war is always judged twice, first with reference to the reasons states have for fighting, secondly with reference to the means they adopt”\(^6\) and that “when soldiers fight freely . . . their war is not a crime; when they fight without freedom, their war is not their crime.”\(^7\) His first statement highlights the core premise of the principle of moral equality, namely the independence of the *jus ad bellum* from the *jus in bello*. The second statement is central to Walzer’s justification for this independence, for him the case of combatants fighting freely applies to medieval knights seeking adventure; the crucial factor here is consent.\(^8\) While it is questionable as to whether this is an accurate representation of medieval knights, it is certainly not an accurate picture of war today. Walzer recognises this and argues that when the “limit of consent is breached” and men are forced to fight, war takes on a distinct moral character: it becomes “hell”\(^9\).

These two justifications for the principle of moral equality, consent and coercion, are common. Whilst the argument that combatants individually consent to their actions has been rejected, a more sophisticated theory of consent has been put forward. This states that combatants either agree to the war convention, of which the principle of moral equality is a

---


\(^7\) Ibid.; p. 37.

\(^8\) Ibid.; p. 25.

\(^9\) Ibid.; p. 28.
part, or that the war convention itself is the product of agreement as to the best system of rules. The first of these arguments, the ‘Boxing Match Model’ of war;\textsuperscript{10} states that individuals, by becoming combatants, implicitly accept the right of enemy combatants to attack or kill them in exchange for the right to use force themselves.\textsuperscript{11} The second of these arguments holds that the war convention provides the morally best set of rules and laws that are possible and that it is, or should be, accepted by the participants.\textsuperscript{12} In either case, the consent to the rules is seen as including a waiver of the right not to be attacked. The focus on consent, whether actual or hypothetical, means the justification can only apply to volunteer armed forces in relatively free countries, as consent is incompatible with conscription.\textsuperscript{13} Even in all-volunteer armed forces it has been argued that many of those of who volunteer come from the poorest and most deprived parts of the community, with the fewest choices, and so consent may not be fully free.\textsuperscript{14} Given that the principle of moral equality is supposed to apply to all combatants in all armies, the consent argument cannot provide the full justification necessary. More significantly from a revisionist perspective, war, unlike boxing, is not an activity with a value-free outcome. It is unclear how mutual consent can justify participation in an activity in which the overall character is unjust or why combatants on the just side should consent to waiving their right not to be attacked, even if they accept that there may be a risk of being unjustly attacked.\textsuperscript{15}

The opposite justification from consent is that combatants are coerced to fight. This is the argument that Walzer relies upon to justify moral equality.\textsuperscript{16} The fact of coercion denies combatants’ individual moral responsibility for the war; this is the ‘Gladiatorial

\textsuperscript{10} McMahan, \textit{Killing in War}; pp. 51 - 57.
\textsuperscript{13} Ibid.; pp. 210 - 211.
\textsuperscript{14} Ibid.; pp. 213 - 215.
\textsuperscript{15} McMahan, \textit{Killing in War}; p. 57.
\textsuperscript{16} Walzer, \textit{Just and Unjust Wars}; p. 35.
Model’ of war.\textsuperscript{17} There are several problems with this argument, however. The main problem is that it does not seem applicable in the contemporary western world, with largely volunteer armies and relatively minor punishments for refusing to follow orders (the punishments, namely a period of imprisonment, are not sufficiently severe to justify killing).\textsuperscript{18} Even if coercion were more severe, it is not clear that it would entitle combatants to use force against one another. A plausible conclusion is that combatants would gain the right to resist the coercion by defending themselves against those coercing them.\textsuperscript{19} It should also be noted that the argument from duress is pragmatic and not an argument against the denial of the independence thesis on moral grounds. The argument suggests that it would be morally wrong to hold, at least some, combatants individually morally responsible due to the duress they are under, but it does not dispute that were duress not a factor then combatants could be held so responsible.\textsuperscript{20}

The other two justifications that are often put forward are epistemic uncertainty and self-defence. The argument about epistemic uncertainty is based on the (alleged) inability of combatants to determine the justice of a war. Recognising that the decision to go to war is complex, involving competing moral, legal, and empirical claims, that governments will often have access to more information than is released, that governments may lie or misrepresent the facts, and that combatants may not have the time, maturity, or education to be able to assess the information that is available, it is often argued that combatants should not be held responsible for the justice of the war.\textsuperscript{21} This argument is problematic as, while it may apply to some combatants, it cannot apply to all. Some combatants will be aware or will

\textsuperscript{17} McMahan, \textit{Killing in War}; pp. 58 - 59.
\textsuperscript{18} Rodin, \textit{War and Self-Defense}; pp. 171 - 172.
suspect that the war is unjust, or should be aware as the information is easily available. In short, epistemic uncertainty cannot ground a justification for moral equality but, at best, can provide an excuse (which may be full or partial) for participation depending on what the combatant knew and could have been reasonably expected to find out.  

The final argument that is commonly used is that of self-defence. The intuitive plausibility of this argument rests on the fact that combatants are armed and pose a threat to one another and potentially to non-combatants and so have a right to use force in self- or other-defence. This argument has been criticised and rejected by McMahan and Rodin. They argue that to justify the principle of moral equality on the basis of self-defence would be tantamount to arguing that in the domestic realm a mugger who attacks a victim would have the right to use force if the victim justly defends themselves, or if a police officer intervenes to prevent the attack. Furthermore, the scope of the legitimate use of force in war is substantially broader than in conventional self-defence, including the right to use force against those who are not posing a direct threat at the time.

Whilst the arguments that support moral equality are not entirely persuasive, it is also necessary to consider the arguments for a principle of individual responsibility, or of the moral inequality of soldiers. The core of this argument is that one is only liable to attack if one bears “moral responsibility for an unjust threat”. Combatants fighting in a just war are not posing an unjust threat and so are not liable to attack. At least some combatants in an unjust war, however, bear moral responsibility for the unjust threat that they are posing and, therefore, are liable to attack. In short, McMahan and Rodin argue that combatants’ actions

---

23 Nagel’s discussion of the meaning of the word ‘innocence’ in just war theory, as referring to ‘currently harmless’ rather than morally innocent, is instructive here. Nagel, T., “War and Massacre,” *Philosophy and Public Affairs*, Vol. 1, No. 2 (1972); pp. 139 - 140.
in a war should be judged by reference to the cause of the war and, thereby, open a space for individual moral and, potentially, legal accountability.

This argument leads both McMahan and Rodin to highly revisionary conclusions as to who may be legitimately targeted. Both agree that combatants in a just war have done nothing to lose their right to life and to not be attacked, except in specific cases where they use disproportionate or indiscriminate means of warfare that violate *in bello* principles. Rodin argues for the removal of *in bello* rights and privileges from unjust combatants, but with no extension of them for just combatants. This conclusion is radical enough and would lead to a complete transformation of both the laws and practice of war. McMahan, however, goes further still. Not only does he advocate the removal of *in bello* rights from unjust combatants, but he also argues that, in some cases, just combatants may legitimately go further than the current restrictions permit. In particular, he argues that non-combatants and prisoners may be legitimate targets if they bear moral responsibility for an unjust threat in the context of war, this being the criteria of liability to attack.

**The Normative Structure of War**

These debates about the principle of the moral equality of combatants are important, however, they need to be seen in a broader light than as simply a high-level philosophical debate. Notwithstanding the criticism of the principle of moral equality, it has been institutionalised in the laws of armed conflict and provides the basis for the normative structure of war. Similarly, the principle of moral inequality is an attempt to construct a new normative structure of war that would change the very role and nature of war as an institution. In order to understand these implications it is necessary to utilise an interpretivist

---

27 McMahan, *Killing in War*; p. 16.
and constructivist methodology in order to elucidate the normative structure of war. Such an approach is valuable as it allows an understanding of the “socially created meaning” of actions and events;\textsuperscript{30} it is impossible to judge, morally or otherwise, without understanding the meaning of the actions for the participants.\textsuperscript{31}

Examples of a constructivist approach to the study of war as an institution include Nathaniel Berman’s work on the combatants’ privilege and Tal Dingott Alkopher’s work on the social construction of war.\textsuperscript{32} Berman’s work is very useful and will be drawn upon to help illustrate the arguments made here, however his focus on the laws of armed conflict neglects the role of the just war tradition in constituting war. Dingott Alkopher’s work is an excellent example of how constructivism can help explain important features of the different types of war fought in different epochs, and the role of norms and principles in making wars of a particular type possible. However, she sees war in a relatively static way and focuses on shifts in the \textit{jus ad bellum} and their role in legitimising and delegitimizing particular types of war. In contrast to this, the remainder of this paper analyzes the way in which war and the meaning of actions within war is constituted by the relationship between the \textit{jus ad bellum} and the \textit{jus in bello}; the actual regulative content of the two sets of rules is relatively less important in this analysis than the way in which they interact to constitute the normative structure of war. The distinction between regulative and constitutive rules and norms is important. Regulative rules help regulate an already existing activity; in many cases regulative rules can be changed without fundamentally altering the nature of the activity itself; for example, the \textit{jus in bello} rules prohibiting certain types of weapon have changed


over time, and will likely continue to change, without changing the institution of war. Constitutive rules, on the other hand, bring an activity into being by defining what it is and who may take part in it. Constitutive rules do not govern the activity, rather they are the activity; when the activity is discussed what is being referred to is not a pre-existing abstract activity, but the complex of rules, principles, and norms which make the activity possible. This distinction is related to, but not identical with, Walzer’s distinction between the rules regarding when and how soldiers can kill, which are essentially regulative, and those regarding whom they can kill, which is a largely constitutive question.

The relationship between the *jus ad bellum* and the *jus in bello* is crucial as it provides the moral or normative foundation for the definition of combatancy, that is, for determining who may and may not take part in combat and who may or not be legitimately targeted, as well as for enmity. In other words, the concept and principle of discrimination (between combatants and non-combatants) gains its empirical content from the moral distinctions drawn about the justification of combatancy. As such, it allows the actions of said combatants to be interpreted and understood and provides the basis for the more specific regulative rules of warfare. More importantly, the normative meaning of the actions within war, the actions of killing and being killed, is determined by this normative structure, in the sense that the structure allocates responsibilities as well as constituting actors.

**The Principle of Moral Equality and the Laws of Armed Conflict**

It is necessary here to demonstrate how the normal understanding of war is based on the principle of the moral equality of combatants, as well as how this principle has been

---


34 *Walzer, Just and Unjust Wars*; pp. 41 - 44.

institutionalised in the laws of armed conflict and thereby has implications for the practice of war. This institutionalisation has come about through the granting of the combatants’ privilege to combatants on both sides in a war, regardless of the justice of their cause. The combatants’ privilege is used to define who “has the legal right . . . to exercise coercion and violence in a public armed conflict situation” as it “places some violent actions and actors substantially outside the purview of ‘normal’ criminal law and human rights law.” Soldiers are only held to be morally and legally accountable for individual violations of the laws of armed conflict.

The laws of armed conflict are founded on the principle of the equal rights of the opposing belligerents and are designed to be non-punitive. The Lieber Code, written during the American Civil War and which is one of the earliest examples of the codification of rules of war, explicitly states that:

```
The Law of Nations allows every sovereign government to make war upon another sovereign state, and, therefore, admits of no rules or laws different from those of regular warfare, regarding the treatment of prisoners of war, although they may belong to the army of a government which the captor may consider a wanton or unjust assailant.  
```

Similarly, an even clearer statement of the principle of the non-punitive nature of the laws of armed conflict comes from ‘The Laws of War on Land: Manual Published by the Institute of International Law’, better known as the Oxford Manual, produced in 1880. It states that the only people entitled to commit “acts of violence” are “the armed forces of belligerent

---

37 Berman, "Privileging Combat?,” pp. 3 - 4.
States”. As such “[i]ndividuals who form part of the belligerent armed force, if they fall into the hands of the enemy, are to be treated as prisoners of war”, but “[t]he confinement of prisoners of war is not in the nature of a penalty for crime” so “[t]he captivity of prisoners of war ceases . . . at the conclusion of peace”. On the other hand, “inhabitants [of occupied territory] who commit acts of hostility against the occupant are punishable”.

The principle of the moral equality of combatants was reaffirmed following World War II when only the remaining leadership figures from the Nazi and Imperial Japanese regimes were prosecuted for the crimes of waging aggressive war and crimes against peace, or violations of the jus ad bellum. No individual German or Japanese soldier was prosecuted for actions committed that were in accordance with the laws of armed conflict, notwithstanding that the war itself had been declared criminal. Furthermore, the Geneva Conference which met and produced the Geneva Conventions of 1949 to update and replace the previous conventions maintained the principle that the laws, the combatants’ privilege, and the right to be accorded prisoner of war status, were to be applied to both sides in war.

Whilst some criteria were modified to make it easier for resistance groups operating under the authority of a government in exile or a government not recognised by their opponent to participate in war, this was on the basis that the groups in question were both still linked to a party to the conflict and that they met certain criteria, namely:

1. that of being commanded by a person responsible for his subordinates;
2. that of having a fixed distinctive sign recognizable at a distance;
3. that of carrying arms openly;

40 Ibid.; Art. 21, p. 33.
41 Ibid.; Part III, Section A, p. 37.
42 Ibid.; Art. 73, p. 38.
43 Ibid.; Art. 47, p. 36.
44 Berman, “Privileging Combat?,” p. 11.
4. that of conducting their operations in accordance with the laws and customs of war.\textsuperscript{46}

As such the just war tradition and the laws of armed conflict constitute the identity of the combatant in such a way that the right to kill depends upon meeting the formal criteria laid down in the law, which requires that one is acting on behalf of a party to the conflict and is under said party’s authority. This normative structure, enshrining the principle of the moral equality of combatants, turns the practice of war into a contest between said combatants and the basis of enmity is the affiliation to the opposing groups, rather than the criminality or injustice of the enemy. As Walzer writes, “[i]t is precisely the recognition of men who are not criminals.”\textsuperscript{47}

This normative structure of war does not, of course, ensure that every war is fought according to these principles, still less that every soldier recognises their opponents as moral equals. Although in some important cases this is one of the effects of this normative structure; the Christmas Truce in World War I and some of the examples cited by Walzer of soldiers reflecting on their own experiences being clear examples of this. Nevertheless the crucial importance of the normative structure is that it allows actions, including violations of the normative structure, to be identified, recognised, and interpreted, and it allows for responsibility to be ascribed. It provides the basis for the judgement of the actions in war.\textsuperscript{48}

By constituting war this normative structure simultaneously constitutes the distinction between war and massacre, between war and terrorism, war and crime, war and murder. Whilst the boundaries between war and other forms of violence and between combatants and other actors, like terrorists, contractors, freedom fighters, unlawful combatants, and so on, are


\textsuperscript{47} Walzer, Just and Unjust Wars; p. 36.

\textsuperscript{48} Walzer, Just and Unjust Wars; p. 34.
blurred and contested, the intensity of the contestation highlights the importance of the distinctions, as they mark off moral categories and define moral meanings.49

**Moral Inequality: A New Normative Structure for War?**

The argument put forward by the revisionists is an attempt to establish a new normative structure for war. By positing the *jus in bello* and, concomitantly, the combatants’ privilege as dependent upon the *jus ad bellum*, the nature of combatancy becomes very different. Rather than the combatant being an agent of the state and being defined according to their relationship to the state, or party to the conflict, the combatant becomes an agent of justice itself. The right to participate in war is limited to the just side and the unjust side are, by definition, criminals and murderers. War is “replaced by crime and punishment, by evil conspiracies and military law enforcement.”50 As war becomes analogous to international law enforcement, it loses its distinct character as an institution of the international system.

The denial of the right to combatancy to those on the unjust side would, in such a scenario, turn the practice of war into more of a crusade against those who have been declared outlaws by a global governmental authority. The basis of enmity would therefore become the unjust or evil character of the individuals fighting and the threat they are posing. Hence McMahan’s suggestion that even non-combatants and prisoners may be legitimately targeted if they pose an unjust threat. By defining enmity in terms of good and evil, rather than political affiliation and adherence to the formal criteria of the law of armed conflict, then compromise becomes more difficult. In terms of the practice of war, the principle of moral inequality would require that the taking of prisoners would become, when done by the just, a punitive measure leading to judgement and punishment or, when done by the unjust, an


50 Walzer, *Just and Unjust Wars*; p. 41.
illegal act of kidnapping and false imprisonment that would simply exacerbate the crimes they had already committed by taking up arms to begin with.

In short, the principle of moral inequality would transform the meaning of the actions within war from being violence on behalf of political communities for which the political communities themselves are responsible, to being individualised acts of crime and law enforcement.

The Breakdown of Intersubjectivity: Iraq and Afghanistan

The normative structure of war based on the principle of the moral equality of combatants has traditionally provided the basis for an intersubjective understanding of what war is as a practice and institution and what actions within war mean. Currently the principle of moral inequality has not replaced the principle of moral equality as the basis of the normative structure of war and there is no international authority with the authority or capacity to institutionalise such a principle. However, certain ideas regarding moral inequality have started to undermine the intersubjective understanding of war as a contest between moral equals. Certain features of the wars in Iraq and Afghanistan help illustrate this breakdown. It should not be supposed that this breakdown explains all of the features of these wars, or that it is the main determinant of the changes in practice identified below, as other factors, including technological and material changes and changes in the social, economic, and political structure, are also important. On the role of changes in the social, economic, and political structure of society and its implications for the practice of war, see: Kaldor, M., New and Old Wars: Organized Violence in a Global Era, 3rd ed, Polity Press: Cambridge, (2012). However, a consideration of the breakdown of the normative structure of war will illustrate how profound these changes are.

For present purposes there are two important features of the practice of the wars in Iraq and Afghanistan that merit attention; namely, the use of Guantanamo Bay to hold

---

prisoners captured in these conflicts (and elsewhere in the ‘war on terror’) and the general spread of this conflict beyond the immediate confines of the battlefield. To begin with, however, it is necessary to consider the way in which the wars in Iraq and Afghanistan, and the war on terror more generally, have been defined in stark terms of good versus evil. From the Bush administration’s description of the ‘axis of evil’ and the claim that it was a choice between supporting America and supporting the terrorists, the conflict has been portrayed in highly moralised terms. Whilst the Bush administration understood the conflict to be a war against terrorism, rather than global law enforcement, the nature of the war they perceived themselves to be waging differed from the traditional view of war based on the principle of the moral equality of combatants.

As Berman writes, the US declared that those captured as part of the war on terror “did not merit the protections of criminal law due to their combatant activities, and that they did not merit the protections of the jus in bello due to the unlawful nature of their combat”. These detainees were then held in Guantanamo Bay, or rendered to other countries for detention, in a constitutional and legal black-hole. In his article, Berman focuses on what he describes as the “instrumentalization” of the two bodies of law, criminal law and the laws of armed conflict, in the war on terror. Instrumentalization, however, suggests a broadly rational process, an attempt to take advantage of differing sets of legal regimes. Whilst undoubtedly this rationality is important, a consideration of the shifting understanding of the normative structure of war helps explain the treatment of detainees. As participation in combat against the US came to be seen as morally culpable, the salience of the distinction between the two bodies of law, criminal law and the laws of armed conflict, reduces as the distinction is predicated on the principle of moral equality. Rather than strategically instrumentalizing two bodies of law to gain advantage, the use of the two bodies of law, and

---

53 Ibid.; p. 3.
Just War Theory and the Deep Morality of War in Iraq and Afghanistan

the use of neither, reflects the pursuit of a normative objective, for which the legal framework is not designed for.

The second, and more important, feature of the war on terror is the way that it has expanded far beyond the original conflict zones of Iraq and Afghanistan. The use of drones, in particular, and special forces to conduct strikes against suspected militants in other countries, including Pakistan, Yemen, and Somalia, poses a challenge to the laws of armed conflict which assume a relatively contained conflict. Much of the current legal debate focuses on the ‘boundaries of the battlefield’, both temporal and geographic, there is a natural concern within the legal scholarly community to find some way to contain the use of force. However, a focus on the laws involved obscures the deeper normative shift underway in which war is being reconceptualised as conflict against evil, unjust, and criminal individuals, wherever they are, rather than being between political communities. In a war against individuals the geographic boundaries of war dissolve to encompass all culpable individuals and the temporal limit of war disappears as there is no political community which can be defeated or with which an agreement can be made. Many of the suggestions made by legal scholars to find ways to limit war are based upon a conventional view of the normative structure of war and fail to realise that the very meaning of war as an institution is changing. The particular focus on drones in the literature suggests that it is technological changes that are leading to the breakdown of the traditionally understood boundaries of the battlefield. Whilst the capabilities of drones certainly contributes to this change, the key issue is the normative structural change that is reconstituting war.

Conclusion

This paper has used a constructivist approach to explore the key way in which ideas and norms from the just war tradition constitute war as a practice and institution. As such it challenges the idea that war is either natural or unchanging. It contributes to the just war debate as well as to the more general debate about the role of norms in international relations by demonstrating that war is not separate from norms and principles, as some realists would claim, nor do norms merely regulate war and its conduct. Instead war itself is constituted by norms and the way in which they interact to define what type of activity it is and what it means to engage in it. The current philosophical debate within the just war tradition is an attempt to fundamentally reconstitute war and what it is. This philosophical debate is paralleled in the way that the US government understands the war on terror, where it is seen as a war against individuals rather than against political communities. These individuals are defined by the unjust reason for which they fight, rather than by their political affiliation. As such the conventional categories of law and the distinctions between types of law become less relevant, leading to the expansion of the war.


