

THE STATE RIGHT OF SELF-DEFENSE: A CLAIM IN NEED OF JUSTIFICATION

Jennifer Kling

A dissertation submitted to the faculty at the University of North Carolina at Chapel Hill in partial fulfillment of the requirements for the degree of Doctor of Philosophy in the Department of Philosophy.

Chapel Hill
2015

Approved by:

Bernard Boxill

Thomas E. Hill, Jr.

Carl Ficarrotta

Geoffrey Sayre-McCord

Ryan Preston-Roedder

© 2015
Jennifer Kling
ALL RIGHTS RESERVED

ABSTRACT

Jennifer Kling: The State Right of Self-Defense: A Claim in Need of Justification
(Under the direction of Bernard Boxill)

My dissertation focuses on the nature and conditions of the state right of self-defense. The claim that states have rights of self-defense that sometimes justify going to war is supported by appeal to the so-called domestic analogy, which likens states to individuals. Just as individuals have rights of self-defense that sometimes justify the use of lethal force, so too do states have rights of self-defense that sometimes justify going to war. But while the domestic analogy is both intuitively persuasive and a pervasive idea in the study of international relations, it does not succeed in justifying the claim that states have rights of self-defense.

Whatever reasons we have for accepting that individuals have rights of self-defense, such reasons do not provide grounds for concluding that states have rights of self-defense as well. I consider Locke's natural law theory of individual rights and the associated theory of state rights, Mill's instrumentalist theory of individual rights and the associated theory of state rights, and Rawls' theory of individual rights and the associated theory of state rights, and conclude that these different ways of cashing out the domestic analogy all fail to justify the claim that states have rights of self-defense.

However, this does not mean that we must conclude that states do not have rights of self-defense. States do have rights of self-defense when they fulfill one of their primary roles, namely, when they are organized so as to provide the protection that their populations deserve.

Such protection involves the state recognizing and respecting the dignity of its individuals, considered as rational autonomous agents, via its deliberative processes, laws, institutions, and policies. When states fail to recognize and respect the dignity of the members of their populations in these ways, they do not have rights of self-defense. Thus, inter-state interventions against such states are not straightforwardly ruled out as rights violations, but instead may be justified in certain circumstances.

To my advisors, family, and friends.
Thank you for all of your support and help—this work would not exist without you!

TABLE OF CONTENTS

| | |
|--|-----|
| CHAPTER 1: THE STATE RIGHT OF SELF-DEFENSE: A CLAIM IN NEED OF JUSTIFICATION..... | 1 |
| CHAPTER 2: THE LOCKEAN JUSTIFICATION FOR STATE RIGHTS OF SELF-DEFENSE..... | 16 |
| Locke's Transfer Theory of State Rights..... | 17 |
| The Right to Self- and Other-Preservation..... | 27 |
| The Right to Punish..... | 59 |
| The Transfer Theory of State Rights and Contemporary Just War Theory..... | 62 |
| Objections..... | 72 |
| CHAPTER 3: THE INSTRUMENTALIST JUSTIFICATION FOR STATE RIGHTS OF SELF-DEFENSE..... | 81 |
| The Classic Instrumentalist Argument for the Individual Right of Self-Defense..... | 88 |
| Casting Doubt on the Instrumentalist Argument for State Rights of Self-Defense..... | 101 |
| A Plausible Alternative Conclusion for the Proposed Instrumentalist View..... | 110 |
| A Mismatch Between the Conventional State Right of Self-Defense and Its Proposed Instrumentalist Justification..... | 114 |
| Conclusion..... | 121 |
| CHAPTER 4: THE RAWLSIAN JUSTIFICATION FOR STATE RIGHTS OF SELF-DEFENSE..... | 122 |
| The Rawlsian Argument for Individual Rights..... | 125 |
| The Analogous Rawlsian Argument for State Rights of Self-Defense..... | 133 |
| A Methodological Concern with the First International Original Position..... | 141 |

| | |
|--|-----|
| Methodological Concern Aside, Would the Representatives Agree?..... | 152 |
| Conclusion: Rawls' Overly Revisionary View of Just War..... | 167 |
| CHAPTER 5: JUSTIFYING THE STATE RIGHT OF SELF-DEFENSE..... | 169 |
| The Individual Right of Self-Defense: An Assumption (For the Time Being)..... | 173 |
| The Case for States: A Historical Argument..... | 175 |
| The State Right of Self-Defense..... | 179 |
| What Counts as Protection? The Individual Right of Self-Defense Revisited..... | 187 |
| An Implication for Just War Theory..... | 196 |
| REFERENCES..... | 202 |

CHAPTER 1: THE STATE RIGHT OF SELF-DEFENSE: A CLAIM IN NEED OF JUSTIFICATION¹

Contemporary just war theory, idealist² international relations theory, and international law all agree that states, when unjustly threatened with aggression, have a right to defend themselves in various ways, up to and including the use of war. Therefore, according to such theories, defensive wars have the potential to be just wars.³ While many theorists diverge on questions of what counts as aggression, what counts as a threat, and what counts as defense, the core idea, that states have a right to defend themselves from unjustified threats and attacks, in some cases by going to war, is widely agreed upon in the contemporary just war literature. Hence the general agreement that, if any species of war is just, it is defensive wars.

The importance of the state right of self-defense to contemporary just war theory cannot be overstated; that states have the right of self-defense is what makes it the case that defensive wars can be, in some instances, justified. As both Thomas Hurka and Jeff McMahan argue, the resort to war is justified only when there is a just cause for war. In the absence of a just cause, the resort to war is unjust. Continuing, they point out that the most widely accepted just cause for war recognized in the contemporary literature is self-defense against unjust aggression, *viz*, an

¹Many thanks to Bernie Boxill, Tom Hill, Carl Ficarrota, Jerry Postema, and the members of the Fall 2012 Dissertation Research Seminar at UNC-Chapel Hill for their many helpful comments on this chapter.

²In the political realm, ‘idealist’ theories are those which hold that moral considerations should play a role in state behavior. This is different than the classic use of the term in western philosophy generally.

³Defensive wars in response to aggression have the potential to be just wars; if they both meet the other criteria for being a just war (proposed criteria include, but are not limited to, that the resort to war be necessary, proportionate, have a reasonable hope of success, and be done with the right intention) and are conducted appropriately, just war theorists claim, then they are just wars. For good discussions of the criteria that must be met for the resort to defensive war to be justified, see both Crookston, “Strict Just War Theory and Conditional Pacifism,” and McMahan, “Just Cause for War.”

unjustified threat or attack that violates one's rights.⁴ McMahan goes on to argue for the existence of other just causes for war, such as humanitarian intervention, the recovery of goods lost to prior unjust aggression, and the prevention of future unjust aggression, in addition to the just cause of defending the state against unjust aggression. Throughout his argument, however, McMahan is clear that we can make sense of these causes as just causes for war in no small part because of their strong resemblance to the standard case of a just cause, namely, that of a state defending itself against unjust aggression.⁵ John Stuart Mill, conversely, argues for the claim that the *only* just cause for war is the defense of the state against unjust aggression; he understands this state right of self-defense to be a corollary of the state right of self-determination.⁶ Michael Walzer takes a middle position; he argues that the main just cause for war is defense against unjust aggression, but allows that in certain cases, humanitarian intervention can also be a just cause for war.⁷

My intention here is not to adjudicate between theorists regarding the appropriate set of just causes for war; rather, it is to point out the prevalence of the claim that defense of the state against unjust aggression is the primary just cause for going to war. Following Walzer, the overwhelming majority of contemporary just war theorists explain *why* this cause for war is just in terms of the state right of self-defense.⁸ As Walzer writes, “self-defense seems the primary and

⁴Hurka, “Proportionality in the Morality of War,” 35, and McMahan, “Just Cause for War,” 1. The schematic understanding of aggression here comes from Hurka and from Orend, *The Morality of War*, 31-2.

⁵McMahan, “Just Cause for War,” 12-17.

⁶Mill, “A Few Words on Non-Intervention,” 238-63.

⁷Walzer, *Just and Unjust Wars*, 51-58, 90. See also Rodin, *War and Self-Defense*, 141-2.

⁸Among the major contemporary theorists, Jeff McMahan alone seems to be careful to avoid making the claim that states have rights; nevertheless, he cites approvingly those traditional theorists, such as Grotius, St. Augustine, Vattel, and Vitoria, whom he thinks do understand unjust aggression as a violation of states' rights. See McMahan, “Just Cause for War,” 8. Contemporary theorists who understand this just cause for war in terms of the state right of self-defense include, among others, Michael Walzer, David Rodin, Thomas Hurka, and Brian Orend.

indisputable right of any political community, merely because it is *there* and whatever the circumstances under which it achieved statehood.”⁹ In other words, states are justified in defending themselves against unjust aggression, in some cases by going to war, because they have certain rights which, when violated, may be defended by any means necessary; put colloquially, they have the right to defend themselves from unjust aggression with lethal force (if such force is necessary to block or stop the relevant aggression). Cécile Fabre and Seth Lazar are explicit that “conventional just war theory...argues that the right to wage war in national defence is held by sovereign political communities [states].”¹⁰ The state right of self-defense, because it provides the primary justification for going to defensive war, is a cornerstone of contemporary just war theory. In addition, it also plays a large and essential role in international law and idealist international relations theory, insofar as both of these areas have been heavily influenced by the just war tradition.¹¹ As Margaret Moore puts it, “the right to defensive war is one of the pillars of international law and practice, and one of the least controversial aspects of the ethics of war.”¹²

My overall project is to examine this core idea of contemporary just war theory, that states have a right of self-defense that justifies, in some cases, going to defensive war. Why should we think that states have rights of self-defense that operate in this way? What, if anything, morally grounds this right of self-defense such that it has enough normative force to justify mass violence and death? In an effort to answer this question, and others in a similar vein, many just war theorists have suggested that we should think of states as analogous to individuals. Just as

⁹Walzer, *Just and Unjust Wars*, 82, italics in original.

¹⁰Fabre and Lazar, “Introduction,” 1.

¹¹Roth, *Governmental Illegitimacy in International Law*, McMahan, *Killing in War*, and Johnson, *Just War Tradition and the Restraint of War*.

¹²Moore, “Collective Self-Determination, Institutions of Justice, and Wars of National Defence,” 185.

individual people have a right of self-defense that justifies, in certain circumstances, the use of lethal force, the thought goes, so too do states. Walzer is explicit that “states actually do possess rights more or less as individuals do...our primary perceptions and judgments of [international] aggression are the products of analogical reasoning.”¹³ Moore agrees, writing that “much of the support...for defensive rights to war is based on...[the] analogy between individual self-defence and collective (or national) self-defence.”¹⁴ So, by considering how and when individuals may justifiably defend themselves, we can determine how and when states may justifiably defend themselves. Michael Walzer calls this comparison of states to individuals “the domestic analogy,” and regards it as central to the explication and understanding of just war theory.¹⁵ As David Rodin points out, this analogy is ubiquitous in political theory; he writes that “it is difficult to overstate the importance of this idea in the history of international ethics, international law, and political philosophy.”¹⁶ The domestic analogy between individuals and states has been invoked by, among others, Plato, Thucydides, Augustine, Aquinas, Machiavelli, Grotius, Vattel, Vitoria, Hobbes, Rousseau, Kant, Mill, Morgenthau, Bull, Walzer, Nozick, Orend, Rodin, Hurka, and McMahan in an effort to explain the moral status and operation of states in the international arena.¹⁷ As Charles Beitz puts it, “perceptions of international relations have been more thoroughly influenced by the analogy of states and persons than by any other device...a standard application [of the analogy] is the idea that states, like persons, have a right

¹³Walzer, *Just and Unjust Wars*, 58.

¹⁴Moore, “Collective Self-Determination, Institutions of Justice, and Wars of National Defence,” 185.

¹⁵Walzer, *Just and Unjust Wars*, 58-9.

¹⁶Rodin, *War and Self-Defense*, 141.

¹⁷In much of traditional and contemporary just war theory, the comparison goes from individuals to states. Plato, however, famously goes from city-states to individuals. Plato, *Republic*, Book II, 368d-369a.

to be respected as autonomous entities.”¹⁸

But while the domestic analogy clearly connects the state right of self-defense with the individual right of self-defense, the nature of this connection is not spelled out by the analogy itself. Hugo Grotius, invoking the domestic analogy, writes that “what has been said by us up to this point, concerning the right to defend oneself and one’s possessions, may be made applicable also to public war, if the difference in conditions be taken into account.”¹⁹ Grotius draws on the domestic analogy to make the point that the right of self-defense, or as he sometimes calls it, self-preservation, justifies both individual (private) acts of self-defense and state (public) acts of self-defense, such as going to defensive war. The relevant difference of conditions that he mentions is the lack of legal recourse in the international case.²⁰ And while this clearly does make a difference, Grotius' position seems to be that we can, with appropriate, non-extensive modifications, apply what we know about the individual right of self-defense to the state right of self-defense. The problem, though, is that it is not obvious why we can do this; the domestic analogy does not present an argument for why we should apply conclusions from the individual case to the state case. “The default view” in contemporary just war theory is “the thesis that the principles governing the justification of defensive war are identical to those that justify defensive acts in ordinary life.”²¹ But other than the weight of tradition, why should we accept this view? Or, to put it another way, why should we regard the domestic analogy as either a good, or appropriate, or justifying, analogy?

This is an essential question, given the prevalence of the domestic analogy not only in

¹⁸Beitz, *Political Theory and International Relations*, 69.

¹⁹Grotius, *De Jure Belli Ac Pacis*, bk. II, ch. 1, 184.

²⁰Grotius, *De Jure Belli Ac Pacis*, bk. II, ch. 1, 184.

²¹Fabre and Lazar, “Introduction,” 4.

contemporary just war theory, idealist international relations, and international law, but also in “the popular imagination.”²² As Hans Morgenthau points out, “[the] application of domestic experience to international experience is really a main stock-in-trade of modern international thought.”²³ And this is understandable, given the intuitive nature of the domestic analogy. After all, it not only aligns with our tendency to personify states,²⁴ but also vindicates our thought that the domestic and international spheres are importantly connected. As Hedley Bull writes, “The ‘domestic analogy’ is the argument from the experience of individual men in domestic society to the experience of states...the conditions of an orderly social life, on this view, are the same among states as they are within them: they require that the institutions of domestic society be reproduced on a universal scale.”²⁵ And not only does the domestic analogy generally connect domestic and international society in a way that appears sensible, but it also (nicely) does not make an exception of war. Rather than claiming that war is a special, unique activity to which the ordinary, everyday rules do not apply, the domestic analogy recommends simply extending our thinking about instances of individual self-defense to instances of war in the appropriate way. Thomas Hurka acknowledges this when he writes, “since our intuitions about [individual] self-defense are often clearer than our intuitions about war, we can make progress with just war by considering parallel cases involving individuals.”²⁶

²²Moore, “Collective Self-Determination, Institutions of Justice, and Wars of National Defence,” 185.

²³Morgenthau, *Scientific Man versus Power Politics*, 113.

²⁴Call to mind here the frontispiece of *Leviathan*, wherein the sovereign is depicted as a large man made up of tiny men. See Hobbes, *Leviathan*. Also, think about the language that historians and statesmen use: they note that some states have “special relationships,” talk about the “consent” or “dissent” of states to treaties and international actions, and regularly discuss the “birth” and “death” of states. See, among others, Tocqueville, *Democracy in America*, Burke, *Reflections on the Revolution in France*, and Churchill, *Into Battle*. Of course, this does not provide evidence in favor of accepting the domestic analogy; it merely shows that the domestic analogy is prevalent in and influences our discourse.

²⁵Bull, “Society and Anarchy in International Relations,” 35.

²⁶Hurka, “Proportionality in the Morality of War,” 39.

The domestic analogy, as presented in contemporary just war theory, is at once both prevalent and intuitive. But despite this, it is difficult to see how, precisely, it works as a justificatory argument for the cornerstone claim of contemporary just war theory, the claim that states have rights of self-defense that sometimes justify going to defensive war. It certainly appears illustrative as an analogy, but analogies, as such, are not in themselves justifications. Hurka recognizes this when he writes, in reference to the domestic analogy, that “this type of argument cannot be decisive, since there is no guarantee that what holds in the two domains is identical. But it is suggestive.”²⁷ So on the one hand, Hurka is aware that the domestic analogy alone does not provide justification for the claim that states have rights of self-defense. But on the other hand, Hurka, like many other contemporary just war theorists, does seem to regard the domestic analogy as doing some argumentative work, or at the very least as providing some suggestions for the sort of justificatory argument that will work to support the traditional state right of self-defense that is espoused in contemporary just war theory. And this is important, because if the domestic analogy cannot be cashed out appropriately in any sense, then there is no reason to regard it as helpfully illustrative. Bluntly, if the domestic analogy is a bad analogy, then we ought not use it, not even as a heuristic, to draw conclusions about when and why states may go to war.

Considering the matter, there are two types of arguments that could support the claim that states have rights of self-defense, such that using the domestic analogy to illuminate the state right of self-defense would be appropriate. The first type of argument, which I discuss in Chapter 2, might be regarded as either inferential or reductive: either we infer state rights from individual rights, or we reduce state rights to individual rights. The general strategy of this type of argument, which I call the Lockean argument for state rights, is to begin with individual rights,

²⁷Hurka, “Proportionality in the Morality of War,” 39.

and then explain how, through an implicit or explicit contractual process, certain of these individual rights are transferred to the state. As Douglas Lackey, a proponent of this type of view, argues briefly, the “justice of defensive wars is inferred from the right of personal self-defence.”²⁸ Among contemporary just war theorists, Michael Walzer seems to adopt this type of view, as does Jeff McMahan.²⁹ While Lackey, Walzer, and McMahan all refrain from spelling out the argument in detail, instead relying on the domestic analogy to support their specific claims about the state right of self-defense, they all seem to conclude that the state right of self-defense comes from, or can be ultimately reduced to, the defensive rights of individual citizens.³⁰ If this type of argument for the state right of self-defense, however it is spelled out, turns out to be correct, then it does seem appropriate to utilize the domestic analogy to illuminate the state right of self-defense, because according to this picture, a state's right of self-defense is closely related to, if not identical with, the organized exercise of its citizens' individual rights of self-defense.

I argue that this Lockean reductive reading of the domestic analogy cannot justify the claim at the heart of contemporary just war theory, *viz*, the claim that states have rights of self-defense that sometimes justify going to defensive war. I argue that, if the state right of self-defense is reducible to the organized exercise of citizens' individual rights of self-defense, then the state will have similar, if not identical, limitations on the exercise of its right of self-defense as individuals do on their rights of self-defense. One of the key limitations on the individual right

²⁸Lackey, *The Ethics of War and Peace*, 18.

²⁹Walzer, *Just and Unjust Wars*, and McMahan, “Just Cause for War.”

³⁰While Walzer supports a wholly reductive picture, McMahan is cagier; he does admit the possibility of harms against collectives that are not reducible to harms against individuals, although he is not clear on how much of a role such collective harms play, or how their existence ought to alter our conception of the state right of self-defense. McMahan, “Just Cause for War,” 12. Walzer, *Just and Unjust Wars*, 53-55, and “The Moral Standing of States,” 210-12. Lackey does not spell out the argument in enough detail to make it clear whether he supports a wholly or mostly reductive picture. Lackey, *The Ethics of War and Peace*, 17-9.

of self-defense, I argue, is responsibility. Put briefly, I understand the limitation of responsibility on the individual right of self-defense to be as follows: when an individual is attacked, she is morally justified in defending herself only against the person morally responsible for the attack.³¹ She may not justifiably defend herself by attacking innocent bystanders or innocent threats. If this limitation also holds for the state right of self-defense (which I argue it would if the broadly Lockean argument for the state right of self-defense is correct), then, I argue, states are never, practically speaking, justified in going to war, because war, as it is practiced in the contemporary world, necessarily involves attacking innocent threats (coerced soldiers) and usually involves attacking innocent bystanders (civilians who are in the way). So, I conclude that insofar as contemporary just war theorists want to maintain that the state right of self-defense sometimes justifies going to defensive war, they cannot accept the argument that the state right of self-defense is reducible to, or inferred from, the organized exercise of individuals' rights of self-defense.

But my argument in Chapter 2 does not suffice to dismiss the domestic analogy altogether, because as I mentioned above, the domestic analogy also points to a second type of argument that could support the claim that states have rights of self-defense that sometimes justify going to war. This second type of argument, which I discuss in Chapters 3 and 4, is a straightforward argument by analogy: states have rights of self-defense similar to individual rights of self-defense, we might think, because states and individuals are relevantly similar to each other, such that the reasons that we have for thinking that individuals have rights of self-defense ground the conclusion that states have rights of self-defense as well. The general strategy of this type of argument is to provide a specific argument for individual rights of self-defense,

³¹The legal doctrine differs here; in many contemporary legal systems, a person is legally justified in defending herself not only from morally responsible aggressors, but also from innocent threats, such as crazed persons. However, for my purposes, I am focusing on the morality, rather than the legality, of self-defense.

and then show that a parallel, if not identical, argument justifies state rights of self-defense. Strictly speaking, this strategy makes the argument for individual rights and the argument for state rights logically independent from each other; however, if the domestic analogy is to be properly illuminating in the way that contemporary just war theorists take it to be, the two arguments (for individual rights and for state rights) must be very similar, both in terms of structure and content. If this type of argument, however it is spelled out, turns out to be correct, then it does seem appropriate to use the domestic analogy to demonstrate the proper operation of the state right of self-defense, because according to this picture, states *are* relevantly similar to individuals, and so it is both understandable and plausible that their rights of self-defense work in similar ways.

However, because there are different ways of arguing for individual rights, there are different ways of making the argument (by analogy) for state rights. In Chapter 3, I discuss the so-called instrumentalist argument for individual rights. The existent system of individual rights is best conducive to overall individual well-being, the argument goes, and so we have good reason to maintain, approve of, and defend that system. This is John Stuart Mill's argument for individual rights. The corresponding argument for state rights, then, is analogous: the existent system of state rights is best conducive to overall individual well-being, and so we have good reason to maintain, approve of, and defend that system. The domestic analogy is illustrative, given this kind of argument, because both systems of rights arise out of a concern to attain the same end, namely, the greatest promotion of overall individual well-being. The instrumentalist argument for state rights also makes sense of the presumption, common in contemporary just war theory, that all states have rights of self-defense, regardless of their internal political structure.³²

³²Doppelt, "Walzer's Theory of Morality in International Relations," 6-8. See also, among others, Walzer, *Just and Unjust Wars*, Rodin, *War and Self-Defense*, and Luban, "Just War and Human Rights," 164-5.

After all, if the system of state rights is best conducive to overall individual well-being, then we should assume that states do have rights of self-defense in the absence of very good reasons to think otherwise.

I argue that we have good reasons to doubt that such a Millian-style instrumentalist argument successfully justifies the conventional state right of self-defense. It is implausible to think, given both the contextual differences between domestic society and international society and the lessons of history, that the traditional state right of self-defense, as it is currently understood in contemporary just war theory, is best conducive to overall individual well-being. The system of states rights that is the current working assumption of idealist international relations, international law, and just war theory is in fact harmful to a significant portion of the world's population, insofar as it serves—and it commonly does—to justify states' going to war. In addition, Millian-style instrumentalists have a feasible alternative to an anarchic system of sovereign states; they could (and I think, given the harmful nature of the current system, they should) argue that an appropriately-structured world state would be more conducive to overall individual well-being than the current system. The availability of this feasible alternative, in combination with the apparent harm caused by the widely-accepted conventional state right of self-defense, provides a good reason to think that the proposed instrumentalist argument does not ground the conclusion, espoused in contemporary just war theory, that states have traditional rights of self-defense. I conclude this chapter by pointing out that the proposed Millian-style instrumentalist justification for state rights of self-defense makes those rights conditional on their being best conducive to overall individual well-being. Many, if not most, contemporary just war theorists do not want to understand state rights of self-defense as being conditional in this way; this suggests that they have yet another good reason to set aside the proposed instrumentalist

justification for the state right of self-defense in favor of some other, more friendly justification.

In Chapter 4, I take up another way of cashing out the domestic analogy that has been influential in contemporary just war theory. In *A Theory of Justice*, John Rawls famously argues for his two ideal principles of domestic justice on the grounds that they are the principles that would be accepted and endorsed by persons choosing principles of domestic justice for their closed, well-ordered society, when they are behind a veil of ignorance in an appropriately situated fair deliberative position. In *A Law of Peoples*, Rawls makes an analogous, or parallel, argument for his principles of international justice, which include the principle that states (or peoples, as he puts it) have a right to go to war in self-defense. He argues that representatives of liberal states, choosing principles of international justice for their closed, well-ordered society of states from behind a veil of ignorance in an appropriately situated fair deliberative position, would accept and endorse the state right of self-defense. The domestic analogy would be helpfully illustrative, given an argument of this kind, because it nicely indicates the similarities between Rawls' argument for the ideal principles of domestic justice and his argument for the ideal principles of international justice.

I argue that Rawls' justification for the state right of self-defense does not successfully support the traditional state right of self-defense that is espoused in contemporary just war theory, for two main reasons. For starters, the representatives of liberal states in Rawls' first international original position, given their knowledge and presuppositions about the nature of their closed society of liberal states, would not accept and endorse (as an ideal principle of international justice) the principle that all states in the society of states have rights of self-defense that sometimes justify going to war. And secondly, I argue that the representatives in the second and third international original positions, considering the existence of decent (non-liberal but

non-aggressive) and outlaw (internally or externally aggressive) states in turn, would not accept and endorse the principle that all, or even most, states have rights of self-defense. Instead, because of their fundamental interest in furthering justice for all the people of the world, the representatives would accept and endorse a state right of self-defense limited solely to liberal states. So Rawls' way of cashing out the domestic analogy, while it is consistent, fails to justify the universal state right of self-defense that contemporary just war theorists place at the heart of the just war tradition.

Although I do not argue against every possible iteration of the domestic analogy, the sustained argumentation in Chapters 2, 3, and 4 is meant to show that there are good reasons for concluding that the domestic analogy, as a general strategy, will not work to provide a justification for the state right of self-defense. So in Chapter 5, I provide an independent argument, one not based on the domestic analogy, for the state right of self-defense, and conclude that some—but not all—states have rights of self-defense that sometimes justify going to war. Basically, I argue that states have rights of self-defense when they are organized so as to properly protect their populations. I begin with the assumption that individuals have rights of self-defense, and then argue that, in a world of states, states are the institutions best situated to provide the protection that individuals deserve in virtue of having such individual rights of self-defense. When states are fulfilling this protective role in regards to their populations, they have rights of self-defense that sometimes justify going to war, because such state rights of self-defense enable states to better protect their populations. Conversely, states that are not fulfilling their protective role do not have rights of self-defense. Put simply, I argue that the state right of self-defense, unlike the individual right of self-defense, is conditional on a state's being organized so as to fulfill its protective role. To fill out my argument, I explain that a state is

organized so as to fulfill its protective role when its deliberative processes, laws, institutions, and policies recognize and respect, for the most part and to the extent possible, the dignity of the members of its population, considered as rational autonomous agents.

Contrary to common opinion, then, I conclude that not all states have rights of self-defense, because not all states are organized so as to properly protect their populations. This has a number of implications for contemporary just war theory, perhaps the most important of which concerns inter-state interventions. While it does not follow from a state's not having a right of self-defense that all, or even most, interventions against it are justified, it does follow that such proposed interventions cannot be straightforwardly ruled out as rights violations. So the question of whether and when to intervene in another state's domestic affairs is in fact much more complicated than contemporary just war theory standardly allows. My view of the state right of self-defense, I contend, is nicely sensitive to these complications.

My primary goal in this chapter has been to set up the problem to which my dissertation is a response. The cornerstone of contemporary just war theory, the claim that states have rights of self-defense—comparable to individual rights of self-defense—that sometimes justify going to war, stands in need of justification. It is insufficiently defended by contemporary just war theorists themselves, who (perhaps understandably) commonly cite the domestic analogy in defense of this claim before quickly moving on to detail their understanding of the moral shape of war. But, while the domestic analogy is widespread, it is not by itself a justificatory argument for the claim that states have rights of self-defense. So, investigation is needed to see whether the domestic analogy can be cashed out in a way that justifies the state right of self-defense, and if not, whether it is possible to give an independent argument for the claim that states have rights of self-defense that sometimes justify going to war. I undertake this investigation in the following

chapters.

In closing, I would like to point out that there are both practical and theoretical reasons to care about whether this claim can be justified, and, if it can be, about what form that justification takes. Practically speaking, the stakes surrounding this claim are very high; the state right of self-defense, as it is espoused in contemporary just war theory, purports sometimes to justify mass killing, mass death (in the form of collateral damage), population displacement, economic collapse, and a host of other serious, large-scale harms. Furthermore, contemporary just war theory has a recognizable impact on both international law and states' foreign policies.³³ Given the nature and scale of the harms that just war theory purports sometimes to justify, as well as the very real impact that just war theory has on international policy, it is practically important to determine whether the cornerstone of just war theory is itself justified. And theoretically speaking, the form that the justification for the state right of self-defense takes will impact the nature of the conclusions that contemporary just war theorists reach about the operation and limitations of the state right of self-defense. Thus, it is reasonable to think that there needs to be a justification for this claim in place before proponents of just war theory can rightly move forward and make specific claims about the moral status of various aspects of war.

³³Luban points out the impact of just war theory on international law in "Just War and Human Rights," 160-3. Owen points out the impact of just war theory on states' foreign policies in "How Liberalism Produces Democratic Peace," 87-8, as does McMahan in "Just Cause for War," 1.

CHAPTER 2: THE LOCKEAN JUSTIFICATION FOR STATE RIGHTS OF SELF-DEFENSE¹

In this chapter, I argue for the following conditional claim: if one accepts the Lockean argument for state rights of self-defense, then one cannot accept the received view of the state right of self-defense found in contemporary just war theory. What follows from this Lockean argument about what it is justifiable to do in the prosecution of a war contradicts, I contend, what contemporary just war theorists claim it is justifiable to do in the prosecution of a war. To argue for this conditional claim, I first present Locke's argument that all state rights are, as John Simmons puts it, "the redistributed natural rights of citizens."² Then, I argue that this reductive understanding of state rights entails certain conclusions about what sorts of wartime actions are justified. In particular, I argue that, according to the Lockean picture, only those combatants who are morally responsible for unjust attacks may be justifiably attacked. This conclusion, however, goes against contemporary just war theory, which maintains that moral responsibility for an unjust attack is not required for moral liability to attack; all that is required is that combatants be causally responsible for posing a threat. If combatants pose a threat, contemporary just war theorists maintain, then they may be justifiably attacked, regardless of whether they are morally responsible for posing that threat. Thus, I conclude, the Lockean understanding of what is justified in war, which flows from the Lockean justification for state rights of self-defense, is radically at odds with the received view in contemporary just war theory. I then argue that, given

¹Many thanks to Bernie Boxill, Tom Hill, Jerry Postema, Carl Ficarrota, and the members of the Fall 2013 Dissertation Research Seminar at UNC-Chapel Hill for their many helpful comments on this chapter.

²Simmons, *The Lockean Theory of Rights*, 124.

the truth of this conditional claim, contemporary just war theorists have reason to reject the Lockean argument for state rights of self-defense in favor of some other, more friendly, view.

I. Locke's Transfer Theory of State Rights

One straightforward way of justifying the claim that states have rights of self-defense that operate in a certain way (namely, similarly to individual rights of self-defense) is to argue that the state has such rights because certain of its citizens' rights are transferred to it via an implicit or explicit contractual, consensual process. This is the Lockean justification for state rights; state rights literally are assembled (via a contractual, consensual process) from, and so ultimately are reducible to, individual citizens' rights. John Simmons puts the Lockean point clearly when he writes, “governmental rights, then, are simply composed of the natural rights of those who become citizens, transferred to government by some voluntary undertaking (e.g., contract, consent, or the granting of a trust).”³ Understood in this way, we might say that 'state rights' is shorthand for the organized exercise of its citizens' individual rights. According to this picture, then, the state may justly do no more than individuals in the non-political state of nature may justly do.⁴ By implication, the 'state right of self-defense' is shorthand for the organized exercise of its citizens' individual rights of self-defense. Thus, to see how the state right of self-defense operates, that is, to see its structure and limitations, we should consider the structure and limitations of the individual rights that make up the resulting state right. Notice that, according to this justification of state rights, the domestic analogy is particularly apt; state rights of self-defense will operate identically to individual rights of self-defense because the latter comprise the former.

Locke argues first that individuals have natural rights in a non-political state of nature,

³Simmons, *The Lockean Theory of Rights*, 123-4.

⁴In other words, state rights are not “bigger” than their component individual rights; no new rights blossom out of the political association of individuals.

moral rights that they are born to, so to speak.⁵ Every person is naturally in this non-political state of nature, Locke claims, “till by their own consents they make themselves members of some politic society.”⁶ He then argues that the existence of certain of these natural rights, in particular, the right to punish those who transgress against the law of nature, creates inconveniences in this non-political state of nature. The law of nature, for Locke, is that “every one...when his own preservation comes not in competition, ought he, as much as he can, to preserve the rest of mankind, and may not, unless it be to do justice to an offender, take away or impair the life, or what tends to the preservation of life, the liberty, health, limb, or goods of another.”⁷ When a person in the non-political state of nature violates the law of nature, that is, when she attacks the life, body, liberty, or property of a person who has not broken the law of nature, everyone else who is in a non-political state of nature with regards to her⁸ has a right to punish her for her offense. But because people are both biased in regards to their own cases and apathetic in regards to others' cases, they end up punishing others for violations of the law of nature both too harshly and too lightly, creating “confusion and disorder.”⁹ This chaos in turn leads people to join together into a political society, or commonwealth, to which they give their

⁵I do not have the space here to discuss in detail Locke's theory of natural rights, nor to argue in favor of it. This is less problematic, I think, if one remembers that I am committed merely to the conditional claim that if one accepts the Lockean picture, then one cannot unproblematically accept the received view of contemporary just war theory. Nowhere do I argue that, in fact, one ought to accept the Lockean picture of natural rights.

⁶Locke, II, 15. For Locke, a person is in a state of nature when she has not consented to join a legitimate political society; hence I refer to it as a 'non-political' state of nature, to distinguish it from the perhaps more familiar Hobbesian state of nature. See Simmons' “Locke's State of Nature” for a good discussion of the differences between the Lockean and the Hobbesian state of nature.

⁷Locke, II, 6.

⁸That is, everyone who has not consented to join a legitimate political society with her. For Locke, the non-political state of nature is relational; persons can be in a political society with respect to some people and in a non-political state of nature with respect to other people, because it depends on with whom one has consented to join a legitimate political society. Locke, II, 14.

⁹Locke, II, 13.

rights to punish those who violate the law of nature.¹⁰ It is in this transfer of individual natural rights that we have, as Locke puts it, “the original right of both the legislative and executive power, as well as of the governments and societies themselves.”¹¹

More carefully, Locke claims that each person has at least “two powers,” or natural rights, in the non-political state of nature that he subsequently gives to the commonwealth: the first is “to do whatsoever he thinks fit for the preservation of himself and others within the permission of the law of nature” and the second is “to punish the crimes committed against that law [of nature].”^{12,13} (As Simmons points out, Locke here uses 'power' and 'right' interchangeably; a power, or right, for Locke, is in this instance a “moral ability” to treat other people in certain ways.¹⁴) Locke then writes that “both [of] these [rights or powers] he [every person] gives up when he joins in a...particular politic society, and incorporates into any commonwealth, separate from the rest of mankind.”¹⁵ The first individual natural right, the right of self- and other-preservation within the law of nature, is given up to be “regulated by laws made by the society,” and the second, the right to punish those who transgress against the law of nature, is given up to “assist the executive power of the society, as the law thereof shall

¹⁰Locke, II, 124-127.

¹¹Locke, II, 127.

¹²Locke, II, 128.

¹³Of course, Locke thinks that we have other natural rights in the non-political state of nature as well; for the purposes of my argument, I focus on these two natural rights, as they are the two that individuals transfer to the commonwealth.

¹⁴Simmons, *The Lockean Theory of Rights*, 72. Simmons is clear that there are at least four different kinds of individual rights at work in Locke, one of which is this notion of a power, or a moral ability to treat others in certain ways. As I am concerned with individual and state moral abilities, I focus on this kind of right. See Simmons, *The Lockean Theory of Rights*, chapter 2, for a discussion of the four different kinds of individual rights at work in Locke.

¹⁵Locke, II, 128.

require.”¹⁶ These two individual natural rights are, for Locke, transferable; unlike a person's liberty right, which he “cannot, by compact, or his own consent” give up to another, individuals can transfer, or give up, their rights to self- and other-preservation and to punish.¹⁷ Individuals, in joining a commonwealth, give up their natural right to self- and other-preservation within the law of nature and their natural right to punish transgressors of the law of nature to that commonwealth. The commonwealth then entrusts those rights to the government, or state, which, as a result, has the authority and obligation—in virtue of having been entrusted with these two of its citizens' natural rights—to create and enforce laws pertaining to self- and other-preservation and punishment.¹⁸

It is important to note here that, while individuals wholly, or absolutely, give up their natural right to punish to the commonwealth, they give up their natural right to self- and other-preservation only partially, or conditionally. As Locke points out, even in a political society, you retain the right to act so as to preserve yourself and others in extreme, life-threatening situations, that is, you retain the right to save yourself when the executors of the society's laws are not there to save you. As Locke writes, “I may kill...a thief...when he sets on me...because the law, which was made for my preservation, where it cannot interpose to secure my life from present force, which, if lost, is capable of no reparation, permits me my own defence...because the aggressor allows not time to appeal to our common judge, nor the decision of the law, for remedy in a case

¹⁶Locke, II, 129-130.

¹⁷Locke, II, 23. Locke clearly recognizes a difference between, as they are called in the contemporary philosophical literature, inalienable (non-transferable or non-renounceable) and alienable (transferable or renounceable) rights. As Simmons points out, while Locke clearly thinks some individual rights are inalienable, “Locke's position” in regards to the creation of “civil society...requires the optionality [transferability] of (some) natural rights.” Simmons, *The Lockean Theory of Rights*, 76, footnote 28. Arguably, for Locke, part of what it is to have the individual natural rights to self- and other-preservation and to punish is to have the ability to transfer them.

¹⁸Note that, in order to be entrusted with something, the relevant person or group has to both be offered the thing and accept it. Strictly speaking, the acceptance of the trust, once offered, is what engenders the relevant authority and obligations.

where the mischief may be irreparable.”¹⁹ The laws are made in order to preserve individuals; thus, when the executors of the law cannot intervene in a life-threatening situation—perhaps because they are too far away, or too thinly spread out to help—in order to preserve the threatened individual, that individual has the right to preserve herself.²⁰ Unlike the natural right to punish, then, individuals do not wholly give up their natural right to self- and other-preservation to the commonwealth. While the right is transferable, individuals transfer it on the condition that they retain the moral ability, or right, to defensively attack their life-threatening aggressors when no duly authorized help is available or forthcoming. The executors of the law, i.e. the people who make up the institution of the state, are authorized to enforce the law in virtue of having been entrusted, by the commonwealth, with the individual rights of the citizens of the state, and furthermore are obliged to enforce the law in virtue of having accepted that trust. However, such authorized executors cannot be everywhere (this is Locke's pragmatic point in the above passage), and so when a life-threatening situation arises in their absence, individuals retain the right to defend themselves. Nevertheless, when the authorized executors are present, they, and not the individual citizens, have the right to defend those individual citizens, in virtue of their having been entrusted with the individuals' natural rights to self- and other-preservation and to punish (where their being entrusted with those rights entails their having accepted that trust).

The relationship between the state and its citizens, then, is that of any other institution to its constituents. According to the Lockean contractual view, the state, or government, is not an independently existing entity over and above its citizens, with vastly different rights, powers, and obligations, but rather simply a group of citizens entrusted with certain powers by their fellow

¹⁹Locke, II, 19.

²⁰For example, if you are being threatened by a serial killer and the police officers cannot get to the scene of the attack in time to save you, you have the right, even in a political society, to defensively attack the serial killer in order to save yourself.

citizens for the purpose of preserving all of their lives, bodies, health, liberty, and property. As a result of being entrusted with (which entails their acceptance of the trust) their fellow citizens' individual rights to self- and other-preservation and to punish for this purpose, the group of citizens who make up the government, or state, have certain obligations, namely, to create and enforce laws relating to self- and other-preservation and punishment that operate for the common good. As Locke writes, in virtue of being entrusted with such power, i.e. being offered such power and accepting it, for this reason, "whoever has the legislative or supreme power of any commonwealth, is bound [obliged] to govern by established standing laws...by indifferent and upright judges...and to employ the force of the community at home, only in the execution of such laws; or abroad to prevent or redress foreign injuries, and secure the community from inroads and invasion. And all this to be directed to no other end but the peace, safety, and public good of the people."²¹ So, the state not only has certain rights, or powers, in virtue of individuals transferring their individual rights to self- and other-preservation and to punish to the commonwealth, but it also has certain obligations to those individuals, because of the reason for their transfer and subsequent entrusting of individual rights. It is important that the individual natural rights are *transferred* to the commonwealth and subsequently *entrusted* to the state. (As I noted above, the concept of being entrusted with something includes the idea that whoever is being entrusted with the thing accepts it and its attendant obligations.) Because the rights in question are merely entrusted to the state, and not transferred, said rights can be taken back again by the commonwealth if the state fails to fulfill the obligations that it has in virtue of being entrusted with the individual rights of its citizens.²²

²¹Locke, II, 131.

²²This is one of the key differences between Locke and Hobbes. Because Locke has a two-step rather than a one-step process (contra Hobbes) for the creation of the state, it is possible for the Lockean state to be dissolved without its citizens reverting back to a non-political state of nature.

The state, then, is simply a group of citizens who, as a result of being entrusted with certain powers, have an obligation to use those powers in a particular way, namely, for the good of the individuals who gave them that power. The state, according to Locke, is not an independent entity that is different in kind from its citizens; it is just more citizens, in particular, it is just “whoever has [been entrusted with] the legislative or supreme power” and thus “is obliged to secure every one's [life, body, liberty, and] property.”²³ So, although our everyday language indicates that the state is an independently-existing entity—we talk about the actions of the United States, rather than the actions of the people who are currently entrusted with the individual rights to self- and other-preservation and to punish of the citizens of the United States—this language, for Locke, is misleading. To accurately reflect Locke's view of the relationship between the state and its citizens, we should discuss the actions of the people who are currently entrusted with the individual rights to self- and other-preservation and to punish of their fellow citizens, and we should discuss their actions in light of the power that they have been entrusted with and the subsequent obligations that they have. Furthermore, we should discuss their actions not only in light of the special obligations that they have in virtue of having accepted the trust of their fellow citizens' individual rights, but also in light of the obligation to obey the law of nature that they have as individuals. As individuals, the creators and executors of the law are bound by the law of nature to preserve all mankind as much as possible; as creators and executors of the law, they are bound to act for the common good of their citizens as much as possible. (As I shall explain below, it is this obligation that they have as individuals that blocks aggressive wars.) So, although the relationship between the state and its citizens is complex, it is not mysterious; the state is simply a group of citizens who have, in addition to their usual obligations in virtue of

²³Locke, II, 131. Although Locke says “every one” here, it is clear, given the context, that he means every citizen, i.e. every member of the commonwealth.

being individuals, special obligations to their fellow citizens in virtue of having been entrusted with those citizens' individual rights for a particular purpose.²⁴

This is a decidedly minimalist understanding of the state, which can be seen as either a benefit of, or as a problem with, Locke's view. On the one hand, Locke's understanding of the state and its relationship with its citizens is straightforward and, I think, fairly clear; there is nothing spooky about the constitution (in the metaphysical sense) of the state, or about the origin or nature of its powers and obligations. On the other hand, Locke's view, as he himself understands,²⁵ has some very counter-intuitive results, including the conclusion that if all of the perpetrators of an unjust state action are dead (where 'the perpetrators' includes not only those who actually committed the action, but also those who actively encouraged and consented to the action), then no one can be justly punished for that action, although reparations of some sort may be justly demanded. For instance, consider the theft of the Elgin Marbles by Great Britain. Assuming that the perpetrators of the theft are dead, Great Britain cannot be punished for the theft, because there is no independently-existing abstract entity called 'Great Britain' that is responsible for the theft; at most, there are a number of government officials and British citizens, now deceased, who were responsible for the theft. So, Greece cannot justly demand the subsequent punishment of either Great Britain as a whole or any of Great Britain's citizens.²⁶ However, Greece can justly demand from the thieves' descendants the return of the Elgin Marbles or other suitable reparations. Locke is clear that stolen property remains stolen,

²⁴It may, of course, happen that these two sets of obligations can come into conflict with one another, although I suspect that this is less common than people intuitively think. Although Locke does not address this issue specifically, he seems to imply that the special obligations should take precedence, and I tend to agree. However, I add the caveat that, in such a case, compensation should be made (if possible) to those non-citizens who lose out as a result of resolving the conflict in this manner.

²⁵Locke, II, 103, 175.

²⁶Thanks to Luke Elson for this helpful example.

regardless of the amount of time that goes by.²⁷ Hence, in his view, neither the thieves nor their descendants ever acquire a right to the stolen property, and so it is always open to Greece to demand, not punishment, but the return of the Elgin Marbles or other suitable reparations.

More broadly, if the state, that is, if the group of citizens entrusted with the relevant individual rights of their fellow citizens, misuses the power so entrusted to it, then that misuse is the fault of that group of citizens, not the state understood as an abstract whole. As Locke writes, “the people having given to their governors no power to do an unjust thing...they ought not to be charged as guilty of the violence and injustice [of their governors]...any farther than they actually abet it.”²⁸ Only the governors who perpetrate the unjust state action, as well as those who abet it, i.e. who encourage and consent to it, are guilty of it and so can be justly punished for it. (This follows from Locke's understanding of the relationship between the state and its citizens. The state, having been entrusted with the individual rights of its citizens, is responsible for how it chooses to use those rights.) Although it can be tempting to do, it is a mistake, in the Lockean framework, to think of states as independent entities over and above their citizens. Instead, we should think of groups of citizens, or even individual citizens, who are entrusted with particular powers and who, as a result, are obliged to use those powers in certain ways.

According to the Lockean picture, the government, or state, not only has the obligation to take certain actions, it also has the right to take those actions because it is entrusted with citizens' rights that, in a non-political state of nature, would justify those actions. In short, “the citizens' executive rights, once entrusted to government, become the executive power of the state.”²⁹ What the state has the power to do justifiably in service of its obligations then, both in general and in

²⁷Locke, II, 176, 192. This is contrary to Jeremy Waldron's view in “Superseding Historic Injustice.”

²⁸Locke, II, 179.

²⁹Simmons, *The Lockean Theory of Rights*, 127.

times of war, depends on what those citizens' rights would justify doing in the non-political state of nature. As Locke writes, the state's power is

[T]he joint power of every member of the society given up to that person or assembly which is legislator; it [the state's power] can be no more than those persons had in a state of nature before they entered into society, and gave up to the community: for nobody can transfer to another more power than he has in himself...and having in the state of nature no arbitrary power...but only so much as the law of nature gave him for the preservation of himself and the rest of mankind; this is all he doth, or can give up to the commonwealth, and by it to the legislative power, so that the legislative can have no more than this.³⁰

The state's rights are the transferred individual natural rights of its citizens, and so the state can only justly do what individuals can justly do in the non-political state of nature. So, to determine what the state has the power, or right, to do, we must look to the operation and limitations of the individual natural rights to self- and other-preservation and to punish in the non-political state of nature. The state, as we have seen, has an obligation to act for the good of its people, that is, to create and enforce laws in order to preserve their lives, bodies, liberty, and property. However, the state cannot do anything and everything to fulfill these obligations. Its power, or right to act, is limited to the powers, or rights, that it is entrusted with via the transfer of the individual natural rights of its citizens. Thus, the state can do no more justly than individuals can do justly in the non-political state of nature. So, to see what the state may justifiably do in order to fulfill its obligations, we must look to the source of the state's power. More concretely, the Lockean state, as we shall see, clearly has an obligation to protect its citizens from invasion and enslavement by outside forces; the question is what the state has the right to do in service of this obligation.³¹

³⁰Locke II, 135.

³¹To take a historical example, the United States had the obligation to protect its citizens from the Axis powers in WWII, and may well have had the right to prosecute a defensive war in service of this obligation (more on this later). However, despite this obligation, the United States was not justified in setting up internment camps for citizens of Japanese descent in the western half of the country during this time, because the United States had no right to detain and persecute citizens in this wholesale way in the absence of evidence.

Because of the constitutive connection between state rights and the individual natural rights to self- and other-preservation and to punish, we can answer the above question by considering how these individual natural rights operate in the non-political state of nature. This will lead directly to an understanding of how state rights operate, both in general and in times of war. This is especially true for what the state may justifiably do to another state and that state's citizens in times of war, because states and their respective citizens are in a non-political state of nature with regards to each other (that is, the states and their citizens have not consented to join a legitimate political society with each other).³² To see what states may justifiably do in war, then, we must consider the operations of the individual natural right to self- and other-preservation and the individual natural right to punish violations of the law of nature in the non-political state of nature.

II. The Right to Self- and Other-Preservation

As we saw above, Locke argues that, within the permission of the law of nature, individuals in the non-political state of nature have the natural right to do whatever they think is necessary for self- or other-preservation.³³ Although the emphasis seems to be on doing whatever is necessary to preserve oneself, Locke includes doing whatever is necessary to preserve others as well, because this fits with his understanding of the law of nature as calling for “the preservation of mankind.”³⁴ However, whether a person is preserving herself or another, her action is limited to doing what is permitted by the law of nature. Her right to self- and other-preservation does not justify every and any action; it only justifies those actions that are sanctioned by the law of nature. Broadly speaking, the natural right to self- and other-

³²Locke, II, 14, 145.

³³Locke, II, 128-9.

³⁴Locke, II, 135.

preservation has a limitation on its operation—it can only make justified those actions which are not outlawed by the law of nature. The law of nature, as noted above, outlaws taking away or impairing “the life, or what tends to the preservation of life, the liberty, health, limb, or goods of another” *unless* a person is doing so in order to “do justice to an offender” of the law of nature.³⁵ So, the right to self- and other-preservation, while it can justify many actions, cannot justify killing or harming another person's life, body, liberty, or property, unless that person has already transgressed the law of nature. Such aggressive actions are not justifiable by reference to the right of self- and other-preservation, because the right is structured in such a way that it has what I call the *law of nature* limitation on its operation.

This limitation rules out as impermissible what we might refer to as individual aggressive actions, *viz*, individual actions that harm another person's life, body, liberty, and property, when that person has not broken the law of nature. Following Locke's transfer theory of state rights, this limitation also rules out as impermissible state aggressive actions, *viz*, state actions that harm another state's, or another state's citizens', lives, bodies, liberty, and property, when neither that state nor its citizens have broken the law of nature. So, although states do have an obligation to preserve their citizens in virtue of having been entrusted with their citizens' individual rights, they may not fulfill this obligation through engaging in aggressive wars. That aggressive state actions, such as aggressive wars, are impermissible is made especially clear by Locke's claim, in his section on conquest, that “the aggressor, who puts himself into the state of war with another, and unjustly invades another man's right, can, by such an unjust war, never come to have a right over the conquered.”³⁶ The aggressor here referred to is the aggressing state; Locke's point is that aggression (in the form of harming lives, bodies, liberty, or property) against another state or that

³⁵Locke, II, 6.

³⁶Locke, II, 176.

state's citizens, when neither have broken the law of nature, is unjust, and so cannot subsequently give the aggressing state a right to rule the attacked state. I have argued that the reason that such state aggression is unjust is because the state right to self- and other-preservation does not include the right to make aggressive wars, and that this is so because the individual natural right to self- and other-preservation, from which the state right is composed, does not include the right to take aggressive action. The *law of nature* limitation on the operation of the right to self- and other-preservation blocks both state and individual acts of aggression as impermissible.

The more interesting situation is what actions the individual natural right to self- and other-preservation justifies in the non-political state of nature when another person has transgressed against the law of nature. The first issue to deal with here is what counts as transgressing against the law of nature. Locke suggests that credible threats to violate, in-progress violations, and past violations of the law of nature *all* count as transgressions of the law of nature. He writes that people “have a right to destroy that which *threatens* [them] with destruction,” and that “he who *attempts* to get another man into his absolute power” has broken the law of nature and so may be destroyed.³⁷ So, both credible threats to violate and in-progress violations count as violations of the law of nature, according to Locke. Regarding past violations, he writes that, in the non-political state of nature, anyone “may punish another for any evil he *has done*.”³⁸ Apparently, it is the right to punish and not the right to self- and other-preservation that justifies responding to past violations of the law of nature in certain ways. So, I will defer my discussion of how an individual may justifiably respond to those past violations to the next section. Regarding credible threats and in-progress violations, though, it seems that it is the right to self- and other-preservation that justifies responding to them in certain ways. I argue that it is

³⁷Locke, II, 16, emphasis added.

³⁸Locke, II, 7, emphasis mine.

the right to self- and other-preservation that gives a person the right, as Locke says, to destroy that which threatens her with destruction, i.e. that gives her the right to defend herself with force against credible threats to violate and in-progress violations of her life, body, liberty, and property. The individual right of self-defense, then, is a corollary, or aspect of, the right to self- and other-preservation, and it justifies responding with force to credible threats to violate and in-progress violations of the law of nature.³⁹ (To be clear, when a person responds with defensive force to a credible threat to violate or an in-progress violation of the law of nature, she is not punishing the aggressor for the threat or in-progress violation, but rather attempting to prevent the threat or in-progress violation from becoming actual or being completed. Defensive action is preventative, not punitive, in nature. Thus, it falls under the purview of the right of self- and other-preservation, rather than the right of punishment.)

While in-progress violations of the law of nature are fairly easy to identify, because they necessarily involve occurrent unjustified harms to a person's life, body, liberty, or property, it is more difficult to determine what counts as a credible threat to violate the law of nature. Locke suggests that what is necessary is that the aggressor “declare by word or action...a sedate, settled design upon another man's life...[or] an intention...to get another man into his absolute power.”⁴⁰ I take it that Locke has fairly minimal conditions for there being a credible threat to violate the law of nature; all he seems to think is necessary for there to be such a credible threat is that someone has declared (through word or action) the firm intention to take aggressive action against another person's life, body, liberty, or property, when that person has not violated the law of nature. The idea of declaring a firm intention here, I think, is meant to rule out cases where the

³⁹It is important to notice here that justified harms do not count as violations of the law of nature. So, someone who is credibly threatening to violate or who is in the process of violating the law of nature does not have the right to defend herself against someone trying to stop her, because that person has a right to, and thus is justified in, attempting to do so.

⁴⁰Locke, II, 16-7.

person who is espousing the intention to unjustly harm does not really mean it; possibly he is joking or speaking in the heat of the moment, etc. But if the person is not joking or speaking in anger, etc., and rather has coolly considered the matter and has declared a true intention to unjustly harm another, then he is, it seems, a credible threat to that other person. (Neither a joke nor an intemperate spate of anger, it seems, counts as a declaration; part of what it is to make a declaration is to mean, or intend, the message conveyed by the relevant verbal or non-verbal act.)

Locke is clear that the declaration can take either a verbal or non-verbal form; his emphasis on the declaration, as well as the intention, seems designed to ensure that the aggressive message is clear to the victim. That the victim gets the message is important because, as Locke points out, in the final analysis, whether something counts as a credible threat is, in an important sense, up to the victim. He writes, “who shall judge whether another hath put himself in a state of war with me?...of that I myself can only be judge in my own conscience, as I will answer it, at the great day, to the supreme Judge of all men.”⁴¹ Given that ultimately only the victim can decide whether there is a credible threat to her, it seems that Locke here is pointing to the declaration as the best way to determine that there is the relevant intention, the knowledge of which is critical to the victim's decision-making process.

At the least, it seems that there must be an intent to unjustly harm for there to be a credible threat. To say that a declaration of that intention is also necessary for there to be a credible threat seems too strong, given the plausibility of the claim that an aggressor who is hiding her intention is nevertheless posing a credible threat. We can imagine a sneaky person who has the intent to harm, but who hides that intent from her intended victim; it is certainly plausible that “one may smile, and smile, and be a villain.”⁴² In such a case, if the intended

⁴¹Locke, II, 21.

⁴²Shakespeare, *Hamlet*, Act I, Sc. 5, line 109.

victim learns of the sneak's intent to unjustly harm her (perhaps through a careless comment made by one of the sneak's friends), it seems that the intended victim would be justified in defensively attacking the sneak, because the sneak has the relevant intention. The intention appears to be essential here, rather than the declaration. While a verbal or non-verbal declaration perhaps provides the best evidence of a person's intent to unjustly harm, insofar as such a declaration makes it clear to the victim that she is being credibly threatened, it cannot be essential to there being a credible threat, given the plausibility of sneaky aggressors. What is necessary for there to be a credible threat, then, is the intent to unjustly harm. Locke emphasizes the importance of a declaration here not because it is a necessary condition for there being a credible threat, but because it is the most compelling evidence that an intended victim could have that a person is a credible threat to her. Because it is ultimately up to the intended victim to decide whether someone is credibly threatening to unjustly harm her, and because such a decision has weighty consequences, it is important that the intended victim have good evidence supporting her decision. (Deciding that a person is a credible threat to you is a weighty decision because doing so justifies your defensively attacking him; if you're wrong about his being a credible threat to you, then when you attack him, you violate the law of nature.) Of course, while a declaration is one kind of evidence that a person has the intention to unjustly harm another and is therefore a credible threat, it is not the only kind of possible evidence, as we saw from the 'sneak' case above. But evidence is not required for there *to be* a credible threat; it is only required, we might think, for a person to *justifiably conclude* that someone is credibly threatening to violate the law of nature. And these are two different points. For a person to be credibly threatening to violate the law of nature, then, all she must have is the relevant intention.

However, it is possible that this is too weak of a reading of Locke. We might extrapolate

from Locke that not only does a person have to have a firm intention to act unjustly in order to be a credible threat, but also that he must be capable of carrying out that threat. For instance, if George, as Locke puts it, has an “enmity to [another's] being,” but is incapable of acting on that enmity for whatever reason (perhaps George lives halfway across the world from his adversary and has no influence in the country where his adversary lives, or his adversary is dead, or George is a quadriplegic who cannot influence anyone to act on his behalf), then it is difficult, I think, to consider George to be a credible threat to his adversary.⁴³ Conversely, if George is capable of fulfilling his intention to unjustly harm his adversary, then it seems more plausible to regard him as a credible threat. Thus, it appears that intention to unjustly harm by itself does not suffice for someone to be a credible threat; also necessary is that he be capable of acting on that intention. And even these two conditions may not be sufficient for there to be a credible threat; although Locke does not go into detail here, many contemporary political philosophers want to add, at the least, the condition that there must be “a degree of active preparation” to fulfill the relevant intention occurring.⁴⁴ But regardless of exactly how we parse what counts as a credible threat to violate the law of nature, it is clear that credible threats, as well as in-progress violations of the law of nature, create a type of situation where the right of self-defense, as an aspect of the right to self- and other-preservation, justifies actions in response that would normally be impermissible.

The individual right of self-defense thus operates as a justification against a background context of impermissibility; it justifies forceful interpersonal actions that are normally or usually impermissible, such as harming a person's life, body, liberty, and property. Crucially, such harmful actions are justified only in situations where credible threats to violate or in-progress

⁴³Locke, II, 16.

⁴⁴See Walzer, *Just and Unjust Wars*, 81, and O'Brien, *The Conduct of Just and Limited War*, 133.

violations of the law of nature are occurring. The credible threat to violate, or the in-progress violation of, the law of nature is what triggers the right of self-defense, which justifies harmful actions in response to the credible threat or in-progress violation. The right of self-defense, and thus the right to self- and other-preservation, does not seem to include any limitations on what sorts of actions may justifiably be done in response to credible threats to violate and in-progress violations of the law of nature. Locke writes that individuals may justifiably “destroy” those who are credibly threatening to violate or who are in the process of violating the law of nature; he claims that they “may be treated as beasts of prey,” as “dangerous and noxious creatures,” because they, through such credible threats and in-progress violations, have “made a forfeiture of [their] live[s].”⁴⁵ Put bluntly, once a credible threat to violate or in-progress violation of the law of nature is occurring in a non-political state of nature, the right of self-defense justifies doing any sort of harmful action in response, from minimal violence to maiming to killing. (Note that this only holds in the non-political state of nature; in a political society, conversely, the laws will determine what sorts of defensive actions are justified in response to various kinds of credible threats and in-progress violations.)

However, while the individual right of self-defense in the non-political state of nature, according to Locke, does justify an 'open season' response to credible threats against and in-progress violations of the law of nature, it does not justify taking such harmful actions against just anyone. The right of self-defense includes a limitation on *who* may justifiably be harmed when a person is defending against a credible threat or in-progress violation of the law of nature. The people who may justifiably be harmed in defensive response are the people responsible for the credible threat or in-progress violation; as Locke writes, “those who have actually assisted, concurred, or consented to that unjust force” are the people who can justifiably be attacked,

⁴⁵Locke, II, 16, 181.

because they have, by “quitting reason...and using force, become liable to be destroyed by him [they] use force against.”⁴⁶ As I read Locke here, the only people liable to be attacked, that is, the only people who may justifiably be attacked, by the person defending against a credible threat to violate or an in-progress violation of the law of nature, are the people who have intentionally created, propagated, or furthered the credible threat or in-progress violation.⁴⁷ The individual right of self-defense, then, contains what I call the *responsibility* limitation. The right only justifies attacking the people morally responsible for the credible threats against and in-progress violations of the law of nature; attacking anyone not responsible, even in defense, is ruled out as impermissible by the *responsibility* limitation. So while it is open season, I conclude from Locke's text that the only people it is open season on are those who are morally responsible for the credible threats against or in-progress violations of the law of nature. (People who are morally responsible for past violations, against either the victim or others, can be justifiably attacked as well, but such attacks are justified by the right to punish rather than the right of self-defense contained within the right to self- and other-preservation.⁴⁸ For instance, if Saddam Hussein happens to be walking by when I am attacked by Betsy, I cannot justifiably use Hussein as a human shield in my defense, even though he has clearly violated the law of nature in the past, because he is not responsible for my current predicament. To use him to defend myself would be to violate the *responsibility* limitation contained within my right of self-defense. Now, I could theoretically justify my using him as a human shield by claiming that I am doing so in order to punish him for his past violations, but insofar as that claim is false and I am simply trying to defend myself by whatever means are available, I am not justified in using him, or any

⁴⁶Locke, II, 179, 181.

⁴⁷I discuss this reading of Locke in more detail below.

⁴⁸Locke, II, 6-8.

other bystander for that matter, in my own defense.)

The *responsibility* limitation thus rules out attacking innocent bystanders in order to protect yourself against credible threats to, or in-progress violations of, your life, body, liberty, and property. Although Locke never discusses such a case (he only discusses cases with innocent victims and morally responsible aggressors), we can determine what he might conclude about innocent bystanders from what he does say about moral liability to defensive attack.⁴⁹ For example, say Sally is trying to stab Betty with a knife in order to steal Betty's wallet.⁵⁰ Betty, while she is justified in using force, up to and including lethal force, to stop Sally, is not justified in using Alfonso (a man who just happens to be walking by, who is in no way involved in the altercation) as a human shield to protect herself. For Betty to use Alfonso as a human shield would be for her to unjustly harm Alfonso's life, body, and liberty, because he is not liable to defensive attack in virtue of being clearly not responsible for the occurrent attempt on Betty's body and property. The *responsibility* limitation rules out as impermissible unjustly harming others (i.e., harming those who are in no way responsible for the credible threat against or in-progress violation of the law of nature) in order to save yourself. So while Betty's right of self-defense justifies her attacking Sally, it does not justify her attacking Alfonso, and in fact rules out as impermissible her attacking Alfonso. The *responsibility* limitation contained within the individual right of self-defense, insofar as it justifies defensive attacks *only* against those morally responsible for credible threats against or in-progress violations of the law of nature, rules out as impermissible attacking innocent bystanders in order to defend yourself.

However, let us change the case slightly. Perhaps Betty does not need to use Alfonso as a

⁴⁹For the particular cases that Locke discusses, see II, 6, 10, 11, 17, 18, 19, 176, and 181. For his discussion of moral liability to defensive attack, see II, 10, 11, 16, and 179.

⁵⁰Locke famously argues that, if a thief tries to rob you in the non-political state of nature, you are justified, by your right of self-defense, in killing him. Locke II, 18. I add an innocent bystander to this case to help elucidate what precisely the *responsibility* limitation rules out as impermissible.

human shield to save herself from Sally; perhaps she only needs to use Alfonso's coat in order to deflect Sally's knife. Is it impermissible for Betty to take Alfonso's coat in this situation? While initially the answer might seem to be yes, it is impermissible for Betty to commandeer Alfonso's property in this situation (given that Alfonso has done nothing wrong), Locke actually provides us with a more complex answer to this question. In addition to the right of self- and other-preservation, of which the right of self-defense is a corollary, Locke maintains that individuals also have the right of charity; he writes that "charity gives every man a title to so much out of another's plenty as will keep him from extreme want, where he has no means to subsist otherwise."⁵¹ Locke argues for this right of charity by claiming that "it would always be a sin, in any man of estate, to let his brother perish for want of affording him relief out of his plenty."⁵² While Locke does not directly discuss innocent bystanders here, we can extrapolate from what he does say about the right of charity to the conclusion that Betty has a title, or right, to Alfonso's coat if two conditions hold: a) Betty is in extreme want, such that she would not be able to survive without the coat, and b) Alfonso's coat is not necessary to Alfonso's survival, that is, it is a part of his surplus property, without which he would still be able to preserve himself. If both of these conditions hold, then it is permissible for Betty to take Alfonso's coat to save herself from Sally, not because her right of self-defense allows her to attack Alfonso in her own defense, but because her right of charity allows her to use his surplus property to keep herself alive. Intuitively, this seems correct; there does seem to be an important moral difference between using an innocent person as a human shield in order to defend oneself and commandeering a non-necessary piece of an innocent person's property in order to defend oneself. The first is ruled out as impermissible by the *responsibility* limitation contained within the right of self-defense,

⁵¹Locke, I, 42.

⁵²Locke, I, 42.

while the second is permitted by the right of charity.

Notice though that the right of charity only holds when the two aforementioned conditions are met—Betty must have no other means of survival besides taking Alfonso's property, and she may only use Alfonso's property if it is not necessary to his survival. When these conditions are not met, the right of charity does not come into play, and it remains impermissible (due to the *responsibility* limitation on the individual right of self-defense) for Betty to defensively attack Alfonso. This is the key claim for my purposes, because it is the kind of situation, I think, that is most salient to war. The question at issue for our purposes is not whether people can make use of surplus property to save themselves from an unjust aggressor, but whether they can make use of innocent people's lives in order to save themselves from an unjust aggressor. Insofar as a person's life is necessary to his preservation, it seems clear that the right of charity does not extend to killing innocent bystanders in self-defense; such lethal defensive actions are ruled out by the *responsibility* limitation contained within the right of self-defense, and cannot be made permissible by appealing the right of charity.

But while some people are clearly innocent bystanders and thus not responsible for credible threats to violate or in-progress violations of the law of nature, and so cannot permissibly be lethally defensively attacked even in desperate self-defense,⁵³ it is more difficult to determine when a person *is* morally responsible for such credible threats or occurrent violations. Moral responsibility is a notoriously difficult concept; there are whole reams of philosophical literature dedicated to determining what it takes for a person to be responsible for

⁵³It is a deep moral intuition, I think, that defensively attacking innocent bystanders is impermissible. Using random people as human shields, shooting the child or spouse of your unjust attacker to distract her and thus escape, or killing a person who is inadvertently blocking your escape from an unjust attacker all strike us as morally repellent. These innocent bystander cases thus mark a crucial boundary for determining what the right of self-defense can justify, a boundary that I understand in terms of the *responsibility* limitation. See Thomson, "Self-Defense," 89, Nagel, "War and Massacre," 69, and Rodin, *War and Self-Defense*, 81, for fuller descriptions and discussions of these kinds of innocent bystander cases.

some action or other. One fairly commonsense view, put roughly, is that a person is morally responsible for some action when she can be appropriately praised or blamed for it, that is, when she is culpable for that action.⁵⁴ I think that this is the view of moral responsibility most evident in, and that best coheres with, Locke's political philosophy. Although he does not state his view of moral responsibility explicitly, he does seem to think that culpability is required for moral responsibility and thus moral liability. After all, it is when a person declares a 'sedate, settled design' against another person's life, body, liberty, or property, (when that person has not violated the law of nature), a design that she attempts to fulfill, that she is morally responsible for the aggression and so is morally liable to defensive attack. As Locke writes, a person has to have "renounced reason" and credibly threatened to or attempted to commit "unjust violence and slaughter" for it to be the case that he may be justifiably attacked in self- or other-defense.⁵⁵ A person is morally liable to defensive attack, writes Locke, when he has "declared...by word or action...a sedate, settled design upon another man's life,"⁵⁶ when he has "declare[d] himself to quit the principles of human nature, and to be a noxious creature."⁵⁷ More broadly, it is when a person actually assists, concurs, or consents to credibly threatening to violate or violating the law of nature, when he purposefully "puts himself into the state of war with another, and unjustly invades another man's right," that he is morally responsible for that aggression.⁵⁸

⁵⁴Aristotle espouses this view in the *Nicomachean Ethics*, 1109b30-35. Modern proponents of this view include, among others, Strawson in "Freedom and Resentment," Watson in "Responsibility and the Limits of Evil" and "Two Faces of Responsibility," Wallace in *Responsibility and the Moral Sentiments*, Zimmerman in *An Essay on Moral Responsibility*, and Feinberg in *Doing and Deserving*.

⁵⁵Locke, II, 11. I focus on self-defense for the most part throughout because I think it is the usual case; however, note that all of the limitations and permissions that apply to self-defense also apply to other-defense, because both self-defense and other-defense are part of the right to self- and other-preservation.

⁵⁶Locke, II, 16.

⁵⁷Locke, II, 10.

⁵⁸Locke, II, 176.

Locke uses a number of terms to pick out those who are morally responsible for aggression; presumably he means to point out that there are different ways in which a person can take on responsibility for an aggressive act. Those who “have used force to do, or maintain an injustice,” those who “actually abet” injustice, and those who assist, concur, or consent to injustice, are, according to Locke, the people who are “guilty” of that injustice, i.e. the people who are morally responsible for it.⁵⁹ Now, while it is fairly straightforward, I think, to determine what counts as either using aggressive force or as assisting and abetting in the use of that force, it is more difficult to determine what counts as concurring or consenting to that force. Locke famously invokes at least two different types of consent in the *Second Treatise*, express consent and tacit consent, and it is unclear which type he means to invoke in his discussion of moral responsibility for aggression.⁶⁰ The question is, as Locke puts it, “what shall be understood to be a sufficient declaration of a man's consent.”⁶¹ Express consent occurs when a person makes a (verbal or non-verbal) declaration of concurrence or consent—such a declaration can take a number of forms, including, but not limited to, a verbal agreement, a written agreement, a handshake, or some other contextually or culturally accepted (verbal or non-verbal) sign of agreement. It is this “positive engagement, and express promise and compact” that counts as express consent.⁶² Conversely, tacit consent occurs when a person “has made no expressions of it at all,” but does enjoy the benefits of some arrangement.⁶³ Locke's thought here is that by accepting the benefits of some arrangement, a person thereby accepts the burdens of that

⁵⁹Locke, II, 179.

⁶⁰Locke, II, 119.

⁶¹Locke, II, 119.

⁶²Locke, II, 122.

⁶³Locke, II, 119.

arrangement as well; we might say that she implicitly agrees to take on those burdens when she takes on the relevant benefits.⁶⁴ In his discussion of express and tacit consent, which takes place in the context of discussing the process by which a person becomes a member of a political society, Locke argues that tacit consent, or merely accepting the benefits of living in a political society without dissent, is sufficient to make a person subject to the laws of that society. As he puts it, “every man, that hath...enjoyment of any part of the dominions of any government, doth thereby give his tacit consent [to that government], and is...obliged to obedience to the laws of that government, during such enjoyment.”⁶⁵ However, Locke claims that such tacit consent is not sufficient to make a person a member of the relevant political society; to become a member of a commonwealth, that is, to be morally bound to a commonwealth and its government until and unless that commonwealth is dissolved, express consent is necessary.⁶⁶

Express consent, then, unlike tacit consent, seems to involve a sharing of moral responsibility. To be a member of a commonwealth (where membership is dependent on express consent) is to share in moral responsibility for that commonwealth's decisions and actions. Conversely, to be subject to a government in virtue of enjoying the benefits of living under that government does not seem to involve a sharing of responsibility at all, but rather seems to be simply a matter of fairness. Following John Simmons here, what Locke seems to be driving at in his discussion of tacit consent is that it is only fair that when you get the benefits of living in a state, then you are obliged to obey the laws of that state.⁶⁷ But because tacit consent has essentially to do with issues of fairness, rather than with actively sharing moral responsibility, it

⁶⁴Locke, II, 119-122.

⁶⁵Locke, II, 119.

⁶⁶Locke, II, 121-22.

⁶⁷Simmons, *The Lockean Theory of Rights*, 153-4.

seems irrelevant to the question of what counts as consenting to the use of aggressive force (where consent makes you morally responsible for that aggression). A person who accepts the benefits of living in a particular state, while he is thereby obliged to obey the laws of that state, does not thereby consent to all of the actions of his state in a way that makes him morally responsible for those actions; as Locke says, such a person is “innocent” of his state's unjust wars.⁶⁸ So, failure to dissent to the use of aggression, while it may well be a moral wrong of some sort, is not equivalent to sharing moral responsibility for that aggression. What it takes to share moral responsibility, as we have seen, is express consent. Thus, to share moral responsibility for aggression, a person must expressly consent to it via some verbal or non-verbal declaration.

Given the connection that Locke makes between express consent and sharing in responsibility, I think that it is correct to conclude that Locke means, in his discussion of moral responsibility for aggression, that those who *expressly* consent or concur to aggression, as well as those who use aggression and those who assist and abet in its use, are morally responsible for that aggression. Now, as I mentioned above, what counts as a verbal or non-verbal declaration of express consent will vary both contextually and culturally; however, at the very least, it seems that there must be some generally-accepted sign of agreement for there to be express content. Locke is clear that, where there is no sign or expression of agreement “at all,” there is no express consent.⁶⁹ Importantly, this means that a failure to dissent to aggression, or silence in the face of aggression, does not count as express consent to that aggression, and thus does not make the silent or non-dissenting observer morally responsible for that aggression.⁷⁰ Now, this is not to say

⁶⁸Locke, II, 179.

⁶⁹Locke, II, 119.

⁷⁰In some contexts, silence is viewed as a sign of express consent. (Think of the philosophy professor who says to her students, “I take your silence to mean that you agree with the view under discussion.”) In such contexts, silence

that failure to dissent to aggression, or silence in the face of aggression, is not a moral wrong. It certainly seems that a person who fails to dissent to aggression has done *something* wrong; she has perhaps failed to fulfill her positive obligations to the person under aggressive attack, or her positive obligations to make the world a more just place, or she has failed to be virtuous in an important way. But it does not seem that she, by failing to dissent, has taken on moral responsibility for the aggressive attack. Were we to describe a person who remains silent in the face of aggression as having consented to that aggression, we would simply be making a mistake. She has not consented, because she has given no generally-agreed upon sign of her consent; thus, she is not morally responsible for the aggression in a way that makes her morally liable to defensive attack. To be morally responsible for aggression, a person has to share in the responsibility for that aggression. In other words, she must either be the principal user of the aggression, assist with or abet the aggression, or expressly consent to it via some generally agreed-upon verbal or non-verbal declaration.

Considering Locke's text, it suggests that there are two criteria for being morally responsible for aggression, such that the aggressor is morally liable to attack on the grounds of self-defense: the first, which we have been discussing, is that the aggressor actually does, assists, concurs, or consents to the aggression, and the second is that she knows that the action she is credibly threatening or attempting to take violates the law of nature.⁷¹ As David Rodin writes, “if one is to be justified in inflicting harm in an act of defense, then there must be an appropriate normative connection between the wrongfulness of the threat one is seeking to avert and the person one harms...the threat we respond to must be *his* threat rather than simply a threat of the

is equivalent to express consent, and thus does bring with it responsibility. But, I take it that silence is not normally or generally a sign of express consent (unlike, for instance, a handshake), and so does not normally or generally bring with it responsibility.

⁷¹These two criteria match the control and epistemic conditions, respectively, that Aristotle places on moral responsibility in the *Nicomachean Ethics*, 1110a-1111b4.

world at large which happens to manifest itself through his body.”⁷² Sally is only morally responsible for unjustly attacking Betty, that is, the threat is only *her* threat, and so she may only justifiably be defensively attacked by Betty, when Sally a) freely chooses (i.e., assists, concurs, or consents) to attack Betty and b) knows that her threatened or occurrent attack on Betty is unjust. These conditions are, I contend, suggested by Locke as being necessary and sufficient for moral responsibility for aggression. If either of these conditions are not met, Sally is not morally responsible for credibly threatening to violate or attempting to violate Betty's life, body, liberty, or property, and so Betty's right of self-defense does not justify Betty in defensively attacking Sally. The *responsibility* limitation, as I understand it, because it operates on the basis of moral responsibility for aggression, rules out as impermissible attacking those who are not morally responsible for the credibly threatened or occurrent violation of your life, body, liberty, or property.⁷³

The *responsibility* limitation thus rules out justifiably defensively attacking those people who are either irresistibly coerced into unjustly credibly threatening or attacking others, are unable to form such an intention, or are, as Vitoria puts it, “invincibly ignorant” of the fact that their credible threats or in-progress attacks are unjust.⁷⁴ Although Locke does not explicitly discuss such cases, in the contemporary literature, such irresistibly coerced, insane, or invincibly ignorant people's unjust threats or attacks are often referred to as excused, and they are regarded as not blameworthy.⁷⁵ I argue that the threat that such persons pose is not *their* threat; either they

⁷²Rodin, *War and Self-Defense*, 88, italics in original.

⁷³Of course, the big problem here is what to say about cases where a person is actually being unjustly credibly threatened or is in the process of being unjustly attacked by someone who is not morally responsible for the threat or attack; I deal with these kinds of cases below.

⁷⁴Francisco de Vitoria, “On the Law of War,” 313.

⁷⁵Jeff McMahan has an excellent discussion of excuses in his book *Killing in War*. He and I differ mainly in our understanding of moral responsibility, as will become apparent later in the chapter.

have not freely chosen to engage in unjustly credibly threatening or attacking others, or they do not realize/are not capable of realizing that they are threatening or attacking at all, or they do not and could not know that the credible threats or attacks that they are engaged in are unjust. In Lockean terms, they have not intentionally decided to contravene the law of nature and so have not renounced reason. Thus, they may not justifiably be destroyed like noxious beasts. To become like a beast (and thus be liable to defensive attack), one must consciously renounce the law of nature that applies to all mankind, or “quit reason;” insofar as irresistibly coerced, insane, or wholly ignorant people do not do this when they threaten or attack others, they are not like beasts and so may not justifiably be attacked in self-defense.⁷⁶ The right of self-defense, I contend, does not justify defensively attacking those who are, we might say, innocent threats or innocent aggressors.

By irresistibly coerced, what I mean is that Sally does not freely choose to unjustly attack Betty, that she is forced into doing so by another person via either physical or non-physical means that, as the American Model Penal Code puts it, “a person of reasonable firmness in [the] situation would have been unable to resist.”⁷⁷ The clearest case of irresistible coercion is that of physical compulsion. Consider a case given by Robert Nozick: someone picks up a fat man and throws him at you from a great height. If he lands on you, he will crush you to death, while he will survive, cushioned by your body. You have a gun, and can shoot him out of the sky, killing him to save yourself.⁷⁸ Nozick, as well as many other contemporary theorists, agree that you would be justified in shooting the man out of the sky in self-defense.⁷⁹ However, I disagree with

⁷⁶Locke II, 11, 16, quote from 181.

⁷⁷American Model Penal Code, Section 2.09.

⁷⁸Nozick, *Anarchy, State, and Utopia*, 34.

⁷⁹Nozick, *Anarchy, State, and Utopia*, 34, Thomson, “Self-Defense,” Uniacke, *Permissible Killing*, Ryan, “Self-Defense, Pacifism, and the Possibility of Killing.”

this assessment on the basis of the *responsibility* limitation that is contained within the individual right of self-defense; I regard it as impermissible to shoot the man out of the sky, because he is clearly not morally responsible for the threat he is posing to your life. He is morally innocent (*ex hypothesi* he did not freely choose to unjustly threaten you), and as such, the *responsibility* limitation on the right of self-defense rules out killing him as impermissible.⁸⁰ This conclusion follows straightforwardly from the necessary and sufficient conditions for moral responsibility, and thus moral liability to defensive attack, that are implicit in Locke's text. Thus, while Locke does not discuss such a case, I maintain that he would conclude, with me, that defensively attacking the fat man is not permitted by the victim's individual right of self-defense. Furthermore, I think that this is an intuitive result; to say that shooting the fat man in self-defense is impermissible partially makes sense of the visceral negative reaction that many people have to the bare possibility of such a case.

However, while it is impermissible to shoot the fat man, at the same time, I maintain that it is excused to shoot him out of the sky; the situation is such that it is either him or you, and I do not think that you can be expected to refrain from saving your own life in such a situation, given the very strong human urge to survive. Locke understands this “strong desire of self-preservation” to be implanted by God in man, and thus concludes that it is reasonable, in general, to follow this inclination.⁸¹ (I assume that you hold no previous ill-will towards the fat man, such that shooting him in this situation is an excuse to get away with fulfilling your unjust intentions towards him. This would, I think, change the case, because then it seems that by shooting him out of the sky you are not saving your life so much as sneakily killing him.) In this situation,

⁸⁰Happily, I am not alone in this view. David Rodin, Richard Norman, and Michael Otsuka agree with me that killing innocent threats is impermissible, for reasons similar to the ones I espouse. Rodin, *War and Self-Defense*, Norman, *Ethics, Killing and War*, and Otsuka, “Killing the Innocent in Self-Defense.”

⁸¹Locke, I, 86.

your life, which as Locke writes you are “bound to preserve,” is in peril, and the fat man is the causal instrument of that peril; he is not simply an innocent bystander.⁸² You are under severe duress, and killing the fat man would remove the causal instrument of your duress. But, at the same time, the fat man is not morally responsible for your severe duress, i.e. for the occurrent unjust threat to your life. I believe that we must acknowledge both of these facts, and that the best way to do so is to admit that your shooting him out of the sky is, strictly speaking, impermissible, but is nevertheless excused. To see this, consider what else we might say in such a case: we ask if there was truly nothing else you could do, we call it a tragedy and say that it was horrible for you to have to make such a choice, and that that you should not blame yourself, but that you should not feel good about, or proud of, your action either.⁸³ As I briefly noted above, many people have a very negative reaction to such cases, and as a result, seek first to reject the act-description; they claim that the case could not possibly be as described, where you truly have no options other than dying or killing the fat man. When convinced that those are in fact the only two available action-options, people often then respond that there is no right answer, that the whole situation is horribly wrong, and that, while you have to save yourself, you still ought not kill the fat man. I maintain that these conflicting moral feelings point to this situation, and others relevantly similar to it, as being akin to, if not actually, a moral dilemma; you're damned if you do shoot him and (possibly⁸⁴) damned if you don't. Ultimately, I conclude—

⁸²Locke, II, 6.

⁸³I think it is no coincidence that non-philosophers, when presented with these kinds of cases, always try to think of an action-option that is not ruled out by the parameters of the case itself. As one student of mine notably complained, philosopher's examples are horrible because they ignore the real world. Ironically, it is a sad fact that these types of cases (although not, admittedly, this particular case) are all too real.

⁸⁴Whether you are damned if you don't depends on whether you have a moral obligation to save yourself and how strong that obligation is. It might also depend on your thoughts about the afterlife. At some points, Locke seems to think that we have a moral obligation to preserve ourselves. See especially II, 6. However, at other points, he seems to think that we have a strong psychological impulse, but not an absolute moral obligation, to preserve ourselves. See I, 86.

as I think is suggested by Locke's understanding of moral responsibility—that your shooting the irresistibly coerced fat man in self-defense is objectively impermissible, but excused. You are excused because you are, in such a situation, under extreme duress; thus, although you act impermissibly in killing the fat man, you do not bear moral responsibility for this action in a way that makes you morally liable for his death.⁸⁵

This is, I have argued, the Lockean picture of the *responsibility* limitation on the individual right of self-defense. I also think that is the correct understanding of the *responsibility* limitation on the individual right of self-defense. As independent evidence for this view (in addition to the textual evidence already noted), I cite the common response to these kinds of cases; we ask whether there was truly nothing else that the victim could do, we urge the victim to go see the fat man's family and apologize, we think it appropriate that the victim feel bad about being causally responsible for the death of the fat man.⁸⁶ While we hesitate to claim that the victim has done anything wrong, we do not think that she has done anything right, either. The urge to respond in these kinds of ways indicates that, at the very least, the case is not morally clear-cut; it is not so simple as Thomson suggests when she concludes that it is clearly permissible to kill the fat man because as a matter of causal fact he will violate your right to life if you do not kill him.⁸⁷ I am not denying that the fat man is the proximate cause of your impending death. What I am denying is that merely being a proximate cause of unjust harm (in Thomson's—and perhaps Locke's—language, a proximate cause of a rights violation), is enough

⁸⁵Although the case is different, it may help here to consider Locke's discussion of forced consent. He argues that forced consent is not consent at all; because the person is forced, i.e. coerced, to consent, she is thereby not morally responsible for whatever it is that she has “consented” to do. The moral responsibility for her forced or coerced action goes, rather, to her aggressor. Locke, II, 186.

⁸⁶This may be a case where agent-regret is appropriate, a concept introduced by Bernard Williams in his seminal paper “Moral Luck.”

⁸⁷Thomson, “Self-Defense.”

to make it permissible for you to lethally attack the fat man in self-defense. It is a horrible situation, no doubt, and one that we hope no one is forced to deal with in their lifetime; but I think that the very fact that we say these sorts of things demonstrates that we are uncomfortable with the conclusion that killing the fat man in self-defense is straightforwardly permissible.

Now, merely showing that people are, as it turns out, uncomfortable with a particular conclusion is not reason enough to declare it false. Such people, after all, might be mistaken, confused, or simply not very thoughtful. However, this sentiment does give us reason to question the conclusion that lethally attacking innocent threats in self-defense is permissible. And once we question this claim on the basis of such discomfort, it seems that we can, as I have tried to show, link that discomfort to a commonsense view about what it takes to be liable to defensive attack. I have argued that it takes moral responsibility for an unjust credible threat to or occurrent violation of the law of nature to make a person liable to defensive attack; in the absence of such moral responsibility, he is not liable to defensive attack and so may not be permissibly defensively attacked. Thomson writes, in response to this kind of view, that it is “an excessively high-minded conception of the requirements of morality.”⁸⁸ But I do not think it is excessively high-minded to think that the right of self-defense does not permit defensive attacks against innocent threats; rather, I think it accurately reflects the role that moral responsibility plays in our moral judgments about what we are permitted to do to others. And furthermore, to say that such defensive attacks are impermissible according to the right of self-defense is not to say that such defensive attacks are not excusable. In a situation where it is your life or the life of an innocent threat, I think it would be an odd moral theory indeed that said that the correct attitude towards you (assuming that you defensively kill the innocent threat) is condemnation.

Happily, my view does not have this consequence; I maintain that while killing the

⁸⁸Thomson, “Self-Defense,” 285.

innocent threat on the grounds of self-defense is strictly speaking, or objectively, impermissible, doing so is completely excusable given facts about the sorts of creatures that we are and facts about what anyone else would do in a similar situation.⁸⁹ The victim in such a case is coerced just as much, I think, as the fat man is, albeit in a different way. While the fat man is physically coerced, the victim is psychologically coerced; thus, while the victim's defensive attack against the fat man is, objectively speaking, impermissible, the victim's defensive actions are excused. In other words, although she acts impermissibly, she does not bear moral responsibility for killing the fat man in a way that makes her liable to attack in turn, because she too is coerced.⁹⁰ Given this, the correct attitude to have in response is that the whole situation is a tragedy. And in fact, I think that this is what has gone wrong in Thomson's analysis; she does not make room for a moral theory that says both that killing the fat man in self-defense is impermissible and that our attitude towards the defensive attacker and the situation as a whole should be one of sorrow and resignation, rather than condemnation. In the background of Thomson's argument seems to be the thought that if we conclude that the defensive attacker has acted impermissibly, then we must condemn her; but surely we need not have this attitude. As I have suggested, the appropriate attitude, rather, is to regard the situation as tragic, because the defensive attacker cannot emerge from the situation morally well-off, so to speak. Either you kill the fat man impermissibly but excusably, or you allow yourself to be killed (perhaps also impermissibly but excusably); either way, something has gone terribly wrong with the world.

Furthermore, my conclusion that what occurs in these types of cases is akin to, if not

⁸⁹Here, I am pointing to our strong survival instinct as well as the point that we think we would react similarly when placed under such duress.

⁹⁰This is similar, although not equivalent, to Joel Feinberg's famous 'stranded hiker' case. Although Feinberg does not use the language of excuse, he implies that the hiker, in breaking into an unoccupied cabin in order to avoid dying in a terrible storm, has acted wrongly but excusably. Insofar as he has acted wrongly, the hiker owes compensation to the cabin's owner for damages; but insofar as the hiker was under duress, he is not to blame (morally speaking) for his action. Feinberg, "Voluntary Euthanasia and the Inalienable Right to Life," 102.

actually, a moral dilemma, fits with the intuition that many people have about these kinds of cases when they are realistically described. (As I mentioned earlier, whether there is an actual moral dilemma here depends on what other moral obligations the victim has. In particular, we might reasonably think, as Locke sometimes does seem to think,⁹¹ that she has a moral obligation to herself to keep herself alive.) When these types of cases actually occur or are vividly laid out in fiction, people tend to respond in precisely the way that I have described; they withhold judgement about whether the defensive attacker has acted wrongly or rightly, and instead claim that the whole situation is awful and tragic. They sometimes rail against God or Fate or the world itself, complaining about 'the unfairness of it all.'⁹² Or, if there is a villainous aggressor who is responsible for the innocent threat, they focus their condemnation and blame on that person, and console the defensive attacker, saying that although it is awful, there was nothing else that the defensive attacker could have done, and that she is not to blame for being forced by circumstances to act as she did. As Thomas Nagel writes, "the idea of a moral blind alley is a perfectly intelligible one...our intuitions rebel at the idea...but it is not in itself a contradiction."⁹³ He concludes that "it is naïve to suppose that there is a solution to every moral problem with which the world can face us."⁹⁴ I have tried to argue that the case of the physically compelled innocent threat is just such a moral problem, and to claim that it is not is both to ignore people's actual reactions to such situations and to radically revise our understanding, which I contend that Locke shares, of what it takes to be morally liable to defensive attack.

⁹¹See Locke, II, 6, and I, 86, 88.

⁹²Consider how people respond to the reality of child soldiers. In fiction, P.G. Wodehouse, Alison Croggon, and Barbara Kingsolver give good examples of these types of cases, in *Very Good, Jeeves!*, *The Crow*, and *The Poisonwood Bible*, respectively.

⁹³Nagel, "War and Massacre," 143-4.

⁹⁴Nagel, "War and Massacre," 144.

Of course, not all cases of irresistible coercion are so simple; many times the coercion does not take the form of occurrent physical compulsion. Other types of coercion include physical, psychological, or financial threats against oneself or others. While I do not have the space to go through the various shades of coercion here, I do think that the understanding of what counts as irresistible coercion provided by the American Model Penal Code is good, albeit vague: it is pressure to act that a person of reasonable firmness in the situation would be unable to resist. Such irresistible pressure, I contend, makes it the case that the coerced person who is credibly threatening to or actually acting unjustly is not morally responsible for her unjust threat or action. A person who acts unjustly because a villain is holding a (literal or metaphorical) gun to her head or a (literal or metaphorical) knife to the throat of her loved one is just not morally responsible for what she does. The threat she poses is not *her* threat, and so she may not justifiably be defensively attacked. Rather, like the fat man, she is the instrument of someone else's malice, or enmity; that person is the one who freely chose to threaten or attack, knowing (again, *ex hypothesi*) that the threat or attack was unjust. So, it is that person who is morally responsible for the unjust threat or occurrent attack, and thus it is that person who may justifiably be defensively attacked. The irresistibly coerced person, on the other hand, whether physically forced or irresistibly threatened, is an innocent threat, and so, according to the *responsibility* limitation on the right of self-defense, is not morally liable to lethal defensive attack.

Now, it may well be the case that other actions in response to innocent threats are permitted by the right of self-defense, such as stepping aside so that the fat man falls, not on you, but on the pavement (and subsequently dies). While the Lockean individual right of self-defense, as I understand it, rules out as impermissible attacking the fat man with lethal force, it does not appear to rule out allowing innocent threats to come to harm when your life is at risk. In general,

we may do whatever is not ruled out by either the *law of nature* limitation or the *responsibility* limitation, and neither of these two limitations, I argue, rule out allowing innocent threats to come to harm when your choice is between dying yourself, allowing them to come to harm or lethally defensively attacking them. This is sometimes referred to in the contemporary literature as the distinction between doing and allowing.⁹⁵ Again, Locke does not mention any such cases, but in keeping with my attempts to make the Lockean picture as intuitively plausible as possible, I submit that we should allow this distinction between doing and allowing. So, while the *responsibility* limitation blocks you from justifiably doing any direct harm to the innocent threat's life, body, liberty, or property, it does not, I think, block you from allowing such harm to come to him by acting in your own self-preservation (so long as your actions, in line with the *law of nature* limitation, do not directly harm anyone else). While you may not permissibly shoot the fat man, you may step aside (an action that putatively does not directly harm anyone), and thus allow him to die. The harm that is done to the fat man in such a case is properly attributed to the person who picked him up and threw him at you; that person is morally responsible for the fat man's death, not you. As Daniel Statman argues, “the responsibility for the [fat man's] death can be seen as resting exclusively with the aggressor-murderer, and although it would be morally nice if V [the victim] sacrificed his life to save the [fat man], he is not to be reproached for failing to do so.”⁹⁶ The aggressor-murderer is morally responsible for the fat man's death because he is the one who freely and knowingly violates the fat man's life and liberty. In this situation, then, the victim is not to be reproached for failing to sacrifice herself because she acted within her right to self-preservation; she preserved her own life without taking either any aggressive action (ruled out by the *law of nature* limitation) or any unjustified defensive action (ruled out by

⁹⁵Foot, “The Problem of Abortion and the Doctrine of the Double Effect,” 4.

⁹⁶Statman, “Supreme Emergencies Revisited,” 70.

the *responsibility* limitation). So, to say that an innocent threat is not liable to defensive attack, and thus that it is strictly speaking impermissible to attack innocent threats in self-defense, is not to say that the victim in such cases is obliged to let herself be killed. In real world cases, she will have many other action-options that are permitted by her right to self-preservation, up to and including allowing the innocent threat to be seriously injured or killed as a result of her self-preserving but non-aggressive action.⁹⁷

In addition to irresistibly coerced innocent threats, there can also be innocent aggressors, people who credibly threaten or attack without knowing that they are doing so unjustly, either because they are ignorant or mistaken, insane, or developmentally incapable of understanding what it is that they are doing. By insane or developmentally incapable of understanding what it is that they are doing, what I mean is that the person in question does not have the mental capacity, either at the time or in general, to form an intention of the correct sort or to grasp the true nature of the situation. Consider two cases given by George Fletcher: you are in an elevator with a mild-mannered colleague who suddenly goes berserk and tries to stab you, having been unwittingly fed a psychopathological-behavior-inducing drug earlier that day by your enemy (let us say that your colleague has a large knife in her hand because you both are returning to work from an office birthday party, and she was in charge of cutting the cake). Less fantastically, you are in the elevator with that same colleague when she suddenly has a violent epileptic fit and starts swinging the knife ever closer to one of your vital organs. In both cases, you cannot stop her from killing you without using extreme, if not lethal, defensive force.⁹⁸ A third case, one often brought up in conversation but not commonly seen in the literature, is that of a young child, or an

⁹⁷Of course, the victim may well be permitted to sacrifice herself to save the innocent threat. My point is simply that she is surely not required to do so. (Perhaps the case is different when the innocent threat is a child; I am not sure about this.)

⁹⁸Fletcher, "Proportionality and the Psychotic Aggressor," 371.

adult who has the mental capacity of a young child, who is threatening you with what they believe is a squirt gun but is in actuality a real gun. Again, by stipulation, you cannot stop the child or developmentally delayed adult from killing you without using extreme, if not lethal, defensive force.

In such situations, I think it is clear that the unjust credible threat that such persons pose, or the unjust attack that they are in the process of doing, is not *their* threat or attack; they are not morally responsible for acting as they do, either because they are temporarily insane or incapacitated or because they do not have the mental capacity required to understand what it is that they are actually doing. Such persons, despite being the direct cause of your life, body, liberty, or property being in peril, are not knowingly choosing to put you in such peril, and so they are not morally responsible for the unjust peril that you face. Thus, the *responsibility* limitation rules out as impermissible defensively attacking them to save yourself. Again, I appreciate that this is psychologically difficult to accept; intuitively, we might think that saving yourself justifies defensively attacking even such innocent aggressors. After all, it is your life that is at stake. But I maintain that the individual right of self-defense does not countenance defensively attacking those who do not freely and knowingly choose to unjustly credibly threaten or attack others. Nevertheless, it is completely excusable that we do defensively attack innocent aggressors, mainly because it seems that, in many cases, their unjustly attacking us is good evidence that they have freely and knowingly chosen to unjustly attack. For instance, it seems that I could have no way of knowing that my colleague had been fed crazy pills by a villain earlier in the day. Thus, when she unjustly attacks me in the elevator, it is perfectly reasonable for me to assume that she is morally responsible for her attack. But, my assumption here, reasonable as it is, is mistaken; she is not morally responsible for her attack. Thus it is strictly

speaking impermissible, albeit excused, for me to defensively attack her. She, like the developmentally delayed adult, is an innocent aggressor, and so, according to the *responsibility* limitation, is not morally liable to defensive attack.

The other type of innocent aggressor is the person who freely and knowingly chooses to credibly threaten or attack another, but who believes falsely—and crucially, who could not have known better—that her credible threat or attack is justified. Such people, following Francisco de Vitoria, are referred to as being invincibly ignorant or mistaken.⁹⁹ Vitoria claims that if a person does not know that her action is unjust, but rather reasonably believes it to be just, and she does not have the means to overcome her ignorance, then she is invincibly ignorant and thus not morally responsible for the injustice she commits.¹⁰⁰ More concretely, if Sally believes, and has good reasons to believe, that her credible threat or attack is just, even though it is actually unjust, and she could not have known better, then she is invincibly ignorant about the unjust nature of her aggression. Perhaps she has been provided with undetectably doctored compelling evidence that Betty is in the process of unjustly stealing property from others through some complicated scheme, or that Betty is unjustly credibly threatening someone else's life, body, liberty, or property.¹⁰¹ Sally's belief that Betty has broken the law of nature is thus epistemically justified, even though it is false. Given this, it seems that Sally is not morally responsible for the unjust nature of her credible threat to or attack on Betty; although she does freely and knowingly credibly threaten or attack, she does not knowingly *unjustly* credibly threaten or attack. It is

⁹⁹Vitoria, *Political Writings*, 158-9.

¹⁰⁰Vitoria, *Political Writings*, 266-72, 307-8.

¹⁰¹Think here about cases where someone is set up to be the “fall guy” by the real villain, perhaps through the planting of evidence, etc. (The movie *The Fugitive*, as well as innumerable TV shows, provide examples of this sort.) If we have no reason to think that the person implicated by the evidence is such a “fall guy,” it seems completely reasonable for us to think that our attacking him is justified. (The FBI agents chasing Harrison Ford's character in *The Fugitive* have very good reasons to believe that their threatening and attacking him is just. The audience only knows better because we are given access to information that the FBI agents do not, and importantly could not, have.)

crucial here that Sally both does not, and could not, have known better. As David Rodin points out, if Sally is mistaken about Betty's moral status because Sally negligently or recklessly forms the relevant beliefs, then she is morally responsible for her subsequent unjust credible threat or attack, because she should have known better.¹⁰² As Vitoria would put it, in such a case, Sally has the means to overcome her ignorance and thus is not invincibly ignorant of the nature of her aggression in a way that makes her not morally responsible for her aggression. Rather, she is vincibly ignorant, and thus morally responsible for her unjust actions.¹⁰³

As with coercion, there will be a spectrum of ignorance/mistake cases, ranging from people who should have known better, to people who could have known better but who are non-culpably ignorant for not knowing better, to people who could not have known better. I leave it to the epistemologists to tell us what conditions must be in place for someone's belief to be epistemically justified; assuming, however, that it is possible for people to have epistemically justified but mistaken beliefs about others' moral statuses, I contend that people who unjustly credibly threaten or attack others on the basis of such mistaken beliefs are not morally responsible for the unjust credible threat that they pose or the unjust attack they commit. Through no fault of their own, the unjust nature of their threat or attack is totally opaque to them. Assuming that such invincibly ignorant or mistaken attackers would not attack if they knew better, they cannot, I contend, be held morally responsible for their unjust credible threat or attack. (If such persons would attack even if they knew better, then it seems that they are not attacking because they believe that they are justified so much as attacking because they think they can get away with it.) People who credibly threaten or attack others because they are invincibly ignorant or mistaken about the nature of their threat or attack are not morally

¹⁰²Rodin, *War and Self-Defense*, 90.

¹⁰³Vitoria, *Political Writings*, 268.

responsible for unjustly credibly threatening or attacking, and so, according to the *responsibility* limitation, are not morally liable to defensive attack.

Again, though, it is excusable to defensively attack such invincibly ignorant innocent aggressors, especially because we tend to think that most people who unjustly credibly threaten or attack due to ignorance or mistake should have known better. Often, as J.L. Austin points out, such epistemic excuses answer one charge of moral responsibility only by admitting another—the attacker was ignorant or mistaken about the nature of her threat or attack, but she was so because she was thoughtless or careless or negligent.¹⁰⁴ However, in situations where this is not the case, although it is excusable for the unjustly threatened or attacked person to respond with defensive force, it is not permissible for him to do so. His responding with defensive force is ruled out as impermissible by the *responsibility* limitation contained within his individual right of self-defense; he cannot justifiably defensively attack truly innocent aggressors, whether they are insane, unable to understand what they are doing, or invincibly ignorant or mistaken about the nature of their credible threat or attack. But while the use of defensive force is not permissible in these kinds of epistemic cases, its use is, as I have pointed out, excusable, because we usually think (with good reason) that the person who is causally responsible for the unjust credible threat against or attack on us is morally responsible as well. Nevertheless, when the unjustly credibly threatening or attacking person has the false but really epistemically justified belief that her credible threat or attack is just, then she is morally innocent, and so is not morally liable to defensive attack.

The *responsibility* limitation on the individual right of self-defense, as I understand it, generally rules out as impermissible defensive attacks against anyone who is not morally responsible for unjust credible threats against or in-progress violations of the law of nature. As

¹⁰⁴Austin, “A Plea for Excuses,” 3.

we have seen, it particularly excludes as impermissible severe or lethal defensive attacks against innocent bystanders, innocent threats, and innocent aggressors, because they have not freely and knowingly chosen to unjustly credibly threaten or attack; they are not morally responsible for the unjust credible threats and in-progress attacks in which they are (or are not, in the case of innocent bystanders) causally involved. Following Locke's transfer theory of state rights, the *responsibility* limitation also rules out as impermissible a state defensively attacking another state or its citizens when neither is morally responsible for unjust credible threats against or in-progress violations of the first state's, or its citizens', lives, bodies, liberty, or property. When a state or its citizens is unjustly credibly threatened or attacked, that state may justifiably respond with defensive force of any magnitude because of its right of self-defense (which is a corollary of its right to self- and other-preservation), but it may only use such defensive force against whomever is morally responsible for the unjust credible threat or occurrent attack. So, it is justified for a state to do anything to those who are morally responsible for unjustly credibly threatening or currently attacking it, but it is impermissible (albeit possibly excused) for a state, even in self-defense, to attack innocent bystanders, innocent threats, or innocent aggressors.

III. The Right to Punish

As I mentioned above, the right to punish in the non-political state of nature applies to past violations of the law of nature, rather than credible threats against or in-progress violations of it. As Simmons puts it, “punishment of a criminal [a past violator of the law of nature] involves far more than defending someone against attack; punishment begins where defense leaves off.”¹⁰⁵ Arguably, both the *law of nature* limitation and the *responsibility* limitation hold for the individual right to punish in much the same way as they hold for the individual right to self- and other-preservation. The *law of nature* limitation rules out as impermissible punishing

¹⁰⁵Simmons, *The Lockean Theory of Rights*, 136.

those people who have not transgressed against the law of nature; the right to punish only justifies harming another person's life, body, liberty, or property when that person has already broken the law of nature. This limitation rules out as impermissible, for example, punishing innocent people because doing so will have overall good consequences.

The *responsibility* limitation rules out as impermissible punishing people who are not morally responsible for past violations. While the individual right to punish justifies attacking any and every past violator of the law of nature who is morally responsible for his or her violation, it rules out as impermissible punishing those who, despite being causally involved in the violation, were not morally responsible for it.¹⁰⁶ In short, those who did not freely and knowingly choose to violate the law of nature, that is, to unjustly harm another person's life, body, liberty, or property, cannot justifiably be punished for their causal involvement in the past unjust harm. In the non-political state of nature, neither you nor any other individual may justifiably punish those people who were either irresistibly coerced into unjustly harming, insane or otherwise incapable of having the relevant aggressive intention, or invincibly ignorant or mistaken about the unjust nature of the harm that they committed. The *responsibility* limitation contained in the right to punish, like the similar limitation contained in the right to self- and other-preservation, rules out as impermissible punishing innocent bystanders, innocent threats, and innocent aggressors for past violations of the law of nature.

While the right to self- and other-preservation, as we saw above, seems to justify doing anything to those morally responsible for credible threats against and in-progress violations of the law of nature, the right to punish does not, I think, include such an 'open season' proviso. Rather, it seems limited to punishing past transgressions against the law of nature in a way that is proportionate to the seriousness of the violation. As Locke puts it, while “every man in the state

¹⁰⁶Locke, II, 7.

of nature has a power to kill a murderer,” “lesser breaches” of the law of nature must be punished less severely.¹⁰⁷ While Locke is not concerned to work out the details of this limitation on the individual natural right to punish—he writes that it is “beside [his] present purpose to enter here into the particulars of the law of nature, or its measures of punishment”—he does claim that “it is certain there is such a law” and that it is plain to “rational creature[s]” to what degree different transgressions against the law of nature may justifiably be punished.¹⁰⁸ In effect, while Locke is clear that there is what we might call a *proportionality* limitation on the individual natural right to punish, he leaves figuring out the specifics of this limitation as an exercise for the reader. Nevertheless, it seems that the *proportionality* limitation, in general, rules out the sort of ‘open season’ response to credible threats and in-progress violations that is allowed by the right to self- and other-preservation. Instead, it limits justifiable punishment for past violations of the law of nature to that punishment which is “proportionate to [the] transgression.”¹⁰⁹ According to the *proportionality* limitation on the individual natural right to punish, then, excessive punishment for past violations of the law of nature is impermissible.¹¹⁰

Following Locke's transfer theory of state rights, the state right to punish justifies states attacking other states, or their citizens, for those states' or citizens' past violations of the law of nature. However, it is impermissible, according to the *law of nature* limitation on the state right to punish, to attack those states or their citizens who have not violated the law of nature, and it is

¹⁰⁷Locke, II, 11-12.

¹⁰⁸Locke, II, 12.

¹⁰⁹Locke, II, 8.

¹¹⁰To be clear, I am not taking a stand on whether Locke is a desert theorist about punishment, or whether he is a consequentialist about punishment. At some points, especially where he focuses on the punishment being proportionate to the crime, he looks like a desert theorist (see especially II, 8). At other points, he focuses on the punishment being whatever is necessary for repentance and deterrence of future crime, which looks like a more consequentialist theory of punishment (see especially II, 12). Given that Locke seems to go in both directions regarding punishment, the most that I want to ascribe to him is the minimal *proportionality* limitation, which can be read, I think, in both a desert-theoretic and consequentialist way.

impermissible, according to the *responsibility* limitation contained within the state right to punish, to attack those states or their citizens who are not morally responsible for past violations, even if those states or citizens were causally involved in the relevant past violations. States and their citizens, like individuals in the non-political state of nature, can be innocent bystanders, innocent threats, and innocent aggressors, as well as morally responsible aggressors. Finally, the *proportionality* limitation on the state right to punish rules out as impermissible states excessively punishing other states or their citizens for their past violations of the law of nature; the punishment, to be justified, must (so to speak) fit or match the crime.

IV. The Transfer Theory of State Rights and Contemporary Just War Theory

As we have seen, the Lockean justification for the state right of self-defense is based on the claim that citizens, when they consent to enter into a legitimate political society, give up their individual natural rights to self- and other-preservation and to punish to that political society, which in turn entrusts those rights to the state. The state's rights, then, are simply all of its citizens' individual rights to self- and other-preservation and to punish put together. Because states and their respective citizens are in a non-political state of nature with respect to each other, (that is, various states and their respective citizens have not consented to join a legitimate political society with each other), how each state can justifiably act in war is determined by what the individual natural rights to self- and other-preservation and to punish justify doing in the non-political state of nature. As we have seen, these individual natural rights contain various limitations. Following the transfer theory of state rights, these limitations carry over to the state, such that the state may not justifiably engage in aggressive wars, and may only justifiably use defensive force against those who are morally responsible for either credibly threatening to unjustly attack or are in the process of unjustly attacking. The state may also, according to the

Lockean picture, justifiably punish other states or their citizens for past unjust attacks for which those states or citizens are morally responsible, but may only justifiably do so in a way that is proportionate to the seriousness of the past violation of the law of nature.

Modern wars necessarily involve attacks on innocent threats and innocent aggressors, and often involve attacks on innocent bystanders; thus, it is difficult to see how a Lockean understanding of the state right of self-defense can justify defensive wars. Combatants are, for the most part, innocent threats or innocent aggressors; they are most commonly either irresistibly coerced into fighting or invincibly ignorant of the fact that the war in which they are engaging is unjust. Of course, it is certainly not the case that *all* combatants are innocent threats or innocent aggressors; it is likely that at least some combatants freely and knowingly choose to engage in unjust actions. But, it is wildly implausible to think that the vast majority of combatants freely and knowingly choose to engage in unjust actions. Many combatants are irresistibly coerced into fighting; such coercion can take the form of direct physical threats to their lives and the lives of their families, but can also take the form of indirect, but still very serious, threats to their future careers and economic potential. In many parts of the Middle East and Africa, men and boys are threatened with their deaths or the deaths of their families unless they join the relevant military force.¹¹¹ In the United States, a direct refusal by a combatant to engage in combat when ordered to do so by a superior officer is punishable by death,¹¹² although the last US combatant actually executed for refusing to fight when ordered to do so was Private Edward Slovik in 1945.¹¹³ More common in the Global North is the threat of court-martial; combatants convicted of refusing to fight when ordered to do so are first sent to military prison for a number of years, and then, upon

¹¹¹Grete, "Congolese Children Forced to Fight."

¹¹²"Assaulting or Willfully Disobeying Superior Commissioned Officer," United States Military Code.

¹¹³"The Execution of Private Slovik," *The Army Lawyer: A History of the Judge Advocate General's Corps, 1775-1975*.

their release, are treated as felons for the remainder of their lives.¹¹⁴ Such treatment makes it practically impossible to obtain or maintain anything but the most menial of jobs.¹¹⁵ This threat to one's future life and livelihood is serious enough, I maintain, to constitute irresistible coercion; it is a threat which a person of reasonable firmness would not be able to resist. Thus, I maintain that many combatants in the modern era are irresistibly coerced into fighting, and so are not morally responsible for any unjust wars in which they engage.

Still other combatants are invincibly ignorant of the fact that the wars in which they are engaging are unjust. The use of propaganda, the withholding of relevant information, and the indoctrination which combatants undergo during their basic training all combine to make it incredibly difficult, if not impossible, for the combatants on the front lines to know that the war that they are being ordered to prosecute is unjust. Due to circumstances beyond their control, they could not, in other words, know about the unjust nature of the wars in which they are ordered to engage. While such combatants may freely choose to fight, they do not knowingly engage in unjust threats or actions; thus, I conclude, they too are not morally responsible for any unjust war in which they engage. If this is correct, then it seems that the state right of self-defense, because it contains the *responsibility* limitation, does not justify attacking enemy combatants. To defend itself, the unjustly credibly threatened or attacked state may justifiably respond with defensive force against those who are morally responsible for the unjust credible threat or attack; but, I argue, enemy combatants are not morally responsible for the unjust credible threat or occurrent attack. They are merely causally involved. And as we have seen, causal involvement is not sufficient for moral responsibility; what is required (and what is rarely

¹¹⁴“Uniform Code of Military Justice” in the US, “Military Courts of the United Kingdom” in U.K., “Court Martial Appeal Court of Canada” in Canada, etc.

¹¹⁵Christopher Uggen, Melissa Thompson, and Jeff Manza, “Crime, Class, and Reintegration: The Socioeconomic, Familial, and Civic Lives of Offenders,” 281-310.

the case) is that the enemy combatants freely and knowingly choose to engage in unjustly credibly threatening or attacking another state or that state's citizens. So, unless it is possible to prosecute a war without attacking such morally innocent enemy combatants, the *responsibility* limitation rules out as impermissible states going to war against enemy combatants even in self-defense.

Again, it is possible, and in fact likely, that some combatants do freely and knowingly choose to prosecute wars that they know to be unjust. However, this does not constitute a problem for my argument; all I need is the more minimal claim that many, and perhaps the majority, of combatants in the modern era are innocent threats or innocent aggressors. Add to this the plausible claim that the most low-ranking combatants, i.e. those who are most likely to be on the front lines of any war, are precisely those combatants who are most likely to be either irresistibly coerced or invincibly ignorant, and it looks as though, given the *responsibility* limitation, it is impermissible for the defending state to order their own troops to attack such a front line in self-defense.¹¹⁶ Such a defensive attack may well be excused, of course, but that, as I have argued above, is different than saying that such a defensive attack is justified. The state right of self-defense, because it contains the *responsibility* limitation, rules out as impermissible attacking innocent threats and innocent aggressors. Insofar as modern warfare necessarily requires defensively attacking innocent threats and innocent aggressors in the form of enemy combatants, modern defensive wars cannot be fought justly. At best, modern defensive wars are impermissible but excused.

Contemporary just war theory elides this problem by arguing that combatants are

¹¹⁶At the very least, such innocent threats and innocent aggressors will be inseparably mixed together with morally responsible aggressors, such that it is impossible to aim at, and hit, only the morally responsible aggressors. Thus, the Doctrine of Double Effect—which permits the unintentional but foreseeable deaths of innocents when the goal is the intentional attacking of aggressors—does not work as a response here. There is no way to aim at, or intentionally attack, only the responsible aggressors; all that is possible is an intentional attack on (a section of) the front line as a whole. And that is impermissible, given that I am correct about the composition of the front line.

permitted to kill each other in times of war, regardless of whether the threat they pose is just or unjust, and regardless of whether they freely chose to pose a threat. As Michael Walzer, Thomas Nagel, and Elizabeth Anscombe argue, what makes a combatant morally liable to defensive attack is not that he is morally responsible for posing a threat, but rather the simple fact that he is the direct causal instrument of another combatant's peril.¹¹⁷ As Nagel puts it, enemy combatants are “the cause of danger,” and so even assuming that they are morally innocent, we are nevertheless “justified in killing [combatants] who do not deserve to die.”¹¹⁸ Contemporary just war theorists depend on this understanding of what it takes for a combatant to be morally liable to attack; it is how they argue that wars can be fought justly. Without this claim, just war theorists would have to say that many, if not all, combatants act impermissibly when they engage with enemy forces. Put bluntly, were it not for the claim that combatants may be permissibly attacked simply in virtue of being causally responsible for posing a threat, then contemporary just war theorists would have to conclude that many, if not all, combatants are simply murderers (or, at least, guilty of manslaughter) and thus that it is difficult, if not impossible, for defensive wars to be fought justly.

I have tried to show that the received view in contemporary just war theory of what it takes for a combatant to be morally liable to attack is not correct; merely being used as the causal instrument of someone else's enmity, whether that enmity is just or unjust, is not enough to make a person morally liable to defensive attack. What is needed, rather, is moral responsibility for unjustly credibly threatening or attacking. Such moral responsibility for an unjust credible threat or attack would make a combatant morally liable to defensive attack. However, I contend that the majority of combatants are not morally responsible for the unjust credible threats or attacks that

¹¹⁷Walzer, *Just and Unjust Wars*, 138-45, Nagel, “War and Massacre,” 139-40, Anscombe, “Mr. Truman's Degree” and “War and Murder.”

¹¹⁸Nagel, “War and Massacre,” 139-40.

they pose, and so they cannot be justifiably attacked in war, even in self-defense. (And of course, combatants who are justly credibly threatening or attacking cannot be justifiably attacked, because they have in no way violated the law of nature by so threatening or attacking. Attacking these so-called 'just combatants' would be to contravene the *law of nature* limitation contained within the state right of self- and other-preservation.)

Again, it would be excusable for individual combatants to defend themselves with extreme and even lethal force when the enemy combatants engage with them; when someone is shooting at you, even if you know that she is irresistibly coerced or invincibly ignorant, it is extraordinarily difficult not to shoot back, especially when your comrades-in-arms and superior officers are exhorting you to do so. But still, although excused,¹¹⁹ it is nevertheless impermissible to use defensive force against such innocent threats and innocent aggressors. So, states that order their troops into defensive battles not only act wrongly insofar as they order their troops to engage in impermissible actions (assuming that the majority of the enemy combatants are innocent threats or innocent aggressors), but such states also act wrongly insofar as they put their own troops into a difficult moral situation, namely, a situation where each combatant must choose between a) her own death, b) the (often quite severe) consequences of disobeying orders, and c) committing lethal defensive actions that are, at best, impermissible but excused. It seems that a state which is putting its own citizens into such a difficult moral situation is doing precisely the opposite of fulfilling its obligations with respect to those citizens. However, this directly contradicts the received view of contemporary just war theory, which, as we have seen, depends heavily on the claim that all combatants are permitted to kill each other in war, regardless of whether or not they are morally responsible for the (just or unjust) threats that they

¹¹⁹Whether such actions are fully or partially excused depends, I think, on the degree of duress or coercion that the defensive combatant is under, or, alternatively, on whether he or she is also invincibly ignorant of the nature of the situation.

pose.

Thus, the Lockean justification for the state right of self-defense is incompatible with contemporary just war theory. According to the Lockean picture, the state right of self-defense, because it is composed of its citizens' individual rights of self-defense, contains the *responsibility* limitation, which rules out as impermissible attacking innocent bystanders, innocent threats, and innocent aggressors. Contemporary just war theory is committed to the permissibility of attacking innocent threats and innocent aggressors in the form of combatants. So, the Lockean understanding of what the state right of self-defense justifies and contemporary just war theory's understanding of what the state right of self-defense justifies are incompatible. Furthermore, it appears that the *responsibility* limitation, which is—according to the Lockean view—contained within the state right of self-defense, might well rule out war altogether, insofar as it is impossible to prosecute modern wars without attacking innocent threats and innocent aggressors. The *responsibility* limitation would, however, justify defensive attacks against those morally responsible for unjust credible threats and attacks, such as political and military leaders. While this does not directly contradict contemporary just war theory, many contemporary theorists are uncomfortable with the permissibility of assassination campaigns.¹²⁰ Ultimately, though, if one accepts the Lockean argument for state rights of self-defense as I have presented it, then one cannot accept the received view of contemporary just war theory, because each is committed to a claim about the moral status of attacking enemy combatants who are innocent threats or innocent aggressors that contradicts the other.

Of course, it is open to contemporary just war theorists to embrace a revisionary understanding of just war theory, and this is precisely what Jeff McMahan does. He argues

¹²⁰See Walzer, *Just and Unjust Wars*, 203, and Orend, *The Morality of War*. The notable exception here is Richard Norman, who argues that in fact assassination campaigns may well be justified in many, if not most, cases of state defense. Norman, “The Case for Pacifism.”

against the received view of contemporary just war theory that merely being causally responsible for posing a threat is not sufficient to make a combatant morally liable to attack.¹²¹ Instead, the combatant must be responsible for posing an objectively unjust threat. On its face, this looks very similar to the Lockean picture outlined above. However, this is deceptive, because McMahan has an odd view of responsibility, one that is dependent not on freely and knowingly choosing, but on a lack of physical force and facts about engaging in objectively unjust behavior. He argues that if a person engages in a morally risky activity—that is, an activity that has the potential to unjustly harm another person(s)—for no morally good reason, then that person is engaging in objectively unjust behavior and so is morally responsible for any unjust harm that her action ends up causing.¹²² This strikes me as extraordinarily strange, because it seems that what logically follows from this is that, in order to avoid being morally responsible for unjust harms, people ought never, unless in the service of some morally good goal, to take any risks. But this cannot be right; risk is a part of life, and to say that taking risks, when not attempting to achieve some morally good goal, is objectively unjust is to inordinately curtail the range of morally acceptable behaviors. McMahan packs too much into his understanding of objective wrongdoing, and thus packs too much into his understanding of moral responsibility, insofar as he claims that we are morally responsible for any unjust harms that occur as the result of our objective wrongdoing (i.e., our taking a risk for no morally good reason).

Perhaps unsurprisingly, McMahan goes on to say that combatants knowingly engage in a risky activity (war) for no morally good reason, and thus that they are morally responsible for the objectively unjust threat that they pose. Furthermore, he thinks that it is unrealistic to claim that combatants who are engaged in unjust wars do not know, for the most part, what they are

¹²¹McMahan, *Killing in War*.

¹²²McMahan, *Killing in War*, 162-3.

doing.¹²³ While McMahan does think that irresistibly coerced, invincibly ignorant or mistaken, and insane combatants are, to a greater or lesser extent, excused, he nevertheless argues that, because they are posing objectively unjust threats and know, for the most part, what they are doing, most—if not all—combatants are morally responsible for the unjust threats that they pose and thus are morally liable to attack.¹²⁴ In response, I would like to point out that McMahan seems to have a very strange view of what it is like to be a combatant. He seems to have in mind predominately officers in the militaries of the Global North, who do appear, for the most part, both to have entered the military of their own accord and to have access to information that would be relevant to determining the justice of the war in which they are being ordered to engage. However, such officers are in the minority in their own militaries, which are mainly composed of low-ranking enlisted troops. Such troops, as I have pointed out above, are subject to psychologically compelling basic training, intense levels of propaganda, and financial (if not psychological) coercion. The same goes, and to a more extreme degree, for the militaries of the Global South. Given these facts, I think that McMahan is simply wrong to claim that combatants, for the most part, know what they are doing when they engage in unjust wartime actions; much more realistic is the claim that they do, for the most part, reasonably believe that the wartime actions in which they engage are just. Thus, it is wrong of him to claim that combatants bear moral responsibility for their unjust actions simply because they knowingly engage in a risky activity for no morally good reason; by their own lights, their activity is not morally risky, and they do have morally good reasons for their actions. Thus, they are not morally responsible for the unjust harms that they cause.

Ultimately, because McMahan misunderstands both the nature of moral responsibility

¹²³McMahan, *Killing in War*, 184-5.

¹²⁴McMahan, *Killing in War*.

and the reality of combatant life, he reaches the incorrect conclusion that so-called 'unjust combatants,' i.e. combatants who engage in what he refers to as objectively unjust credible threats or attacks, are morally responsible for the unjust harms that they cause and thus are morally liable to defensive attack. This, I have argued, is mistaken: McMahan should conclude, rather, that unjust combatants, insofar as they are innocent threats or innocent aggressors, are not morally responsible and thus are not morally liable to defensive attack. So, McMahan's revision of contemporary just war theory, while interesting, does not make contemporary just war theory compatible with the Lockean picture of the state right of self-defense. Instead, it simply locates the incompatibility in a slightly different location.¹²⁵

Thus, I conclude that the Lockean understanding of what is justified in war, which flows from the Lockean justification for state rights of self-defense, is radically at odds with both the received view of contemporary just war theory and McMahan's revisionist view of just war theory. If contemporary just war theorists want to maintain that all combatants are neither murderers nor guilty of manslaughter when they kill each other in war, and that defensive wars can be fought justly, then it seems that they should not take up the Lockean argument for state rights of self-defense, at least insofar as that argument contains the understanding of moral responsibility that I have set forth. It seems uncontroversial that many contemporary just war theorists, McMahan possibly excepted,¹²⁶ want to maintain that all combatants are neither murderers nor guilty of manslaughter when they engage in war, and that all just war theorists

¹²⁵Furthermore, McMahan argues that the different moral statuses of just and unjust combatants should have no practical impact. He contends that there are good reasons to maintain the fiction that all combatants are equally morally permitted to kill each other, both in international law and in general. I am deeply suspicious of views that are committed to hiding the truth; such an implication seems to indicate that something has gone wrong with the theory. But aside from this quite general worry, I am not sure that anything substantial hangs on this fact about his view. See McMahan, *Killing in War*.

¹²⁶It is not clear whether McMahan wants to claim that unjust combatants, if they are excused, are murderers *per se*. It is clear that he wants to hold them morally liable despite the fact that they are excused. Whether this moral liability extends to putting them in the category of 'murderer,' though, is unclear.

want to maintain that defensive wars can be fought justly. Presumably, maintaining this second claim is crucial to one's identity as a just war theorist—that defensive wars can be fought justly and so are sometimes justified is one of the big conclusions of just war theory. But, as I have argued, the Lockean argument for state rights of self-defense does not support, and in fact contradicts, this conclusion. Applying the Lockean picture to modern warfare, we see that defensive wars cannot be fought justly; at best, they are impermissible and unjust, but excused. So, I think it is clear that contemporary just war theorists have fairly compelling theoretical reasons to reject the Lockean argument for state rights of self-defense as I have presented it in favor of some other, more friendly, view.

V. Objections

It is important to note, however, that a more friendly view need not take the form of a wholly non-Lockean view. Contemporary just war theorists can certainly challenge my interpretation of Locke's understanding of the *responsibility* limitation on the individual right of self-defense, i.e. my interpretation of what it takes to be morally liable to defensive attack. However, in order to do so, they will have to make sense of the textual evidence that I have cited that supports the claim that what it takes to be morally liable to defensive attack is freely and knowingly choosing to commit an unjust action. My argument that it is impermissible, according to Locke, to defensively attack innocent threats and innocent aggressors, i.e. those who do not freely and knowingly choose to commit unjust actions, directly follows from what I regard as the Lockean claim that the individual right of self-defense contains the *responsibility* limitation. (To reiterate, the *responsibility* limitation on the individual right of self-defense maintains that defensive actions are permissible only against those who are morally responsible for—who freely and knowingly choose to undertake—the credibly threatened or occurring unjust action.)

Putting that argument together with the factual claim that the majority of combatants in the modern era, especially those who are the citizens of states inclined to engage in aggressive wars, are innocent threats or innocent aggressors, I conclude that defensive wars cannot be fought justly; at best, ordering and engaging in defensive attacks against such enemy combatants is impermissible but excused. Defensive combatants may not be murderers, but they are, according to this view, guilty of manslaughter.

Now, an interlocutor might well challenge my reading of Locke by citing part of Locke's discussion of the law of nature, wherein he appears to say that the limitations contained within the right of self-defense fall away, or are overridden, when a person's own self-preservation is at stake. He writes that "every one...*when his own preservation comes not in competition*, ought he, as much as he can, to preserve the rest of mankind, and may not, unless it be to do justice to an offender, take away or impair the life, or what tends to the preservation of life, the liberty, health, limb, or goods of another."¹²⁷ The suggestion seems to be that when a person's own preservation is at issue, he may, in order to save himself, take away or impair the lives of others, regardless of whether they are offenders of the law of nature or not. Bluntly, when your life is at stake, you may do whatever it takes (including not only defensively attacking responsible aggressors, but also defensively attacking innocent threats, innocent aggressors, and innocent bystanders) in order to save yourself. If this is the correct reading of Locke, then my claim that a person's individual right of self-defense does not justify defensively attacking innocent threats, innocent aggressors, or innocent bystanders in order to save her own life is indeed mistaken. The *responsibility* limitation on the individual right of self-defense, according to this reading of Locke, is either overridden in cases where a person's own life is at stake, or is not contained within the individual right of self-defense at all.

¹²⁷Locke, II, 6, emphasis added.

However, concluding from the above quotation that the *responsibility* limitation is not contained within the individual right of self-defense at all is, I think, mistaken. All of Locke's explicit examples of self-defense deal with defending against aggressors who are morally responsible for their unjust credible threats or actions; presumably he uses these examples in order to demonstrate that their moral responsibility for the unjust credible threats or actions in question is an essential part of their being morally liable to defensive attack. The implication here is that the individual right of self-defense does contain a *responsibility* limitation, if not the absolute limitation that I have described. Furthermore, in his discussion of conquest, Locke is explicit that those citizens of the aggressor state who are not morally responsible for the aggression are not to be defensively attacked or punished. He writes that the citizens of the aggressor state, "having given to their governors no power to do an unjust thing, such as is to make an unjust war (for they never had such a power in themselves) they ought not to be charged as guilty of the violence and injustice that is committed in an unjust war, any further than they actually abet it."¹²⁸ Only those citizens who actively support and engage in the unjust war are guilty of its violence and injustice; Locke concludes from this that, contrary to popular opinion, such abetting citizens are the only people who can be justifiably defensively attacked or punished by the lawful conquerer, that is, by the defending state.¹²⁹ Again, the suggestion is that moral responsibility matters to moral liability to defensive attack and punishment. Thus, I think it is implausible to conclude that the individual right of self-defense, according to Locke, does not contain the *responsibility* limitation at all.

A possibly more plausible move is to argue that Locke maintains that the individual right of self-defense does contain the *responsibility* limitation, but that this limitation is overridden in

¹²⁸Locke, II, 179.

¹²⁹Locke, II, 179.

cases where a person's own self-preservation is at stake. This is the tack that Yitzhak Benbaji takes; he argues that the Lockean individual right of self-defense is such that it allows victims to justifiably attack innocent threats and innocent aggressors (i.e., those who are causally, but not morally, responsible for credible threats or in-progress attacks) in self-defense.¹³⁰ Like the traditional just war theorists discussed above, Benbaji argues that “neither intentionality nor agency” is required to be liable to defensive killing; all that is required is that the individual in question be the causal instrument of unjust aggression.¹³¹ However, he also argues that, because such innocent threats and innocent aggressors are not *morally* responsible for the relevant unjust aggression, they retain their right of self-defense, and so are justified in defending themselves against the victims' defensive attack. As he puts it, “the [defensive] counterattack against the [innocent] sleeping soldiers is justified [on the grounds of self-defense]...notwithstanding the justification of the counterattack, the sleeping soldiers retain a right to defend themselves. ...Soldiers are morally equal because both sides lost the right not to be attacked by each other [in virtue of being the causal instruments of unjust aggression] but retain their right to defend themselves from these attacks.”¹³² Benbaji contends that the core Lockean convictions regarding the *responsibility* limitation contained within the individual right of self-defense are first, that you may justifiably defend yourself against whoever is causally involved in unjustly threatening or attacking you, regardless of their moral responsibility for that aggression, and second, that no one loses their right of self-defense unless they are morally responsible for unjustly threatening or attacking another person.¹³³ From these convictions, he concludes that enemy combatants are

¹³⁰Benbaji, “A Defense of the Traditional War Convention,” 472-3.

¹³¹Benbaji, “A Defense of the Traditional War Convention,” 468.

¹³²Benbaji, “A Defense of the Traditional War Convention,” 473.

¹³³Benbaji, “A Defense of the Traditional War Convention,” 465-8, 470-9.

morally equal, in that they are (absent certain special circumstances) justified both in attacking each other and in defending themselves from each other's attacks. Thus, on Benbaji's view, combatants do not act impermissibly in fighting wars; rather, they are permitted, on the grounds of self-defense, both to attack and defend with lethal force.

Benbaji's view, as should be apparent, is quite similar to my own: I also maintain that enemy combatants are morally equal. However, I argue, contra Benbaji, that combatants are morally equal in the sense that they act impermissibly but excusably. This is because I disagree with him that the *responsibility* limitation on the Lockean right of self-defense permits attacking innocent threats and innocent aggressors in self-defense. Being the causal instrument of unjust aggression is just not enough, I claim, to make a person morally liable to defensive attack. Thus, when combatants defend themselves against other combatants, who, I have argued, are not morally responsible for the unjust threats and attacks they pose, they act impermissibly. However, because they are under severe coercion when they act, their impermissible actions are excused. Clearly, Benbaji and I disagree about the nature of the *responsibility* limitation contained within the Lockean right of self-defense, and it is from this disagreement that our—slightly but importantly—different views follow. Unlike me, Benbaji seems to think that the *responsibility* limitation is overridden in cases where a victim's life, body, liberty, or property is at stake; in such cases, he thinks, the victim may defensively attack the causal instruments of her unjust peril. But, that the *responsibility* limitation operates in this way is not clear from Locke's own language. Locke puts the point negatively, writing only that “when [a person's] own preservation comes *not* in competition...[he] may not, unless it be to do justice to an offender, take away or impair the life...of another.”¹³⁴ Locke does not explicitly comment on what a person may do, in general, when her own preservation does come into competition. He gives a series of

¹³⁴Locke, II, 6, emphasis added.

examples wherein he writes that a person may kill in her own defense, but, as I noted above, all of these examples involve killing or defensively attacking aggressors who are morally responsible for the unjust life-threatening credible threat or occurrent action; nowhere does Locke explicitly deal with the sorts of cases we have been considering, where the person to be defensively attacked is not morally responsible for the unjust life-threatening credible threat or occurrent action. So, there is not a clear case, in the text at least, for supporting the theory that the *responsibility* limitation is overridden in such cases, and so attacking innocent threats and innocent aggressors is permissible, over the theory that the *responsibility* limitation is absolute, and so attacking innocent threats and innocent aggressors in such cases is impermissible but excusable.

Given this, the contemporary just war theorist, such as Benbaji, who wishes to disagree with my interpretation of Locke cannot rely on the above-cited passage as a “smoking gun,” but rather must consider the textual evidence as a whole. And as I have argued, I think that the text, taken as a whole, supports my reading of Locke. Furthermore, my reading coheres well with understanding Locke as providing a counterpoint to Hobbes' political theory as set forth in *Leviathan*.¹³⁵ Hobbes famously argues that there is no interpersonal justice in the state of war; whatever a person does in her own defense, be it attacking unjust aggressors or moral innocents, is wholly permitted.¹³⁶ Conversely, Locke argues that everyone has individual natural rights, and that any breach of these rights, in the absence of a person's own free consent or the declaration, “by word or action,” of “a sedate, settled design upon another man's life,” is unjust.¹³⁷ In keeping with the Lockean project of countering Hobbes, it makes sense to read Locke not as arguing that

¹³⁵See Locke, II, 19 and 93, as well as much of the secondary literature on Locke for this interpretation of Locke's general project.

¹³⁶Hobbes, *Leviathan*, Chapter 13.

¹³⁷Locke, II, 186, 16.

a person may do whatever is necessary when her own self-preservation is at stake (this sounds entirely too much like Hobbes), but rather as arguing that actions that involve breaching others' individual natural rights, even when those actions are in service of a person's own self-preservation, are impermissible. This reading, I contend, preserves the generally accepted image of Locke as firmly opposed to, and as providing an argument against, the Hobbesian story that all is fair in war. So, while it is possible to object to my interpretation of Locke, I think that both Locke's actual text and the general view of Locke as providing a counter-argument to Hobbes' political theory support my interpretation.

Conversely, contemporary just war theorists could agree with my interpretation of Locke regarding the *responsibility* limitation on the individual right of self-defense, but maintain that both Locke and I are mistaken about this particular point. By doing so, such theorists could adopt the general Lockean story that state rights are the transferred individual rights of citizens, while keeping their big conclusion that some defensive wars can be fought justly. However, in order to argue that both Locke and I are mistaken about the *responsibility* limitation on the individual right of self-defense, it will be necessary to make sense of the powerful intuition that many people have that something has gone horribly wrong when a person is forced to choose between allowing herself to die and defensively lethally attacking an innocent threat or innocent aggressor. People resist the possibility of such cases, I contend, because they know that it is impossible to act justly, or rightly, in such a situation; they resist because they do not want the world to turn out this way.¹³⁸ Nevertheless, as I have argued, the world can turn out this way, and when people are forced to see this fact, they very reluctantly conclude that it would be ridiculous to maintain that a person in such a situation must allow herself to die. However, it is interesting

¹³⁸In the psychological literature, this is referred to as the “just-world bias,” and can lead, in addition to the refusal to consider certain cases as realistically possible, to victim blaming and *ex post facto* explanations of what was *really* going on in any given instance. See, among others, Lerner, *The Belief in a Just World: A Fundamental Delusion*, and Melvin Lerner and Leo Montada, “An Overview: Advances in Belief in a Just World Theory and Methods,” 1-7.

to note that people do not often conclude that the person who defensively lethally attacks an innocent threat or innocent aggressor has acted rightly; they will say instead that the person was forced to act, that the innocent threat or innocent aggressor should not have had to die, that the whole situation is a tragedy, and that it should never have happened. These are not the sorts of comments, I submit, that are often made in regards to straightforwardly permissible actions. Rather, as I have argued, they are the sorts of comments that people make when an action is impermissible, but excused. They are, in short, the sorts of comments that we make about those people who are guilty of manslaughter. My understanding (and Locke's understanding as well) of the individual right of self-defense as containing the *responsibility* limitation makes sense of this deep intuition by demonstrating that defensively lethally attacking innocent threats and innocent aggressors is impermissible but excusable. So, a contemporary just war theorist, in order to keep both the Lockean picture of the transfer theory of state rights and the conclusion that defensive wars can be fought justly, must somehow explain this deep intuition while maintaining that the individual right of self-defense straightforwardly permits lethally attacking innocent threats and innocent aggressors in self-defense. It is not obvious, at least to me, that such an explanation is readily available.

Alternatively, contemporary just war theorists could accept Locke's and my understanding of the individual right of self-defense as containing the *responsibility* limitation and conclude that the Lockean argument for state rights of self-defense contradicts one of the essential claims of contemporary just war theory, that defensive wars, in the modern era, can be fought justly. They should then reject the Lockean argument for state rights of self-defense in favor of some other view, one that better supports that claim that is characteristic of, and I think essential to, being a contemporary just war theorist. Happily, there are other justificatory

arguments for the state right of self-defense available that, like the Lockean argument, make the domestic analogy appropriately illustrative. I examine one such view, the Millian-style instrumentalist justification for state rights of self-defense, in the following chapter.

CHAPTER 3: THE INSTRUMENTALIST JUSTIFICATION FOR STATE RIGHTS OF SELF-DEFENSE¹

As I mentioned in the first chapter, it is possible to read the domestic analogy as a true argument by analogy: states have rights of self-defense comparable to individual right of self-defense, we might think, because states and individuals are relevantly similar, such that whatever it is that gives rise to rights of self-defense, both individuals and states have it. The general strategy of this type of argument is to first spell out why individuals have rights of self-defense that operate in a particular way, and then attempt to show that the same, or a very similar, argument applies to states. The argument for individual rights of self-defense is thus suggestive of how the argument for state rights of self-defense might go. Strictly speaking, this makes the argument for state rights of self-defense logically independent from the argument for individual rights of self-defense; however, if the domestic analogy is to be properly illuminating in the way that most just war theorists take it to be, the two arguments (for individual rights of self-defense and for state rights of self-defense) must be very similar in terms of structure and content. Otherwise, there would be no reason to think—as contemporary just war theorists do—that the domestic analogy is appropriately suggestive, that it sheds a helpful light on the justification for and the proper operation of the state right of self-defense.²

Of course, there are many different ways of spelling out this argument by analogy, because there are many different arguments for the claim that individuals have rights of self-

¹Many thanks to Bernie Boxill, Tom Hill, Carl Ficarrotta, Finnur Dellsén, and the members of the Fall 2014 Dissertation Research Seminar at UNC-Chapel Hill for their many helpful comments on this chapter.

²As Michael Walzer, the so-called dean of just war theory, puts it, “States actually do possess rights more or less as individuals do...our primary perceptions and judgments of [international] aggression are the products of analogical reasoning.” *Just and Unjust Wars*, 58.

defense. In this chapter, I will focus on what is sometimes referred to as the *instrumentalist* argument for individual rights of self-defense.³ This line of argument, arguably prominently endorsed by J.S. Mill, David Hume, and Joel Feinberg, goes as follows: the existent system of individual rights is beneficial for most people most of the time, and so we have good reason to maintain, approve of, and defend that system.⁴ This system includes the limited individual right of self-defense (i.e., individual rights of self-defense that can justify otherwise impermissible defensive actions—such as killing—in response to unjustified aggression, but that do so only when the imminence, necessity, and proportionality conditions are met). Insofar as limited individual rights of self-defense are beneficial for most people most of the time, we have good reason to accept and endorse them.

The straightforwardly analogous instrumentalist argument, following Mill, Hume, and Feinberg, for state rights of self-defense thus goes as follows: the existent system of state rights is beneficial for most states most of the time, and so we have good reason to maintain, approve of, and defend that system. This system includes the limited state right of self-defense (i.e., state rights of self-defense that can justify otherwise impermissible defensive actions—such as going to war—in response to unjustified aggression, but that do so only when the imminence, necessity, and proportionality conditions are met). Insofar as limited state rights of self-defense are beneficial for most states most of the time, we have good reason to accept and endorse them. However, this straightforward instrumentalist argument is not, I think, quite right, because there

³I take up the classic instrumentalist way of cashing out the domestic analogy in part because it is endorsed by some contemporary just war theorists, most notably Brian Orend and Cécile Fabre, but mostly because it is a very intuitive way to think about why and how states have rights. Thanks to Finnur Dellsén and Sam Reis-Dennis for pushing me on this point. See also Orend, *The Morality of War*, and Cécile Fabre, “Cosmopolitanism and Wars of Self-Defence,” 90-114.

⁴Mill, *Utilitarianism*, see especially chapter 5, David Hume, *Treatise of Human Nature*, especial Book 3, Part 2, and Joel Feinberg, “The Nature and Value of Rights.” Importantly, I do not mean to claim that Mill, Hume, and Feinberg hold identical positions; their carefully worked-out views have interesting and important differences. Rather, I mean to suggest that they all put forward broadly instrumentalist views that are based, at heart, on the fundamental and exclusive moral importance of promoting the well-being of persons.

is no independent instrumentalist reason, apart from their impact on individuals, to care about the well-being of states.⁵ An underlying assumption behind Mill's instrumentalist argument for individual rights is that we independently care about and want to promote the overall well-being of individuals; the same cannot be said for states.⁶ Rather, we care about the well-being of states insofar as we care about the well-being of the individuals who are affected by states. States, considered in isolation from their impact on individuals, are just not that valuable (if indeed they are valuable at all). This is because their value lies in their connection to individuals; we value states because, and insofar as, they positively impact individuals' well-being. States, unlike individuals, are not intrinsically valuable or worth preserving for their own sake; they are, to echo Hobbes, artificial creations designed to, and ought to be maintained insofar as they do, benefit individuals.⁷ So, the straightforward instrumentalist argument implied by the domestic analogy must be mistaken. That state rights of self-defense, for the most part, benefit *states alone* cannot be, by itself, the justification for accepting and maintaining the current system of state rights. A Millian-style instrumentalist argument at the state level, to be successful, must acknowledge that the reason that we care about the well-being, and thus the rights, of states is because we ultimately care about the well-being of individuals. This view is echoed by Brian Orend when he writes, "But why do states have rights? The only respectable answer seems to be

⁵Some radical nationalist views seem to disagree with this claim; they ostensibly argue that states are intrinsically valuable and/or important, entirely apart from their impact on individuals. I have trouble making sense of this, and suspect that such nationalist views, despite their surface claims, are ultimately grounded in the well-being of individuals (however this is understood). For a good survey of the philosophical debates surrounding nationalism, see *The Morality of Nationalism*, edited by Robert McKim and Jeff McMahan.

⁶Here I take the Millian instrumentalist claim about the importance of furthering the well-being of individuals for granted. It is possible to question whether or not the well-being of individuals is something that we should care about; however, for the purposes of this chapter, I assume that it is. The real question, then, is whether there are other, sometimes overriding reasons to care more about values other than the well-being of individuals—for example, there may be good overriding reasons to care more about the continued existence of one's own (reasonably just) state than about the well-being of the individual soldiers that defend one's state.

⁷Hobbes, *Leviathan*, esp. chapter 13.

that they need these rights to protect their people.”⁸

Given the link between the well-being of states and the well-being of individuals, we should consider a more subtle version of the Millian-style instrumentalist argument that can be pulled from the domestic analogy, one that links the importance of the well-being of states to the importance of the well-being of individuals who are affected by states. This more plausible reading of the Millian-style instrumentalist argument goes as follows: the existent system of state rights is beneficial for the well-being of most *individuals* most of the time, and so we have good reason to maintain, approve of, and defend that system. This system includes the limited state right of self-defense (i.e., state rights of self-defense that can justify otherwise impermissible defensive actions—such as going to war—in response to unjustified aggression, but that do so only when the imminence, necessity, and proportionality conditions are met). Insofar as these limited state rights of self-defense are beneficial for the well-being of most persons most of the time, this intuitive instrumentalist argument claims, we have good reason to accept and endorse them.⁹ As Cécile Fabre puts it, the defensive rights of states “have value only to the extent that they promote some aspect of individuals' well-being.”¹⁰

The relevant similarity between individuals and states, according to this more subtle instrumentalist view, is that both have the ability to attain the same end, viz., furthering the well-being of persons, via the same method, viz., the use of existent, very similar, systems of rights. In other words, similar, if not identical, rights of self-defense are instrumental, for both individuals and states, to furthering the goal—which the Millian-style instrumentalist argument assumes that we want to achieve—of promoting the well-being of persons. If this is correct, then the domestic

⁸Brian Orend, *The Morality of War*, introduction.

⁹Arguably, this is a rough approximation of part of Hume's view of international relations. See his *A Treatise of Human Nature*, Book 3, Part 2.

¹⁰Fabre, “Cosmopolitanism and Wars of Self-Defence,” 94.

analogy is helpfully illuminating, because in both the individual case and the state case, rights of self-defense have the same function (the promotion of the well-being of persons) and so it makes sense to think that they would operate in similar, if not identical, fashions. Assuming that the well-being of persons is a goal that we wish to promote, this intuitive Millian-style instrumentalist argument concludes that we have good reason to accept and endorse not only the conventional limited individual right of self-defense, but also the similar conventional limited state right of self-defense.

This is a broad sketch of the Millian-style instrumentalist argument for state rights of self-defense; while it, like Mill's argument for individual rights, is very intuitive, it leaves many questions to be answered. We could ask, among other questions, whether the well-being of persons is an end with which we ought to be exclusively and overridingly concerned,¹¹ whether state rights of self-defense of any sort would be instrumental to furthering the goal of promoting the overall well-being of persons, or whether the conventional state right of self-defense actually does, as this intuitive instrumentalist argument claims, promote the overall well-being of most people most of the time.¹² In this chapter, I focus my attention on the final question, because my concern is with the state right of self-defense as it is standardly understood in contemporary just war theory, i.e., with the conventional state right of self-defense that purports to sometimes—when the imminence, necessity, and proportionality conditions are met—justify going to defensive war. I first argue that there is strong reason to doubt the instrumentalist claim that the state right of self-defense, as it is currently conceived, generally promotes (to a greater degree than feasible alternatives) the overall well-being of individuals. While the analogous claim in the individual case, that the individual right of self-defense generally promotes (to a greater degree

¹¹This is the traditional challenge from non-consequentialist traditions.

¹²These are both challenges from within the consequentialist, or instrumentalist, tradition. This is the vantage point from which I critique the proposed instrumentalist justification that is under discussion.

than feasible alternatives) the overall well-being of individuals, seems very plausible, if not obviously true, I argue that the claim in the state case is neither obviously true nor very plausible. The massive differences in context between the individual and state cases, as well as the evidence of history, all put the burden of proof firmly onto the instrumentalist theorist who wishes to claim that state rights of self-defense, as they are commonly understood in contemporary just war theory, generally and for the most part best promote the well-being of persons.

In addition, given the large-scale harms to individuals that history shows us come with having an anarchic system of sovereign states, I argue that a Millian-style instrumentalist has good reason to favor instead the creation of a world state. Now, this is obviously not possible in the individual case—there is no way to create a world person, so to speak, and so individual rights of self-defense are necessary to best promote the well-being of persons. However, at the international level, the existence of a world state has long been recognized as a genuine practical possibility.¹³ If a world state would be more conducive to overall individual well-being than an anarchic system of sovereign states, then that provides a good reason for those political theorists who take up the classic instrumentalist position to favor a world state over an anarchic system of sovereign states. Thus, there is good reason to doubt that the intuitive instrumentalist way of cashing out the domestic analogy actually justifies the state right of self-defense that is standardly espoused in contemporary just war theory.

Finally, considering the understanding of the conventional state right of self-defense that is found in the contemporary just war literature, I point out that the proposed instrumentalist justification for the state right of self-defense does not actually support this understanding.¹⁴

¹³See, among others, Kant, *Perpetual Peace*, 115-18, and Hume, “Of the Balance of Power.”

¹⁴This sort of instrumentalist justification may well support the historical understanding of the state right of self-defense that is found in Augustine and Aquinas, but that is not at issue here. Both Augustine and Aquinas argue that

Most contemporary just war theorists argue that states cannot act wrongly in exercising their right of self-defense, so long as their actions meet the imminence, necessity, and proportionality conditions. (That is, states cannot act wrongly in going to defensive war, so long as the act of going to war meets the relevant conditions. Of course, actions taken by military commanders and soldiers in the course of prosecuting such a war can be wrong; but the wrongness of individual military actions does not make the action of going to war, considered as a whole, wrong.¹⁵) Such states' going to war may be foolhardy or unwise, according to contemporary just war theorists, but it is not wrong.¹⁶ However, the Millian-style instrumentalist justification of state rights of self-defense claims that such rights should be accepted, maintained, and exercised because, and insofar as, they lead, overall and for the most part, to the greater well-being of individuals. Arguably, an implication of this view is that, when a state's exercising its right of self-defense conflicts with furthering the overall well-being of individuals, furthering the overall well-being of individuals should win out. According to this plausible interpretation of the proposed instrumentalist view, it is entirely possible for states to act wrongly in exercising their rights of self-defense, even when their actions meet the imminence, necessity, and proportionality conditions.¹⁷ Thus, the understanding of the state right of self-defense in contemporary just war

states may not justifiably go to war unless there is a reasonable chance of success; however, this success criterion appears to drop out of contemporary just war theory. See, among others, Aquinas, *Summa Theologiae* II-II q. 50, article 4, McMahan, "Just Cause for War," and Cécile Fabre and Seth Lazar, "Introduction," 1-10.

¹⁵This distinction is commonly referred to as the distinction between *jus ad bellum* (justice of war) and *jus in bello* (justice in war). Typically, it is thought that the moral status of the decision to go to war is logically independent from the moral status of actions committed in war: so just wars can be fought unjustly, and unjust wars can be fought justly. My concern here is with *jus ad bellum* considerations. For more on this distinction, see Michael Walzer, *Just and Unjust Wars*, David Rodin, *War and Self-Defense*, and Jeff McMahan, *Killing in War*.

¹⁶Michael Walzer famously holds this view. See *Just and Unjust Wars*, especially his discussion of the Winter War between Finland and Russia.

¹⁷This is a specific iteration of the point, familiar from more general discussions of rule utilitarianism and rule consequentialism, that it may well be wrong to comply with a moral rule (such as a right), iff the situation is such that greater benefit will come from breaking the rule than from complying with it. (Taking into account, of course, the disutility that comes from breaking a moral rule in any particular situation and/or the disutility that comes from having exceptions to moral rules, etc.) Such situations will be very rare, rule consequentialists often maintain, but

theory, insofar as it maintains that states cannot act wrongly when exercising their defensive rights in accordance with the imminence, necessity, and proportionality conditions, is radically at odds with the intuitive instrumentalist view under discussion. This provides some reason to think that the existent state right of self-defense, as it is commonly understood in contemporary just war theory, cannot be justified via appeal—by way of the domestic analogy—to the classic instrumentalist argument for rights.

No single one of the arguments that I present in this chapter against a Millian-style instrumentalist argument for the conventional state right of self-defense is by itself decisive. However, taken together, I think that they give us strong reason to doubt that an instrumentalist reading of the domestic analogy successfully justifies the traditional state right of self-defense that is at play in contemporary just war theory. So, assuming that contemporary just war theorists want to maintain their current traditional conception of the state right of self-defense, they have good reason to reject the intuitive instrumentalist argument for the traditional state right of self-defense in favor of some other, more friendly, view.¹⁸

I. The Classic Instrumentalist Argument for the Individual Right of Self-Defense

As we saw above, the intuitive, Millian-style instrumentalist argument for state rights of self-defense that sometimes justify going to war is that such state rights ought to be accepted and endorsed because they best promote, overall and for the most part, individual well-being. Of course, some people do not benefit from state rights of self-defense; certainly, some combatants' and non-combatants' lives go worse when state rights of self-defense are accepted and endorsed. However, the proposed Millian-style instrumentalist argument, because it is concerned with the

not impossible. See, among others, Mill, *Utilitarianism*, especially chapter 5, and Brad Hooker, *Ideal Code, Real World: A Rule-consequentialist Theory of Morality*.

¹⁸Notice that my argument is not dependent on rejecting the Millian-style instrumentalist altogether. Rather, I argue that such instrumentalists, by their own lights, have good reason to reject the traditional state right of self-defense that is commonly espoused in contemporary just war theory.

overall consequences of accepting and endorsing state rights of self-defense, cannot be rebutted by any one case. Rather, because it is concerned with best promoting the general well-being of individuals, it considers overall trends. So the intuitive instrumentalist argument in support of state rights of self-defense with which we are concerned is the argument that state rights of self-defense tend to, always and for the most part, best promote the overall well-being of individuals, considered as a whole.

This claim, unsurprisingly, is exactly analogous to the claim that Mill makes about individual rights; he claims that individual rights (including individual rights of self-defense) should be respected—that is, accepted, endorsed, and maintained—because doing so is the best way to promote the overall well-being of individuals, considered as a whole. As Sumner puts it, Mill “favors a utilitarian justification for the social policy of establishing and enforcing some set of conventional rights.”¹⁹ Mill famously argues that utility, understood as the “greatest amount of happiness altogether,” is the ultimate moral value.²⁰ Because he is a hedonist, Mill understands happiness ultimately in terms of the enjoyment of pleasure and the avoidance of pain. However, he is clear throughout that he does not have in mind primarily physical pleasure and pain; although these do have a role in producing more or less happiness, Mill is more concerned with the sort of pleasure that arises out of the cultivation of the “higher” human faculties of intellect, imagination, moral sentiment, the love of liberty, and dignity.²¹ It is the cultivation of these faculties, Mill thinks, that produces both the greatest quantity and highest quality of pleasure, and thus the most happiness, or utility, overall. From this, he concludes that the “standard of morality” is the promotion of the state of affairs wherein these faculties are cultivated and

¹⁹L.W. Sumner, “Mill’s Theory of Rights.”

²⁰J.S. Mill, “What Utilitarianism Is,” *Utilitarianism*, 9.

²¹J.S. Mill, “What Utilitarianism Is,” *Utilitarianism*, 4-9.

encouraged, insofar as it is possible, for “all mankind.”²² In other words, Mill understands happiness to be a function of the development and exercise of the capacities that we have in virtue of being human, and argues that actions are right insofar as they tend to produce the greatest amount of individual happiness (or, as I have been calling it, well-being) overall.

Mill's justification for accepting, endorsing, and maintaining a system of individual rights, then, is that doing so is conducive to the development and exercise of the capacities that we have in virtue of being human. As he puts it, individual rights are “moral rules, which concern the essentials of human well-being more nearly, and are therefore of more absolute obligation, than any other rules for the guidance of life.”²³ It is *because* respecting individual rights is best productive of the well-being of everyone that we ought to do so; respecting individual rights is instrumental to the promotion of overall utility. Mill goes on to contend that society ought to accept and endorse (viz, maintain and promote) a particular system of individual rights, including individual rights to life, liberty, and property, and the corollary individual rights of self-defense, because doing so will be the most conducive to promoting overall individual well-being.²⁴

Mill mentions the above individual rights as ones that ought to be endorsed, maintained, and promoted at the societal level; unfortunately, he does not provide an in-depth analysis of how these rights operate. However, given that Mill appeals both to the existent system of law as well as the current opinion of mankind when discussing the system of individual rights that ought to be accepted and endorsed for reasons of promoting overall individual utility, it is plausible to read him as endorsing fairly standard conceptions of the above-mentioned individual

²²J.S. Mill, “What Utilitarianism Is,” *Utilitarianism*, 10.

²³J.S. Mill, “On the Connection with Justice,” *Utilitarianism*, 32.

²⁴J.S. Mill, “On the Connection with Justice,” *Utilitarianism*, 32, see also L.W. Sumner, “Mill's Theory of Rights.”

rights.²⁵ Importantly, Mill points out that, given the standard conceptions of the individual rights to life, liberty, and property, and the corollary individual right of self-defense, conflicts between these rights will inevitably arise.²⁶ For instance, a person's right to property may well come into conflict, in some set of circumstances, with another person's right to life; in such a case, there is a question about which person's right ought to be respected.²⁷ Or, to put it another way, we might ask, given that both individuals' rights are *rights*, how we can determine which right is stronger, and why.

Given Mill's endorsement of the system of individual rights on instrumentalist grounds, his response to this issue is not surprising; he argues that the way to adjudicate conflicts of rights is by appeal to “social utility.”²⁸ That is, to decide which person's right ought to be respected in situations where various people's rights come into conflict, determine which course of action (respecting person A's right or respecting person B's right) will best promote overall individual well-being, and then take that course of action. However, Mill does maintain that, in actual fact, rights conflicts will come up fairly rarely. As he points out, we have a judicial system in place that adjudicates most *prima facie* rights conflicts, and so he concludes that cases of actual conflict (as opposed to cases of merely apparent conflict) are quite uncommon.²⁹ Thus, in most cases—as Sumner calls them, in all “non-exceptional cases”—we need not attempt to determine ourselves what will best promote overall human well-being, but can rest assured that, by acting in accordance with the established social system of individual rights, we are best promoting

²⁵J.S. Mill, “On the Connection with Justice,” *Utilitarianism*.

²⁶J.S. Mill, “On the Connection with Justice,” *Utilitarianism*.

²⁷Feinberg's famous (or infamous) cabin case, wherein a hiker breaks into a privately owned cabin in order to save his own life from a storm, is a nice example of individual rights conflicting. Feinberg, “Voluntary Euthanasia and the Inalienable Right to Life,” 102.

²⁸J.S. Mill, “On the Connection with Justice,” *Utilitarianism*.

²⁹J.S. Mill, “On the Connection with Justice,” *Utilitarianism*.

overall social utility.³⁰

Clearly, there is an empirical question here regarding whether Mill is correct to claim that overall individual well-being, in the sense of the development and exercise of our uniquely human capacities, is best promoted by the acceptance, maintenance, and endorsement, at a societal level, of a more-or-less conventional system of individual rights. On its face, however, this is not an implausible claim; many rights theorists have argued convincingly that our standard social system of individual rights, overall and for the most part, benefits people greatly by protecting their interests, welfare, and ability to formulate and carry out life plans.³¹ Joel Feinberg, in his seminal paper “The Nature and Value of Rights,” argues that individual rights are instrumental to human well-being, not only for the above reasons, but also because they ground human dignity; having individual rights is what makes individuals worthy of respect.³² As he puts it, our rights allow us to “stand up like men [persons], to look others in the eye, and to feel in some fundamental way the equal of anyone.”³³ Because this sense of dignity is necessary to our well-being, and this sense of dignity comes from our having individual rights, Feinberg concludes that individual rights are necessary to individual well-being. He thus maintains that we should, at the societal level, accept and endorse a fairly standard system of individual rights because doing so is integral to both our and others' well-being. Ultimately, there are several different ways of cashing out the specifics of the claim that endorsing and maintaining our conventional system of individual rights best leads, overall and for the most part, to the well-being of persons in society; Mill and Feinberg simply provide two convincing examples.

³⁰L.W. Sumner, “Mill's Theory of Rights.”

³¹See, among others, Feinberg, “The Nature and Value of Rights,” Dworkin, “Taking Rights Seriously,” and Thomson, *The Realm of Rights*.

³²Feinberg, “The Nature and Value of Rights.”

³³Feinberg, “The Nature and Value of Rights,” 252.

As I have noted, both Mill and Feinberg argue for the societal acceptance of a system of individual rights, rather than for particular understandings and operations of individual rights; nevertheless, we can, I think, read them as endorsing, on instrumentalist grounds, fairly standard conceptions of the individual rights to life, liberty, and property, and the corollary individual right of self-defense. For my purposes, I will focus on the standard conception of the individual right of self-defense, as it operates in domestic society. I focus on how the right operates in domestic society because both Mill and Feinberg explicitly assume a system of rights operating in society, and most discussions of the individual right of self-defense in the just war tradition implicitly assume the existence of a political society.³⁴ The exception here is Hobbes, who discusses the individual right of self-defense as it operates in a state of nature. Perhaps predictably, Hobbes is a critic of the just war tradition, rather than a member of it.³⁵

The individual right of self-defense is a corollary of what might be referred to as, following Feinberg, the individual right to autonomy.³⁶ The right to autonomy includes rights to life, liberty, property, bodily integrity, etc. Roughly, it is the right to live your life as you see fit, without interference from others, so long as you are not unjustly harming anyone else. (This second clause is important. If you are unjustly aggressing against another and someone tries to stop you, your right to autonomy is not being violated.³⁷) This individual right to autonomy brings with it the individual right of self-defense; if someone unjustly violates your right to autonomy, by either unjustly credibly threatening you or unjustly attacking you, you may

³⁴Thomson's article "Self-Defense" seems to assume this, as does Rodin's discussion in *War and Self-Defense*. See also the invocations of the domestic analogy in Walzer, *Just and Unjust Wars*, Hurka, "Proportionality in the Morality of War," McMahan, "Just Cause for War," and Norman, *Ethics, Killing, and War*.

³⁵Hobbes, *Leviathan*, chapter 13.

³⁶Feinberg, *Harmless Wrongdoing*, 62-4.

³⁷McMahan, *Killing in War*, chapter 1.

justifiably defend your autonomy, i.e., you may defend yourself—via actions that would normally be impermissible—against their aggression. Notice that you are not required to defend yourself; part of what makes the right of self-defense a *right* is that it is under your control. When someone engages in unjust aggression against you, you may, but you do not have to, engage in self-defense. Conventionally, the individual right of self-defense justifies defensive actions against unjust aggression only when the imminence, necessity, and proportionality conditions are met.³⁸

The *imminence* condition limits your defensive actions to being possibly justified only when there is an unjust credible threat or unjust occurrent attack against you. For example, say that a person is walking behind you on a busy sidewalk, and that he is neither credibly threatening nor unjustly attacking you. In this instance, turning and tackling him in self-defense would be unjustified, because there is no imminent threat to which you are responding. Your right of self-defense does not, conventionally, permit defensively attacking just any potential aggressor; after all, everyone you meet is a potential aggressor.³⁹ For your act of self-defense to be possibly justified, you must have good reason to think that you are being unjustly credibly threatened or attacked.⁴⁰ So, if the person on the sidewalk puts a gun or knife to the small of your back, then you would be possibly justified in turning and tackling her, because you have a good

³⁸Thomson, “Self-Defense.” Although Thomson does not use this language in her discussion of self-defense, these do seem to be the limitations on the right of self-defense that she has in mind. George Fletcher identifies these conditions as intrinsic to the individual right of self-defense in *A Crime of Self-Defense*, 19.

³⁹Interestingly, from the fact that everyone you meet is a potential aggressor, Hobbes concludes that, in the state of nature at least, you may justifiably preemptively attack anyone in the name of self-defense. *Leviathan*, ch. 13.

⁴⁰It is true that people often erroneously assess threat levels and mistake innocent actions for unjust threats and attacks; note the widely-circulated study regarding how often Americans mistake tools for guns when those tools are held by black persons. See B. Keith Payne, Yujiro Shimizu, and Larry L. Jacoby “Mental control and visual illusions: Toward explaining race-biased weapon misidentifications.” However, it is also true that we live in non-ideal circumstances, and so we must do the best we can with the limited evidence that we do have. Ultimately, what counts as having good reason to believe that a person is unjustly threatening or attacking you is a difficult question, and one I cannot fully answer here. For more on this issue, see, among others, Robert Audi, *The Architecture of Reason: The Structure and Substance of Rationality*, and Han van Wietmarschen, “Peer Disagreement, Evidence, and Well-Groundedness,” 395-425.

reason to believe that she is unjustly credibly threatening, if not actually attacking, you. (Whether your defensive tackle is actually justified, from a rights-theoretic point of view, depends on whether it meets the necessity and proportionality conditions, as well as the imminence condition.⁴¹) Self-defense is justified, according to the imminence condition, only when it is a response to what you have good reason to believe is an actual unjust credible threat or occurrent attack. As George Fletcher puts it, “legitimate [justified] self-defense must be neither too soon or too late.”⁴² (Defensive attacks that occur after the unjust aggression is over are not, strictly speaking, defensive actions; rather, they are punitive, vengeful, or unjust aggressive actions.)

Conventionally, the individual right to self-defense also includes the *necessity* condition. The necessity condition limits your defensive action to being possibly justified only when it is necessary to avert or stop the unjust aggression in question. For instance, say that a colleague unjustly interrupts your presentation, and that you can stop his interruption in any number of ways, from cueing the moderator to cut him off verbally, to verbally cutting him off yourself, to punching him in the face, to shooting him dead on the spot. Assuming that verbally cutting him off will successfully stop his interruption, you may not shoot him, because shooting him would be, both literally and figuratively, overkill. As Thomson points out, you may only do what is needed to stop the present unjust aggression; she writes that “it would be wrong to kill even a villainous aggressor when you do not need to do so.”⁴³ In other words, the use of excessive force in self-defense is not justified; only those defensive actions that are necessary to avert or stop the

⁴¹Of course, it may be the case that your defensive action meets the imminence, necessity, and proportionality conditions, and yet is not, all things considered, the morally right thing to do. I discuss this issue in more detail below.

⁴²George Fletcher, *Basic Concepts of Criminal Law*, 133.

⁴³Thomson, “Self-Defense,” 284.

unjust aggression (i.e., the unjust credible threat or the unjust occurrent attack) are possibly justified, according to the necessity condition. This limits defensive actions, in many cases, to non-lethal actions, because while killing the unjust aggressor/s will undoubtedly stop the relevant aggression, killing is often not necessary to stop the aggression; a non-lethal action will often work just as well.

Now, it is difficult to predict with complete accuracy what defensive action is necessary to stop any particular unjust aggression; we can easily imagine both super-aggressors (who will not stop threatening or attacking regardless of what non-lethal action the defender takes) and under-aggressors (who will stop at the mere hint of resistance). There is thus always the question, when contemplating some non-lethal defensive action, of whether it will succeed. However, given that the only goal of self-defense is the protection of oneself and one's rights, and *not* the harming or punishing of the aggressor, it seems that in regards to necessity the burden is on the defender to do the least aggressive defensive action possible. This is why running away, when possible, has historically been considered the first line of individual self-defense.⁴⁴ (The recent 'Stand Your Ground' laws in the United States have been challenging this conception of self-defense, however; such laws say that defenders need not try to retreat, but can justifiably stand and fight their unjust aggressors, even when it is not necessary for them to do so. Such laws are possibly the result of viewing running away not as an act of self-defense, but of cowardice. This is the wrong way to view running away, in my opinion.) In general, then, the necessity condition limits defenders to doing the least harmful defensive action that they have good reason to believe will successfully stop the unjust aggression.⁴⁵

⁴⁴David Rodin, *War and Self-Defense*, 40.

⁴⁵I defer to the epistemologists to determine what counts as having good reason to believe that any particular defensive action is necessary in the relevant sense. For an interesting related discussion, see Jessica Brown, "Subject-Sensitive Invariantism and the Knowledge Norm for Practical Reasoning," 167-189.

Also included, conventionally, in the individual right of self-defense is the *proportionality* condition, which limits your defensive action to being possibly justified only when the harmful effect that it will have is balanced against the good that it will achieve. For instance, say that a person trespasses on your property. It would be disproportionate to kill her for this offense, because the good achieved—the protection of your property—is not worth the harm that your lethal defensive action would cause, namely, her death. Some people misunderstand proportionality as having to do with balancing types of aggressive and defensive force, but this is not correct.⁴⁶ What must be balanced is the harm caused via defense and the harm avoided, that is, the good achieved, by said defense. If a karate expert is trying to kill me with her bare hands and all I have to defend myself with is a machine gun, my shooting her would be proportionate, even though the types of aggressive and defensive forces in play are different. This is because the harm caused (her death) is proportionate to the harm avoided/the good achieved (my death/the preservation of my life). As David Rodin puts it, “the proportionality that is required [by the individual right of self-defense] is between the harm inflicted and the good preserved.”⁴⁷ Proportionality thus requires general judgments of value; what an individual may justifiably do in self-defense, according to the proportionality condition, depends both on the value of the thing that she is trying to defend (e.g., her life, body, liberty, property, honor, freedom of speech, reputation, etc) and the value of the thing that she is attacking in defense (e.g., her aggressor’s life, body, liberty, property, honor, freedom of speech, reputation, etc). Self-defense is only proportionate, and thus possibly justified, when these values balance out, that is, when the good preserved by the defender is worth the harm that she causes to

⁴⁶McMahan, *Killing in War*, chapter 1.

⁴⁷Rodin, *War and Self-Defense*, 42.

her aggressor.⁴⁸

It is difficult to determine which defensive actions are proportionate to which unjust aggressive actions. It seems clear that an individual may defend her life with lethal force (“a life for a life,” as we might say⁴⁹), but beyond that, it is hard to determine when lethal defensive force is proportionate. Is it proportionate to kill to protect one's property? One's liberty? One's reputation? One's freedom to vote? This is a murky area in the discussion of individual self-defense.⁵⁰ For the purposes of this chapter, I will not try to give a full theory of proportionality; instead, I will merely point out that conventionally, lethal defensive force is considered proportionate not only when it is in response to unjust lethal aggression, but also when it is in response to unjust enslavement, unjust grievous bodily harm⁵¹, unjust long-term imprisonment, and unjust long-term personal, social, and political oppression.⁵² But, simply because a lethal defensive act is proportionate, does not mean that it is justified from a rights-theoretic point of view; it must also meet the imminence and necessity conditions. (Of course, a defensive act may meet all of the conditions contained within the individual right of self-defense and still not be all-things-considered justified or the morally right thing to do; I discuss this in more detail below.)

⁴⁸Issues of proportionality are what some (although not all) people seem to have in mind when they claim that certain aggressive actions, although bad, do not deserve certain defensive responses. For example, people often say that robbers do not deserve to be shot, because such a response does not “fit” their crime. This notion of fittingness, I think, is closely related, if not identical, to proportionality.

⁴⁹Even this minimal claim is contended by some pacifists, who argue that it is never proportionate to take a life, even in defense of one's own life. For a particularly lucid rendering—although not an endorsement—of this position, see Cheyney C. Ryan, “Self-Defense, Pacifism, and the Possibility of Killing,” 508-24.

⁵⁰For some attempts at clarification, see, among others, Jeff McMahan, *Killing in War*, Richard Norman, *Ethics, Killing and War*, David Rodin, *War and Self-Defense*, Thomas Hurka, “Proportionality in the Morality of War,” and Suzanne Uniacke, “Proportionality and Self-Defense.”

⁵¹Grotius claims that an individual can defend against the loss of a limb with lethal force; he argues that such defense is proportionate because there is a serious risk of bleeding out and dying from such an injury. Grotius, *De Jure Belli Ac Pacis*, 174.

⁵²See especially Thomas Hurka, “Proportionality in the Morality of War,” and Suzanne Uniacke, “Proportionality and Self-Defense,” and also Judith Jarvis Thomson, “Self-Defense,” for discussion regarding whether and why these types of unjust aggression can be proportionately defended against with lethal force.

Now, Locke famously broadens the class of unjust actions that can be proportionately defended against with lethal defensive force. He argues that a person can justifiably use lethal defensive force against anyone who unjustly attempts to get him in her power, because he has good “reason to conclude” that she will either kill him or make him a slave.⁵³ However, it does not necessarily follow from someone unjustly having you in her power that she will either kill you or make you a slave; what you have reason to conclude in such a case depends on the other information that you have, and that will differ in various situations and contexts. For instance, in areas where non-lethal muggings are common, it is not reasonable to conclude that a mugger, although he has you in his power, will kill you, and so it is not proportionate to respond to such a mugging with lethal defensive force. So contra Locke, I maintain that lethal defensive force must be reserved for a restricted class of lethal and almost-lethal (so to speak) instances of unjust aggression, and that not every case of someone unjustly having power over you is an instance of lethal or almost-lethal aggression. In all of those other cases of self-defense then, *viz.*, all of those cases that do not include lethal or almost-lethal unjust aggression, the use of lethal defensive force is not proportionate. A variety of non-lethal defensive actions in such cases will, however, be proportionate, and as I have described, which ones are so depends on how much harm the defensive action will cause versus the amount of good that it will achieve. Only when the harm caused is balanced out by the good achieved is the defensive action in question proportionate and thus possibly justified.

The imminence, necessity, and proportionality conditions on the individual right of self-defense are conventionally viewed, from a rights-theoretic point of view, as individually necessary and jointly sufficient for a defensive action to be justified.⁵⁴ The individual right of

⁵³Locke, III.17.

⁵⁴Again, it does not follow from this that such defensive actions are all-things-considered right or just. I discuss this point in more detail below.

self-defense, as it is conventionally understood, thus has certain limitations, which makes sense given the proposed instrumentalist justification for it. Recall that the purpose of individual rights, according to the Millian-style instrumentalist, is to best further the overall well-being of individuals in a domestic political society. So, the conditions contained within the standard conception of the individual right of self-defense are legitimate, according to such an instrumentalist, if they further the purpose of individual rights, *viz*, if they are best conducive, overall and in the long run, to the general well-being of individuals in society. And on the face of it, the conventional individual right of self-defense that I have described above does seem best conducive to the overall well-being of individuals in society.⁵⁵ It enables individuals to justifiably defend themselves against various unjust credible threats and occurrent attacks, while requiring them not to engage in either preventative attacks or revenge (because presumably, there will be domestic social structures in place to punish past unjust aggressions). It also puts everyone on an equal footing as far as the use of force goes, because it allows defenders to use whatever force is necessary and proportionate in order to defend themselves against imminent unjust aggression.⁵⁶ Finally, it provides societies and their legal systems with a fairly clear and systematic way of adjudicating claims of individual self-defense; although there are borderline cases, for the most part, it is clear when and if, from a rights-theoretic point of view, defensive actions are justified. Given that individuals are more-or-less equal in terms of their ability to defend themselves, and that they have a social and/or legal system to rely on for redress when they are unjustly credibly threatened or attacked, it seems best conducive to overall individual well-being for the individual right of self-defense to operate in domestic political society in the

⁵⁵For a nice general discussion of why archetypal consequentialists should accept and promote conventional individual rights at the societal level, see Philip Pettit, "The Consequentialist can Recognize Rights," 42–55.

⁵⁶This goes against the Christian ethic, which purportedly requires unjustly threatened or attacked individuals to 'turn the other cheek' and not forcibly defend themselves. See Matthew 5:39 and Luke 6:29. For a nice discussion of pacifism and the Christian ethic, see Emily Crookston, "Strict Just War Theory and Conditional Pacifism."

robust but limited way that I have described.⁵⁷

So, it seems that the classic, Millian-style instrumentalist justification for the conventional individual right of self-defense is, if not obviously true, at least extremely plausible. However, despite this plausibility at the individual level, I worry that the analogous argument is not plausible at the state level. In the following sections, I argue that there is good reason to doubt that the classic instrumentalist argument under discussion actually successfully supports the conventional state right of self-defense that is the cornerstone of contemporary just war theory.

II. Casting Doubt on the Instrumentalist Argument for State Rights of Self-Defense

So far, we have primarily considered the classic instrumentalist argument for the traditional individual right of self-defense. Now, let us move to the traditional state right of self-defense. Recall that, if the domestic analogy is to be properly illuminating in the way that contemporary just war theorists often take it to be, a Millian-style instrumentalist argument for the state right of self-defense must reach the conclusion that the state right of self-defense a) contains the same operational structure and conditions as the individual right of self-defense, *because* such structure and conditions are b) best conducive to the well-being of individuals, considered as a whole. Now, a) is what contemporary just war theorists standardly claim: they claim that the state right of self-defense, like the conventional individual right of self-defense, justifies otherwise impermissible actions—such as going to war—when the imminence, necessity, and proportionality conditions (that we discussed above) are met.⁵⁸ That is not at issue

⁵⁷Importantly, I have been describing the individual right of self-defense as it operates in domestic political society, which is very different from how it operates in a Hobbesian state of nature. I do this because it is the individual right of self-defense as it operates in domestic society that just war theorists seem to be referring to when they invoke the domestic analogy. See, among others, Walzer, *Just and Unjust Wars*, Thomas Hurka, “Proportionality in the Morality of War,” Larry May, “Killing Naked Soldiers: Distinguishing between Combatants and Noncombatants,” Jeff McMahan, “Just Cause For War,” and David Rodin, *War and Self-Defense*.

⁵⁸See, among others, Walzer, *Just and Unjust Wars*, Rodin, *War and Self-Defense*, McMahan, “Just Cause for War,”

here.⁵⁹ What I take issue with in this section is the second half of the proposed instrumentalist argument for the state right of self-defense, that the state right of self-defense as it is conventionally understood should be accepted and endorsed *because* it best promotes, overall and in the long run, the well-being of individuals. As Seth Lazar puts it, “in order to have a stable system of relations among states, *which is in turn necessary for people to live good lives*, states must be entitled to defend themselves (in the standard ways) against purely political aggression.”⁶⁰ In what follows, I argue that both differences in the contexts for individuals and states and the weight of history give us good reason to doubt this part of the classic instrumentalist argument.

Let us first discuss the differences in context. As we saw above, part of the reason that the archetypal instrumentalist argument looks empirically plausible in the individual case is because the argument assumes that individuals are living in a political, non-anarchical domestic society⁶¹ that has either a formal or informal system to which unjustly harmed individuals can appeal for help and/or redress. It also assumes that individuals are more-or-less equally well able to defend themselves; although there will be variation across cases, in general, every individual in the society is similarly able to defend themselves and others. These two contextual assumptions make the imminence, necessity, and proportionality conditions appear more plausible. Because

Hurka, “Proportionality in the Morality of War,” and Brian Orend, *The Morality of War*. For a historical iteration of this view, see Grotius, *De Jure Belli Ac Pacis*, III, 1.2-4.

⁵⁹Of course, it is open to question whether contemporary just war theorists who have consequentialist leanings should endorse this particular claim; perhaps they would do better to eschew states-rights-talk altogether, or to insist that what states may do in their own defense depends heavily on empirical claims about what will on balance serve the general welfare of individuals. This may, but need not in every case, match what the conventional state right of self-defense recommends.

⁶⁰Seth Lazar, “National Defence, Self-Defence, and the Problem of Political Aggression,” 34, italics added.

⁶¹Mill is explicit that he means to defend the instrumental value of conventional rights held by individual persons in a political domestic society; that is, he assumes a certain operational context, and then argues that, within this context, conventional individual rights are beneficial to all. Mill, *Utilitarianism*, chapter 5.

there are social systems to which unjustly harmed individuals may appeal to for help and/or redress, preventative, vengeful, and unnecessary defensive attacks are not conducive to the overall well-being of the individuals in society (hence the imminence and necessity conditions, respectively). In addition, because individuals are all more-or-less equally well able to defend themselves with lethal force, limiting defensive actions to those that are proportionate seems to be conducive to everyone in society's well-being. Bluntly, the proportionality condition, much like the necessity condition, helps to keep individual defensive actions from getting out of hand and so is conducive to overall individual well-being.⁶² So, although the context in which the individual right of self-defense operates is not the only reason for thinking that it is best conducive to overall individual well-being, the context in which it operates does help to bolster this archetypal instrumentalist conclusion.

Conversely, the context in the state case is much different, and furthermore it is different in a way that I think casts doubt on the analogous instrumentalist claim that the state right of self-defense is best conducive to overall individual well-being. To begin with, there is no formal or informal system to which unjustly harmed states can appeal for help and/or redress. It is true that the United Nations (UN) has tried to play this role internationally; however, the UN lacks the practical authority to punish unjust international aggressors, because contemporary states—correctly or incorrectly—view their own sovereignty as absolute. (State sovereignty is generally recognized, by many contemporary just war theorists, as the international parallel to individual autonomy.⁶³) Although the UN charter does authorize the UN Security Council (UNSC) to

⁶²This might be part of Nagel has in mind when he distinguishes between various appropriate and inappropriate actions to do in response to an extremely rude taxi driver. Although Nagel is in general arguing for an absolutist point of view against the standard instrumentalist view, some instrumentalist reasoning about precedence does seem to enter into his discussion here. Nagel, “War and Massacre,” 135.

⁶³See, among others, Michael Walzer, *Just and Unjust Wars*, David Rodin, *War and Self-Defense*, and especially Helen Stacy, “Humanitarian Intervention and Relational Sovereignty.”

employ force to maintain or restore international peace, the UNSC has no practical authority because it has no troops under its direct command.⁶⁴ Furthermore, the UNSC is often unable to help with civil or international conflicts or crises in a timely manner because of the extremely inefficient way in which it must, according to the terms of the UN charter, operate.⁶⁵ Given these facts about the international arena, it seems that requiring states to avoid all preventative, vengeful, and unnecessary attacks is not necessarily best conducive to the overall well-being of individuals, considered as a whole. It is at least plausible to think that individuals might do better, on the whole, if states were to preventatively attack suspected aggressor states, rather than waiting for the axe to fall (so to speak). Imagine if France had preventatively attacked Germany in 1936, once it became apparent that the German state was building up its military. As the result of such a preventative attack, the horrors of World War II might well have been avoided. (Of course, this claim is impossible to prove. But it is made more plausible, I think, by considering other points in history wherein preventative attacks successfully stopped aggressive states, such as the Six Day War between Israel and Egypt.⁶⁶) If nothing else, the known willingness of states to preventatively attack suspected aggressor states might well make states less willing to be aggressive, and so could lead to an overall increase in the general well-being of individuals.

In addition, states, unlike individuals, are not more-or-less equally well able to defend themselves. Some are stronger, and others are weaker: for instance, an aggressive Germany versus a defensive Liechtenstein would be nothing approximating a fair fight. In such a situation, it would not make strategic or moral sense for Liechtenstein to respond proportionately to

⁶⁴The UNSC must solicit troops from member states in order to carry out its directives. Member states may refuse, without fear of sanction, to loan troops to the UNSC. United Nations, *Charter of the United Nations*, and *United Nations Security Council*.

⁶⁵For instance, it took over a year for UN troops to arrive in Rwanda during the Rwandan genocide. "Rwanda—UNAMIR Background," *UN Peacekeeping*.

⁶⁶Walzer has a nice discussion of this point. See his *Just and Unjust Wars*, 82-85.

Germany's unjust attack. Given how much weaker Liechtenstein is, it would be better for its citizens if it committed to a disproportionate response, in the hopes of convincing Germany to stop its unjust attack. Without such a display, Liechtenstein could run the risk of losing many, if not most, of its citizens to warfare, and could additionally run the risk of losing the respect of the international arena. Such a loss of face in the international arena could make life appreciably worse for Liechtensteinian citizens, as their country could lose, as a result, favored trade agreements, international concessions, diplomatic representation and immunity, and the like. Given this context, which appears to generalize to all relatively weaker states, the proportionality condition on the state right of self-defense appears to be possibly harmful, rather than obviously conducive, to overall individual well-being.

In addition, states, unlike individuals, cannot be “killed” by one lethal blow. This essential difference between states and individuals means that we need to carefully assess the harm that is done by unjust aggression at the international level: many times, the sort of unjust aggression that would kill an individual does not seem to harm, or even seriously injure, a state. Thus, the conventional state right of self-defense, which includes the qualified power to go to war in response to unjust aggression, cannot be straightforwardly instrumentally justified by reference to the lethal harm that would “obviously” (if we follow the analogy with the individual case) occur were states not to have the power to respond to unjust aggression by going to war. (Some political theorists argue that the introduction of atomic weapons does make it possible to “kill” a state in one blow.⁶⁷ I think that such theorists must be referring to a government, as it is implausible that a state is the sort of thing that can be killed by a blow. After all, the Nagasaki and Hiroshima atomic attacks did not kill Japan. Insofar as it is even possible for states to die—in the sense of ceasing to exist—they seem to take a long time to do so.) Regardless, the overall

⁶⁷See Gregory Kavka, *Moral Paradoxes of Nuclear Deterrence*, and Dani Rodrik, “Who Needs the Nation State?”

thrust of my argument so far is that the many differences in context between states and individuals make it open to question, if not plausible, to think that using classic instrumentalist reasoning will not, contrary to the proponents of an instrumentalist reading of the domestic analogy, lead to the conclusion that individuals are best served by states having the conventional rights of self-defense that are espoused by contemporary just war theory.

As well as differences in context, we must also consider the lessons of history. In the individual case, we can see that history supports the Millian instrumentalist claim that limited individual rights of self-defense, operating in a domestic political society with a formal or informal legal system, are most conducive (broadly speaking) to the overall well-being of the individuals in that society.⁶⁸ However, it is not so clear that history supports the analogous Millian-style instrumentalist claim that limited state rights of self-defense, operating in an anarchic international arena with no formal or informal legal system, are most conducive (broadly speaking) to the individuals in that arena. The first point to make at this juncture is that the general acceptance in the international arena of the conventional state right of self-defense appears to have led to millions of deaths. In the modern era, when state officials invoke their state's right of self-defense against an unjustly aggressive state and declare defensive war, they risk not only their own lives, but also the lives of thousands, if not hundreds of thousands, of other people.⁶⁹ To take one example, over twenty million Russians, combatants and civilians, died defending against the Axis Powers in World War II.⁷⁰ This is a key difference, in the

⁶⁸This is one of the points that Feinberg's paper "The Nature and Value of Rights" so clearly brings out.

⁶⁹Some theorists have argued that this invocation of defensive rights is not an accurate description of how and why wars begin. Marxists cite underlying economic forces as the real reason that wars occur, while some feminists cite the hegemonic grip of masculinist, "life-denying" ideologies. See, respectively, Alan Gilbert, "Marx on Internationalism and War," and Iris Marion Young, "Humanism, Gynocentrism, and Feminist Politics." However, the the existence and subsequent invocation of state rights of self-defense is often given by statesmen as their reason for going to war, and so I think that we must recognize it as a possible explanation of how and why wars begin. Certainly, contemporary just war theorists want to recognize it as such, and that is sufficient for my purposes here.

⁷⁰The official estimate is that anywhere from 21,800,000 to 28,000,000 Russian soldiers and civilians died in World

modern era, between the individual right of self-defense and the state right of self-defense: when an individual invokes her individual right of self-defense and defensively attacks an unjust aggressor, she, in the normal course of events, puts only herself in danger. Conversely, when state officials invoke their state's right of self-defense and defensively attack an unjust aggressor, they, at least in the modern era, put hundreds of thousands of individuals in danger.⁷¹

And furthermore, the individuals who are put in danger, both combatants and civilians, often have no say in their state's decision to go to war, be it aggressive or defensive; they are in many (if not most) instances dragged into it, whether they will or no. Typically, individuals that defend themselves are choosing to put themselves at risk; states that choose to defend themselves put not only their own citizens, but also the citizens of the aggressive state, at risk, often (almost always!) without asking said citizens whether they want to take such a risk. In addition, it is normally the case that individuals are attacked by, and defend themselves against, other individuals who have freely chosen to commit unjust aggressive actions. By contrast, states are typically attacked by, and defend themselves against, military troops that have been more or less strongly coerced into fighting. Given these important differences in the scale and nature of individual violence versus state violence, Thomas Nagel points out that it is possible to argue that “war involves violence on such a scale that it is never justified on standard utilitarian grounds—the consequences of refusing to go to war will never be as bad as the war itself would be, even if atrocities were not committed.”⁷²

It is sometimes easy, when considering the theoretical aspects of war and international

War II. Michael Ellman and S. Maksudov, “Soviet Deaths in the Great Patriotic War: a note—World War II.”

⁷¹By contrast, the early medieval Anglo-Saxons, as well as the medieval Chinese, fought using small war bands, and worked to keep their conflicts from affecting civilian lives. My points here apply primarily to modern, large-scale warfare. (They may also apply to the type of large-scale warfare practiced by the Roman Empire.) See Warren C. Hollister, *Anglo-Saxon Military Institutions*, and Ping-Cheung Lo, “Introduction.”

⁷²Nagel, “War and Massacre,” 125.

conflict, to gloss over these very real, very high costs of war. However, as students of history, we learn about the very high costs of war, not only in terms of the massive numbers of human lives lost, but also in terms of war rape⁷³, population displacement⁷⁴, the destruction of infrastructure⁷⁵, and the up-ending of domestic economic systems.⁷⁶ To give just one example, it is estimated that 1.9 million German women were raped by Red Army soldiers at the end of World War II, when Russian forces marched to Berlin.⁷⁷ Additionally, there is the post-war problem of re-integrating veterans—who often suffer from the physical, psychological, and emotional aftereffects of war—into civil society.⁷⁸ All of these negative effects, which seem to be intrinsic to the nature of large-scale warfare in the modern era, strongly suggest that war, considered in its contemporary form, is not best conducive to individual well-being. Of course, defensive wars are sometimes fought to protect individuals' lives; for example, many of the Native American wars against the European settlers seem to be examples of defensive wars fought to stop genocides.⁷⁹ But more often than not, especially in the European theater, defensive wars are fought, not to stop genocides, but to protect and preserve state sovereignty. (A striking example of this is The Hundred Years' War (1337-1453), which was fought between England and France for control of

⁷³Sally J. Scholz, "War Rape's Challenge to Just War Theory," 273–288.

⁷⁴In 2012, an estimated 7.6 million people were displaced from their homes due to war and international conflict. "Displacement: The New 21st Century Challenge."

⁷⁵More than half of Syria's hospitals have been destroyed or severely damaged during its on-going civil war. Ruth Sherlock, "Syria: more than half of hospitals destroyed or damaged."

⁷⁶Economics experts argue that World War I caused "ruinous inflation," which led to an almost-global depression, which in turn led to famine, and, some argue, World War II. Joshua S. Goldstein, "War and Economic History," 215-218. See also Goldstein, *The Real Price of War: How You Pay for the War on Terror*.

⁷⁷Elizabeth Heineman, *What Difference Does a Husband Make? Women and Marital Status in Nazi and Postwar Germany*, 81.

⁷⁸It currently takes the United States' Department of Veteran Affairs about nine months to a year to process a disability claim, and over 4 million American veterans have filed claims in the past five years. "America's combat veterans: The waiting wounded."

⁷⁹Angie Debo, *A History of the Indians of the United States*.

the state of France. Although France shifted hands several times during this period, life for the bulk of the French population remained the same.⁸⁰) And while state sovereignty may well have some instrumental value to individuals, it is just not obvious (or, I think, plausible) that state sovereignty is worth the extreme costs of war. Given the evidence of history regarding just how harmful war is to individuals, both in the short and long term, perhaps it would be more conducive to the overall well-being of individuals for states not to have a right of self-defense that justifies going to war in response to attacks on state sovereignty. Because war is so costly, it seems that it would be better for individuals if, at the very least, going to war was only justified when the unjust aggression is not against state sovereignty, but against the state's citizens, *viz*, when the unjust aggression is genocidal in nature. But failing the credible threat of genocide, it seems that, if we take the lessons of history into account, we should conclude that the conventional state right of self-defense is not, as it turns out, obviously (or even plausibly) best conducive to the overall well-being of individuals. And if this is correct, then it provides some good reason to doubt that a Millian-style instrumentalist reading of the domestic analogy will actually support the conventional state right of self-defense that is espoused in contemporary just war theory.

Of course, defenders of the instrumentalist justification for the conventional state right of self-defense can also point to history in an attempt to bolster their conclusion. They will point to the many individuals saved by wars, will discuss what would have happened if some particular defensive war had not been fought, and will bring out the ways in which wars have contributed both to higher standards of living and to more widespread recognition of human rights. Now, it is true that modern warfare, as a highly complex social phenomenon, has many—perhaps innumerable—positive as well as negative effects. But as such, it is very difficult to say what

⁸⁰Anne Curry, *The Hundred Years War 1337–1453*.

would have happened in any given case if a defensive war had not been fought; although the instrumentalist argument under discussion presupposes that we can make reasonable comparative judgements about the costs and benefits of actual wars versus the other options available, it is in fact very hard, as a number of theorists have pointed out, to even know how to begin to evaluate such complex counterfactuals.⁸¹ This dependence on complex counterfactual reasoning should, I think, give us pause when we consider whether to accept the proposed instrumentalist argument for the state right of self-defense that is widely accepted in contemporary just war theory.

Ultimately, my argument in this section does not, nor is it meant to, demonstrate that the proposed instrumentalist argument for the conventional state right of self-defense must be wrong. Rather, my argument is designed to show that the claim at the heart of the proposed instrumentalist reading of the domestic analogy, that the conventional state right of self-defense is best conducive to overall individual well-being, is, due to contextual issues and historical facts, at best open to question and at worst highly dubious. If I have succeeded in showing this, then I think I have provided at least some good reason to doubt the success of the Millian-style instrumentalist argument for conventional state rights of self-defense.

III. A Plausible Alternative Conclusion for the Proposed Instrumentalist View

In this section, I consider another good reason to doubt that the classic instrumentalist argument under discussion actually supports the conventional state right of self-defense: the practical possibility of a world state. Given the large-scale harms to individuals that history shows us come with having an anarchic system of sovereign states, it seems plausible that a Millian-style instrumentalist has good reason to favor instead the creation of a world state. And in fact, this is what David Rodin argues; he writes,

⁸¹See, among others, Philip E. Tetlock and Aaron Belkin, "Counterfactual Thought Experiments in World Politics," 3-38.

[T]here is a clear prima-facie case for...choosing a universal state rather than a system of states existing in international anarchy. For, though the international state of nature may not fundamentally challenge the security of states, it certainly does threaten the security of citizens who must risk their lives in combat when hostilities inevitably erupt between states.⁸²

So at the very least, a world state is potentially more conducive to overall individual well-being than an anarchic system of sovereign states, because a world state does not obviously threaten individual security, the having of which is positively related (we might think) to individual well-being. Again, the difficulty here comes with understanding how to go about evaluating the relevant counterfactual, *viz*, the claim that a world state would be better for overall individual well-being than an anarchic system of sovereign states. But, insofar as the proposed instrumentalist view under discussion presupposes the ability to evaluate the costs and benefits of the relevant alternatives, it is open to such a view to endorse or reject the claim in question. And on the face of it, given how badly overall individual well-being has been served historically by an anarchic system of sovereign states, there is at least some good reason for a Millian-style instrumentalist to endorse such a claim. As Charles Beitz puts it, “utility-maximizing calculations should not respect national boundaries...The intuitive idea is that it is wrong to limit the application of [utilitarian] principles of social justice to the nation-state; instead, these principles ought to apply globally.”⁸³ Although Beitz does not explicitly argue in favor of a world state on utilitarian grounds, such an argument is certainly implied by his emphasis on the need for a globally-applied system of distributive justice in order to improve overall individual well-being.⁸⁴

Of course, this alternative Millian-style instrumentalist view at the international level is

⁸²David Rodin, *War and Self-Defense*, 185-6.

⁸³Charles Beitz, *Political Theory and International Relations*, 127-8.

⁸⁴Beitz, *Political Theory and International Relations*, 170-6, 179-83.

disanalogous with the Millian instrumentalist view at the individual level. That view, as we saw, supports conventional individual rights of self-defense; this alternative instrumentalist view does not support conventional state rights of self-defense, because it does not support the anarchic system of sovereign states that is presupposed by the just war tradition's acceptance of conventional state rights of self-defense. But this disanalogy is neither surprising nor worrying; it is simply the outcome of the recognition that states, unlike individuals, are political institutions, and as such are able to combine into one great political institution. This ability of states to merge, which individuals do not share,⁸⁵ makes a world state possible; the potential for such a world state to bring about increased overall individual well-being makes it desirable (at least from a Millian-style instrumentalist point of view).

Now, while the possibility of a world state has long been recognized as a genuine practical possibility, it has also been long argued against on the grounds that it would actually obstruct, rather than promote, overall individual well-being. As Kant puts it, because “laws invariably lose their impact with the expansion of their domain of governance,” a world state would quickly become a “soulless despotism” and then, after it has “uprooted the soul of good,” would “degenerate into anarchy.”⁸⁶ If this is correct, then perhaps Millian-style instrumentalists should prefer an anarchic system of sovereign states to a world state, because the potential harm to individuals that comes with the risk of international war might be less than the potential harm to individuals that comes with having a world-wide unstable tyranny.

⁸⁵One of John Rawls' famous critiques of utilitarianism is that it “does not take seriously the distinction between persons.” Rawls, *A Theory of Justice*, 24. While I am sympathetic to this critique of utilitarianism at the individual level, I do not think that the same critique arises in the international case. Or if it does, I am not sure that it retains its force. To say that my proposed alternative utilitarian view does not take seriously the distinction between states might well be correct, but I fail to see how that is a problem for the view. So long as it is appropriately sensitive to overall individual well-being, why should my proposed alternative utilitarian view take seriously the distinction between states? States are, after all, only instrumentally valuable, according to this view.

⁸⁶Kant, *Perpetual Peace*, 125.

However, it is not clear how Kant's argument here is supposed to go. Why should we agree that laws necessarily lose their impact when they hold over a large territory? (E.g., why should we think that the United States is more likely to become a tyranny than the Dominican Republic?) Practically, this might well have been true when Kant was writing; communication was slow and unreliable in the 18th century, and law enforcement could not, due to the available modes of travel, respond in a timely manner to breaches of the law in non-central locales. These factors, it seems, could easily lead to both tyranny and anarchy. But, it is important to note, these are practical problems with enforcing the laws of a world state, rather than in principle objections to the existence of a world state *per se*. And if Kant's argument is that a world state is likely to degenerate into tyranny and anarchy because of existent empirical conditions, then it is open to challenge. To be brief, the practical problems identified that would have made the enforcement of global law impossible in the 18th century no longer exist today. First, we have near-instantaneous, reliable communication around the globe; this erases the problem of slow, unreliable communication that could lead to a world state falling into a despotism and then anarchy. In addition, it is now possible to move people anywhere in the world within twenty-four hours. This fact, in conjunction with our new ability to communicate globally, solves the problem of the supposed inefficacy of world law; it could now be equally well-enforced everywhere. So, if Kant's argument against a world state is based on the fact that there are empirical conditions in place that make it impossible to govern a world state effectively, then it seems not to hold for the modern world.

Of course, there might be in principle problems with a world state as well; some might argue that it contravenes the sovereignty of states. But this response simply begs the question against the instrumentalist who supports a world state on straightforwardly utilitarian grounds.

More seriously, one might argue that a world state erases the possibility, for individuals, of a political right of exit, and that this is a grave injustice.⁸⁷ However, for the Millian-style instrumentalist who supports a world state, whether this objection is decisive will depend on whether the harm done to individuals, overall and in the long run, by their not having a political right of exit, is greater or less than the increase in their overall well-being that will come with their being members of a world state. So at this point, the Millian-style instrumentalist must fill out her conception of a world state. Which principles of justice will it espouse? How will its deliberative processes operate? What will its laws be? If she can fill out her conception in such a way that it is obvious that overall individual well-being would be extraordinarily well served by the creation of a particular sort of world state, then I think that she has the resources to respond to objections like the one raised above, so long as she can cast such objections in instrumentalist terms.

Now, typically the response to such instrumentalist views is that not all objections to them can or should be cast in instrumentalist terms; but that is neither here nor there for my argument. It is not my goal to contend that a Millian-style instrumentalist argument for a world state is convincing overall. My goal in this section is merely to argue that a Millian-style instrumentalist has, by her own lights, good reasons to prefer a world state to an anarchic system of sovereign states. And if that is correct, then there is good reason to doubt that the classic instrumentalist way of cashing out the domestic analogy will serve to justify the conventional state right of self-defense that is espoused in contemporary just war theory.

IV. A Mismatch Between the Conventional State Right of Self-Defense and Its Proposed Instrumentalist Justification

So far, I have argued that, from the standpoint of the proposed Millian-style

⁸⁷Thanks to Bernie Boxill for pushing this objection.

instrumentalist view, there are good reasons—contra the domestic analogy—not to endorse the conventional state right of self-defense. These reasons include a) the differences in context between individuals and states, b) the lessons from history about the extremely negative effects on individuals of the widely-accepted conventional state right of self-defense, and c) the availability of a plausible alternative, namely, a world state, to an anarchic system of sovereign states. However, let us assume that I am wrong, and that the proposed instrumentalist view actually successfully justifies an anarchic system of sovereign states, each with a right of self-defense. Even assuming that this is the case, I maintain that the proposed instrumentalist justification for the state right of self-defense actually pulls against how that right is standardly understood in contemporary just war theory. Thus, I conclude that contemporary just war theorists, to the extent that they want to adhere to the standard picture of the state right of self-defense that is espoused in contemporary just war theory, have good reason to reject the proposed instrumentalist way of cashing out the domestic analogy in favor of some other, more friendly view.

According to many, if not most, contemporary just war theorists, a state cannot act wrongly so long as it permissibly exercises its right of self-defense, that is, so long as its going to defensive war is in response to imminent unjust aggression and is both necessary and proportionate.⁸⁸ As Cécile Fabre and Seth Lazar put it, “the principle of national defence...is sacrosanct...in both the laws of war, and in conventional just war theory.”⁸⁹ We might say, then, following John Mackie, that contemporary just war theorists view the state right of self-defense as containing both a freedom and a claim-right, such that it is impossible for a state that exercises

⁸⁸See, among others, Michael Walzer, *Just and Unjust Wars*, Brian Orend, *The Morality of War*, Seth Lazar, “National Defence, Self-Defence, and the Problem of Political Aggression,” and Jeff McMahan, “Just Cause for War.” Although Cécile Fabre does not endorse this view, she does regard it as a standard aspect of contemporary just war theory. See Fabre, “Cosmopolitanism and Wars of Self-Defence.”

⁸⁹Cécile Fabre and Seth Lazar, “Introduction,” 3.

its right of self-defense in accordance with the imminence, necessity, and proportionality conditions to act wrongly, all things considered.⁹⁰ (Here, to be free to do something is to not be morally required not to do it.⁹¹) As James Nickel succinctly puts it, “If P has a right to do X, then P does no wrong (morally, if it is a moral right, legally, if it is a legal right) in doing X.”⁹² Given this sort of general account of rights, to say that a state has a right of self-defense settles in advance that it cannot act wrongly in exercising that right, so long as it meets the imminence, necessity, and proportionality conditions.⁹³

Initially, this view of the state right of self-defense might seem somewhat intuitive, and it does match well with the way that contemporary just war theorists often talk about state self-defense. As Brian Orend writes, the “victims of aggression are always justified in fighting,” and, even more strongly, that “fighting is the morally preferred response [to aggressor states].”⁹⁴ But in response to this, consider the case of Finland in World War II, who declared war against the Soviet Union (this is sometimes referred to by historians as the ‘Winter War’).⁹⁵ The Finnish declaration of war was in response to the Red Army invading 70 miles of Finland in order to block the eastern German offensive against Leningrad. Despite assurances from Moscow that the Red Army would retreat after Germany was defeated, Finland refused to cede the border territory

⁹⁰John Mackie, “Can There Be a Right-based Moral Theory?,” 350-59, especially 351.

⁹¹Mackie, “Can There Be a Right-based Moral Theory?,” 351.

⁹²James Nickel, “Dworkin on the Nature and Consequences of Rights,” 1117.

⁹³This is an important issue in value theory, and one that I cannot settle here. Happily though, for my purposes, I do not need to settle the question, which Mackie and Nickel answer in the negative, of whether one can act wrongly when she exercises a right in accordance with the internal conditions of that right. All I need to point out is that contemporary just war theorists seem to think about state rights of self-defense in the same way that Mackie and Nickel think about rights more generally. For two nice discussions of the more general debate regarding exercising rights versus acting rightly, see Ronald Dworkin, *Taking Rights Seriously*, and Joseph Raz, *The Authority of Law: Essays on Law and Morality*.

⁹⁴Orend, *The Morality of War*, 45.

⁹⁵Robert Edwards, *White Death: Russia's War on Finland 1939–40*.

to the Soviet Union, and, after negotiations failed, declared war in late 1939. After massive military casualties on both sides, Finland agreed to cede both the contested territory and additional territory to the Soviet Union, and the Moscow Peace Treaty between Finland and the Soviet Union was signed in March of 1940.⁹⁶

Arguably, the Finnish defense of its territory was, on utilitarian grounds, a terrible idea; Finland knew that its military forces were vastly outmatched by the Red Army, and had assurances not only from Moscow, but also from Great Britain, that the Soviet Union would return the contested territory to Finland after the German threat to Leningrad was neutralized. (Great Britain assured Finland that it would, if necessary, help to forcibly evict the Red Army after the German threat was neutralized.⁹⁷) Furthermore, Finland knew that having the Red Army on its border would block the eastern German offensive from possibly attacking Helsinki; the Soviet forces, by protecting Leningrad, would also inadvertently protect the Finnish capital and Finnish civilians.⁹⁸ So, it seems that although Finland properly exercised its right to self-defense (*viz*, in accordance with the imminence, necessity, and proportionality conditions) when it declared war on the Soviet Union, its doing so was, all things considered, a serious mistake: Finland took heavy military casualties, as did the Soviet Union, and also ended up losing more territory than the Soviet Union had requested before the war.⁹⁹ In addition, the Winter War took both Soviet and Finnish attention away from the eastern German offensive, which arguably enabled the German offensive to maintain complete control over Poland, Latvia, Lithuania, and

⁹⁶Robert Edwards, *White Death: Russia's War on Finland 1939–40*.

⁹⁷William R. Trotter, *The Winter War: The Russo–Finnish War of 1939–40* (5th edition).

⁹⁸A. Chubaryan, “Foreword.”

⁹⁹Edwards, *White Death*.

Estonia.¹⁰⁰ We might say, following Jeremy Waldron, that Finland, in this instance, acted wrongly in exercising its right to self-defense.¹⁰¹

However, both Michael Walzer and Brian Orend cite the Finnish defense of its territory as exemplary; they maintain that Finland acted rightly in exercising its right of self-defense against the unjust aggression of the Soviet Union.¹⁰² Walzer argues that, had Finland failed to answer the Soviet invasion with military resistance, it would have failed to do something morally essential. He writes, in regards to defensive wars that look like utilitarian mistakes, “Resistance seems imprudent, even hopeless. Many lives will be lost, and to what end? Even here, however, our moral preference holds. We not only justify resistance; we call it heroic; we do not measure the value of justice, apparently, in terms of lives lost.”¹⁰³ He goes on to say, of the Winter War in particular, that “their [the Finnish] struggle is right...the Finnish war is a paradigmatic example of the necessary defense.”¹⁰⁴ Although he does not say it explicitly, Walzer seems to think that the state right of self-defense, when exercised properly, acts as Mackie and Nickel argue rights always act; that is, the state right of self-defense overrides general utilitarian justifications for not declaring war in self-defense, and makes a state's defensive actions right, all things considered.

And lest we think that the Winter War is a special case, David Rodin, describing standard contemporary just war theory, writes that “the preservation of a state's sovereign independence from wrongful attack is attributed virtually infinite value.”¹⁰⁵ This suggests that contemporary

¹⁰⁰Needless to say, this was very bad: over 3 million of the 6 million Jewish victims killed in the Holocaust were Polish. Michael Berenbaum, *The World Must Know*, 104.

¹⁰¹Waldron, “A Right to Do Wrong,” 21-39.

¹⁰²Walzer, *Just and Unjust Wars*, and Orend, *The Morality of War*.

¹⁰³Walzer, *Just and Unjust Wars*, 67.

¹⁰⁴Walzer, *Just and Unjust Wars*, 70-2.

¹⁰⁵David Rodin, “The Myth of National Self-Defence,” 71.

just war theorists, despite how bad defensive wars can be for overall individual well-being, will never concede that it might be morally acceptable, if not morally preferable, for a severely outmatched state to appease, rather than fight, its aggressor.¹⁰⁶ More generally, the assumption, if not the stated conclusion, of many contemporary just war theorists seems to be that it can never be wrong for a state to exercise its right of self-defense (assuming, of course, that the relevant state's defensive actions fulfill the imminence, necessity, and proportionality conditions).¹⁰⁷

However, as we learn from Mill, the archetypal instrumentalist understanding of rights does not support this strong view of rights. Rather, for a Millian-style instrumentalist, rights are conditional moral rules that can either be broken in exceptional cases or that have exceptions built into them for exceptional cases.^{108,109} An exceptional case, for the Millian-style instrumentalist, is one wherein it is clear that exercising a right will be more detrimental to overall individual well-being than not exercising it. In such a case, the Millian-style instrumentalist position allows that it can be wrong for a person (or state) to exercise her (or its) right, even when all of the conditions internal to that right have been met.¹¹⁰ As we saw above, the reason that the Millian-style instrumentalist views rights as conditional in this way is because rights are ultimately only instrumentally valuable; the exclusive goal of such a view is the promotion of overall individual well-being. Normally this goal is best achieved by adhering to the conventional system of rights. However, it is possible for there to be exceptions, given the

¹⁰⁶Walzer, *Just and Unjust Wars*, 68-74, and Orend, *The Morality of War*, 44-6.

¹⁰⁷Although he does not state it explicitly, Jeff McMahan seems to adhere to this view in his "Just Cause for War."

¹⁰⁸On my view, Mill is a rule utilitarian. Whether this is the correct interpretation of Mill is discussed in the literature: for a good summary of the debate, see Henry R. West, *An Introduction to Mill's Utilitarian Ethics*, 74-95.

¹⁰⁹Whether it is possible to make exceptions without breaking the (moral) rule is something that I need not answer here; it is enough for my purposes that Millian-style instrumentalists view rights as conditional on their being best conducive to overall individual well-being. See Mill, *Utilitarianism*, especially chapter 5.

¹¹⁰L.W. Sumner, *The Moral Foundations of Rights*.

nature of the very reason that we ought to adhere to the conventional system of rights in the first place. As I suggested above, I think that the Winter War is an exceptional case; contra the received opinion in contemporary just war theory, it would have been morally preferable for Finland to cede the disputed territory to the Soviet Union until the German threat was neutralized.¹¹¹ But regardless of whether there is agreement about this particular case, it remains true that, according to a plausible interpretation of the proposed instrumentalist view, it is entirely possible for states to act wrongly in exercising their rights of self-defense, even when their actions meet the imminence, necessity, and proportionality conditions.

There is thus a mismatch between the Millian-style instrumentalist view of rights and the view of the state right of self-defense that is espoused in contemporary just war theory. And as a result, the proposed instrumentalist justification for the state right of self-defense appears to make that right too flimsy; as a conditional right, it cannot play the “sacrosanct” role that contemporary just war theorists ascribe to it.¹¹² The version of the state right of self-defense that is justified by the proposed instrumentalist reading of the domestic analogy will not unhesitatingly justify every defensive war that meets the imminence, necessity, and proportionality conditions; it will make exceptions when going to such a war is not conducive to overall individual well-being. But such exceptions appear to be anathema to contemporary just war theorists, who maintain that the state right of self-defense can never be overridden by considerations of overall individual welfare.¹¹³ So, I conclude that the understanding of the state right of self-defense in contemporary just war theory is radically at odds with the proposed instrumentalist view. This provides at least some good reason to think that the conventional state

¹¹¹However, if the Soviet Union were to refuse to return the border territory to Finland after the end of the war, then I think that it would be morally preferable for Finland to defensively attack.

¹¹²Cécile Fabre and Seth Lazar, “Introduction,” 3.

¹¹³Larry May, *Aggression and Crimes Against Peace*.

right of self-defense, as it is enumerated in contemporary just war theory, cannot be successfully justified via a straightforward appeal to the classic Millian-style instrumentalist argument for rights.

V. Conclusion

Of course, it is open to contemporary just war theorists to re-conceive of the state right of self-defense, so that it is conditional in a way that the Millian-style instrumentalist position might endorse. However, even if contemporary just war theorists would be willing to change their views in this way, they will then run into the problems of context and history that I enumerated above. These problems, I contend, provide at least some good reason to think that even a Millian-style conditional state right of self-defense will not be best conducive to overall individual well-being. Alternatively, contemporary just war theorists, following David Rodin, could conclude that they ought, for Millian-style instrumentalist reasons, to endorse a world state. While this would be a consistent view, it would also be an extremely radical revision to contemporary just war theory.

Failing such a radical re-conceptualization, I conclude that we have good reasons to doubt that contemporary just war theorists can accept a Millian-style instrumentalist justification in support of the conventional state right of self-defense that is espoused in contemporary just war theory. While I have not decisively argued against a Millian-style instrumentalist reading of the domestic analogy, I have tried to provide a number of reasons that, taken together, strongly suggest that such a reading will not succeed in justifying the traditional state right of self-defense that is at the heart of contemporary just war theory. So, assuming that contemporary just war theorists want to defend the traditional view of the state right of self-defense, they should look elsewhere for another, more friendly justification.

CHAPTER 4: THE RAWLSIAN JUSTIFICATION FOR STATE RIGHTS OF SELF-DEFENSE¹

As I discussed in the first chapter, there are different ways of cashing out the domestic analogy between states and individuals, both because there are different ways of understanding the domestic analogy and because there are different arguments that can be made for the claim that individuals have rights of self-defense. In the previous chapters, I considered Locke's consent-based argument for state rights and the instrumentalist argument for state rights, and determined that the reasons presented by both arguments for the claim that individuals have rights of self-defense that sometimes justify lethal actions cannot successfully ground the analogous claim that states have rights of self-defense that sometimes justify going to war. Of course, this is not to say that either the Lockean argument or the instrumentalist argument for *individual* rights of self-defense fail; I take no stance on whether either argument succeeds in justifying the individual right of self-defense. It is simply to say that, regardless of whether these arguments succeed in justifying the individual right of self-defense, they do not succeed in justifying the state right of self-defense found in contemporary just war theory.

But for the domestic analogy to succeed, some argument is needed that is transferable between individuals and states, because that is what the domestic analogy claims; it claims that individuals and states are relevantly similar, such that whatever arguments we have for thinking that individuals have rights of self-defense that sometimes justify lethal actions, those sorts of arguments also ground the claim that states have rights of self-defense that sometimes justify going to war. In this chapter, I consider the arguments that John Rawls puts forth in support of

¹Many thanks to Bernie Boxill, Tom Hill, and Carl Ficarrotta for their many helpful comments on this chapter.

individual and state rights, and claim that the sorts of arguments that Rawls gives in *A Theory of Justice* for concluding that individuals have certain rights do not, when transferred to the international arena, successfully ground his end conclusion in *The Law of Peoples* that all liberal, decent, and non-aggressive states—or, as he puts it, peoples²—have rights of self-defense.³ To see that Rawls is using a version of the domestic analogy, note that in *The Law of Peoples*, Rawls argues that, “proceeding in a way analogous to the procedure in *A Theory of Justice*,” we will arrive at “familiar and traditional principles” of international justice, including the principle that states have rights of self-defense.⁴ I contend that Rawls' way of cashing out the domestic analogy in *The Law of Peoples*, although initially promising, ultimately fails to support the cornerstone principle of contemporary just war theory, the claim that all states have rights of self-defense that sometimes justify going to war.⁵ (I take up Rawls' way of cashing out the domestic analogy in part because Rawls is one of the major figures in contemporary political philosophy, but mostly because his political theory is well-argued and complex, but not unnecessarily so, and is nicely sensitive to the many and varied political issues that arise in the real world.)

I begin with a brief sketch of Rawls' argument for individual rights, and then provide a more detailed reconstruction of his analogous argument for state rights, including the state right of self-defense. Then, I argue that the Rawlsian justification for state rights of self-defense is not

²I say more about Rawls' distinction between states and peoples below.

³In this chapter, I compare Rawls' domestic political theory as put forth in *A Theory of Justice* with his international political theory as put forth in *The Law of Peoples*. Rawls' domestic political theory importantly changed and developed over the course of his life; *Political Liberalism* (1993), written much later than *A Theory of Justice* (1971), contains some essential differences in the working out of his domestic political theory. However, I here draw from *A Theory of Justice* rather than from *Political Liberalism*, because that is what Rawls himself does in *The Law of Peoples*. See *The Law of Peoples*, 36.

⁴Rawls, *The Law of Peoples*, 36-7.

⁵As will become clear below, Rawls, although he seems to think that his arguments favor 'familiar and traditional' principles of international justice, does not support a universal state right of self-defense. For iterations of the principle that all states have rights of self-defense, see, among others, Hugo Grotius, *De Jure Belli ac Pacis*, especially Book II, Walzer, *Just and Unjust Wars*, Hedley Bull, *The Anarchical Society*, J.L. Brierly, *The Law of Nations: An Introduction to the Law of Peace*, and *The Charter of the United Nations*, Article 2.4 and Article 51.

successful, for two main reasons. First, Rawls' methodology for generating ideal principles of justice, which he employs to great success in the ideally-conceived domestic case, cannot be unproblematically applied to questions of war and self-defense in the analogous first ideally-conceived international case.⁶ The representatives of liberal states in Rawls' first international original position, given their knowledge and presuppositions, would not consider, accept, and endorse the ideal principles of international justice having to do with war and self-defense that Rawls proposes. This worry suggests that Rawls' methodology for generating ideal principles of justice is not actually, despite the appeal of the domestic analogy, straightforwardly applicable to questions of war and self-defense in the first ideally-conceived international case.

Secondly, even if we assume that this methodological worry can be alleviated for the first international original position, there is still the question of whether the representatives of liberal states in the second and third international original positions, now considering, respectively, the existence of decent states (non-liberal but not internally or externally aggressive states) and outlaw states (non-liberal and internally and/or externally aggressive states), would agree to the principle that all, or even most, states have rights of self-defense.⁷ It seems plausible that the representatives of liberal peoples in both the second and third international original positions would know both that such a principle would lead to a host of serious, large-scale harms (*viz*, the harms that come with accepting a principle of non-intervention), and also that such a principle would make it very difficult for them to achieve their fundamental interest in justice for all the people of the world. These reasons, I contend, would lead the representatives in the second and third international original positions, when considering the existence of decent and outlaw states

⁶I go into more detail below about how Rawls conceives of, and differentiates among, various more-or-less idealized international cases.

⁷For Rawls' conception of a decent state, see *The Law of Peoples*, 59-60. For his conception of an outlaw state, see *The Law of Peoples*, 90-1. Both decent and outlaw states are non-liberal, but the first is neither violating human rights domestically nor being aggressive externally, while the second is doing one, or the other, or both.

in turn, to reject the principle that all, or even most, states have rights of self-defense. Instead, they would accept (in both the second and third international original positions) a state right of self-defense limited solely to liberal states. Thus, I conclude that Rawls' way of cashing out the domestic analogy fails to justify the universal state right of self-defense that contemporary just war theorists place at the heart of the just war tradition.⁸ It instead—despite what Rawls ostensibly claims—provides an extremely (and I think overly) revisionary view of just war.

I. The Rawlsian Argument for Individual Rights

In *A Theory of Justice*, John Rawls argues for two ideal principles of domestic justice on the basis that those principles are the ones that would be agreed to by free and equal citizens who are rational and reasonable, and who view their closed society as a fair system of cooperation over time.⁹ To ensure that the persons who are deciding on principles of justice for such a society are truly free and equal, and that the principles they decide on will be fair, Rawls has us imagine that they are in what he calls the 'Original Position,' which is behind a 'Veil of Ignorance' that prevents them from knowing their particular socio-economic, religious, and cultural status in society, and also prevents them from knowing their particular comprehensive doctrine, or conception of the good.¹⁰ These persons in the original position do know general facts about the world and human nature, including the fact of reasonable pluralism (i.e, the fact that different

⁸For the view, prevalent in the just war tradition, that all states have rights of self-defense, see, among others, Michael Walzer, *Just and Unjust Wars*, Brian Orend, *The Morality of War*, Emily Crookston, "Strict Just War Theory and Conditional Pacifism," and Jeff McMahan, "Just Cause for War." See also this chapter's footnote 5.

⁹Rawls, *A Theory of Justice*, 10-15. Importantly, the persons in the domestic original position are considering the ideal principles of justice for a closed, well-ordered society. Rawls is explicit that he is not here considering how the ideal principles of domestic justice might change were the idealizing assumptions of the domestic original position to be different; for instance, he does not consider what the persons would conclude about the ideal principles of domestic justice for an open well-ordered society. *A Theory of Justice*, 7.

¹⁰Rawls, *A Theory of Justice*, 118-123. Of course, there is much more to the domestic original position than what I say here; however, hopefully what I do say suffices to make clear the general thrust of Rawls' argument. For a definitive list of the assumptions built into the domestic original position, see *A Theory of Justice*, 126-7.

people adhere to different reasonable comprehensive doctrines, or value systems).¹¹ What the persons do not know is any of the particularities of their own lives, families,¹² or society. This veil of ignorance, for Rawls, ensures that the persons deciding on ideal principles of domestic justice will not be biased in any way; they will not knowingly be able to choose principles that favor their own particular socio-economic, religious, or cultural positions, or their own reasonable comprehensive doctrines, at others' expense, because they do not know their own particular positions in society.

Rawls argues that the persons in the original position, operating with their general knowledge about the world and human nature, will use maxi-min reasoning (which I explain below) to arrive at his two principles of justice for domestic society. Importantly, although the persons in the original position do not know particular facts about their lives or society, they do, according to Rawls, know that various citizens affirm different reasonable comprehensive doctrines and plans of life, and that their society exists in conditions of moderate scarcity (there are enough of the primary goods to go around, but not enough for every citizen to get everything they want). In addition, the persons in the original position are mutually disinterested—that is,

¹¹Rawls importantly distinguishes between rationality and reasonableness, and claims that persons in the original position are both rational and reasonable. Briefly, to be rational is to be able to recognize and attempt to take the most effective means to one's own ends, and to be reasonable is to limit one's ends to those that are compatible with a fair system of cooperation, when assured that others will do so also. To say that people have different reasonable comprehensive doctrines, then, is to say that while they disagree about the nature of the truth, they recognize that co-existing in a fair system of cooperation requires them to refrain from using coercive political power to force other reasonable citizens to live by their own truth. Instead, they are willing to live with those other reasonable citizens according to mutually agreeable rules. Rawls' understanding of the distinction between the rational and the reasonable, and the nature of each, is subtle and complex, and I cannot discuss it in the depth it deserves without going too far afield from my main argument. However, hopefully what I have said here suffices to give the flavor of the distinction, and to show the importance of reasonableness for Rawls' political conception of justice. See Rawls, *Political Liberalism*, 50-51. For commentary on the distinction between the rational and the reasonable, see, among others, Paul Clements and Emily Hauptmann, "The reasonable and the rational capacities in political analysis," and Jean Hampton, *The Authority of Reason*.

¹²Rawls builds into the domestic original position that the persons are heads of households, in order to ensure that they are motivated to accept and endorse principles of domestic justice that promote justice between and over generations. *A Theory of Justice*, 111.

they are not willing to sacrifice their interests to others¹³—and they are motivated to secure for themselves as many and as much of the primary goods as possible, because the primary goods are necessary prerequisites for fulfilling different rational plans of life.¹⁴ The primary goods that all of the persons in the original position are fundamentally interested in having more of are a) the basic rights and liberties, b) opportunities for positions of authority and responsibility, c) income and wealth, and d) the social bases of self-respect.¹⁵ In addition, the persons in the original position are to assume that all the citizens in the society are rational and reasonable, and that the principles of justice they adopt “will be strictly complied with” by those citizens—this is meant to ensure that the persons in the original position do not accept any principles which they as citizens could not follow.¹⁶ As Rawls writes, “The other limitation on our discussion is that for the most part I examine the principles of justice that would regulate a well-ordered society. Everyone is presumed to act justly and to do his part in upholding just institutions.”¹⁷ Given this information about what they, their closed society, and their fellow citizens are like, the persons in the original position will, argues Rawls, accept and endorse his two ideal principles of justice for their society.

Of course, merely having some set of facts does not determine a conclusion; what

¹³Rawls, *A Theory of Justice*, 112, 124-5.

¹⁴Rawls, *A Theory of Justice*, 54, 79. Rawls points out that the primary goods “are things which it is supposed a rational man wants whatever else he wants.” Thus, they are what the persons in the original position, who are rational and reasonable but ignorant of their particular desires and plans of life, want to secure for themselves.

¹⁵Rawls, *A Theory of Justice*, 54-5, 79-81, 123.

¹⁶Rawls, *A Theory of Justice*, 126. The assumption that citizens will be fully, or strictly, compliant seems to be one of the idealizing assumptions that marks the distinction between ideal and non-ideal theory, for Rawls. I focus on Rawls' arguments concerning ideal theory, because his ideal principles of justice are the end result of his ideal theorizing. While much has been said about the distinction between ideal and non-ideal theory, I will not pursue that discussion here; it is enough for my purposes to note the assumption of strict compliance that is built into Rawls' ideal theory. For discussion of the distinction between ideal and non-ideal theory, see, among others, Amartya Sen, “What Do We Want from a Theory of Justice?,” and A. John Simmons, “Ideal and Nonideal Theory.”

¹⁷Rawls, *A Theory of Justice*, 7-8. See also his listed description of the original position, 126-7.

conclusion a person reaches, given a set of facts, depends on how she reasons about, and with, those facts.¹⁸ Rawls argues that it is rational for the persons in the original position to employ maxi-min reasoning in order to determine what principles of justice to adopt for their society, and argues that they would, using such reasoning, arrive at his two principles of justice. That is, Rawls thinks that it is rational for the persons in the original position to design principles of justice that maximize the minimum level of primary goods that any citizen in the society might end up with; it is rational for the persons in the original position to do this, because they recognize that their particular position in society might well be, for all they know, at that minimum level.¹⁹ Importantly, the persons in the original position are operating in conditions of massive uncertainty; they do not know how many people in their society exist at the lowest social and economic level, nor do they know their particular economic and societal system, and so they have no way to calculate the probability that they will occupy—when they emerge from behind the veil of ignorance—that lowest level.²⁰ In addition, the nature of the risk that they face is extreme; they are reasoning about the basic conditions of distributive justice for their society, which will necessarily determine much of how their lives will go. Given their inability to engage in probabilistic reasoning about their likely position in society and the nature of the risk that they face, it is rational for them to try to make that lowest level as good, in terms of the primary goods, as possible: in other words, it is rational for them, when deciding on principles of justice, to attempt to maximize the minimum. And given the rational employment of maxi-min, or

¹⁸This idea is familiar from philosophy of science; there, it is referred to as the issue of the underdetermination of theory by evidence. Rawls refers to this phenomenon in the realm of value as the burden of judgment. Part of what it is to be reasonable, according to Rawls, is to recognize that everyone, including oneself, is operating under the burden of judgment, and so common agreement on truth is not to be expected. What can be expected instead, with reasonable people, is agreement on mutually acceptable rules. See Rawls, *Political Liberalism*, 50-1.

¹⁹Rawls, *A Theory of Justice*, 132-3.

²⁰Rawls, *A Theory of Justice*, 132-135.

maximizing the minimum, reasoning by the persons in the original position, Rawls concludes that they would endorse his two principles of justice, because his two principles work to maximize the share of the primary goods enjoyed by the lowest members of society.²¹

The two principles of domestic justice that Rawls argues that the persons in the original position will agree to are, first, that each person has the same infeasible claim to a fully adequate scheme of equal basic liberties, which scheme is compatible with the same scheme of liberties for all, and second, that social and economic inequalities are to satisfy two conditions: a) they are to be attached to offices and positions open to all under conditions of fair equality of opportunity, and b) they are to be to the greatest benefit of the least-advantaged members of society.²² While these two principles constrain the structure of the basic institutions of society, they do not—as is evident—determine the particular shape, so to speak, of those institutions; Rawls' principles of justice for domestic society are thus flexible enough to accommodate different institutions in different times and places, depending on the material and historical conditions of the society in question.²³ However, the principles are ordered, so that it is unjust for a society to create institutions that deny some or all citizens' basic rights and liberties in order to secure greater economic advantage.²⁴

In elaborating his ideal theory, Rawls provides a brief discussion of the particular rights and liberties that are encompassed by his first principle of justice; the right of self-defense is not

²¹Rawls, *A Theory of Justice*, 130-33.

²²Rawls, *A Theory of Justice*, 53, 266. Given the use of maximin reasoning, it might be expected that Rawls, instead of endorsing the difference principle, would advocate for a more strict egalitarian principle. To go into detail about his reasons for endorsing the difference principle would take us too far afield; suffice it to say that he thinks that allowing inequalities that benefit the worst off will benefit all the members of society, more so than a strict egalitarian principle.

²³As Thomas Pogge points out, this flexibility is one of the great strengths of Rawls' ideal domestic political theory. Pogge, "Rawls on International Justice," 246-53.

²⁴Rawls, *A Theory of Justice*, 131-2, and 474-80.

mentioned. Given the assumption of full compliance built into ideal theory, though, this is not surprising. While an adequate scheme of basic rights and liberties in the non-ideal, actual world might well include the individual right of self-defense, in the idealized society that the persons in the original position are considering, it is understandable that it would not be included, because there is no need for it. The individual right of self-defense is typically brought up and invoked in response to the possibility of an unjustified threat or attack; but in Rawls' idealized society, there are no unjustified threats or attacks. As Rawls writes, “strict compliance is one of the stipulations of the original position;” thus, it is guaranteed that there will be no instances of unjust aggression.²⁵ The assured absence of such unreasonable aggressive actions makes the individual right of self-defense a non-issue for the persons in the original position; they have no reason to consider it when they are determining the ideal principles of domestic justice. And furthermore, to consider it would be for the persons in the original position to go against one of the idealizing assumptions that constitute their deliberative position, namely the “compliance condition” of “strict compliance.”²⁶ So it is not merely that persons in the domestic original position do skip the issue of self-defense, so to speak, but that they should skip it—to take up the issue of individual self-defense in the original position, when deliberating about the ideal principles of domestic justice, would be for the persons to go off-topic in a crucial respect.

However, it is possible to read Rawls as not being fully committed to strict compliance as one of the idealizing assumptions of the original position. When he writes about the nature of the well-ordered society for which the persons in the original position are determining ideal principles of domestic justice, he says that:

...it is a society in which (1) everyone accepts and knows that the others accept the same

²⁵Rawls, *A Theory of Justice*, 215.

²⁶Rawls, *A Theory of Justice*, 127.

principles of justice, and (2) the basic social institutions generally satisfy and are generally known to satisfy these principles. In this case while men may put forth excessive demands on one another, they nevertheless acknowledge a common point of view from which their claims may be adjudicated.²⁷

The final sentence here suggests that perhaps a well-ordered society is not a society of strict compliance, despite the other passages that I have quoted that seem to say otherwise. If there could be some noncompliance in a well-ordered society, then the persons in the original position might well have reason to agree to the individual right of self-defense when deliberating about the ideal principles of domestic justice for a well-ordered, closed society. After all, recall that they do not know any of the particulars of their own situation in society; thus, they do not know if they are the sorts of persons who are likely either to make “excessive demands” on other members of their society, or to have excessive demands made on them. This could lead them to include the individual right of self-defense among the basic rights and liberties guaranteed to all members of the society by the first ideal principle of domestic justice.

This supposition is supported by what Rawls concludes when he considers questions of justice that arise for closed, well-ordered societies that are non-ideal in certain ways (that is, when he considers questions of non-ideal theory). In particular, he says that it is reasonable for the citizens of a generally well-ordered society that contains some partially compliant and some noncompliant members to accept that everyone in their society has an individual right of self-defense that operates in the standard way (i.e., that is subject to the imminence, necessity, and proportionality conditions discussed in previous chapters), because such an individual right of self-defense would be agreed to by the persons in the original position *if* they were to consider the issue of the existence of some partially compliant and some noncompliant members within their closed society. As Rawls puts it, in response to the question—that arises in non-ideal

²⁷Rawls, *A Theory of Justice*, 4.

theorizing—of whether reasonable people ought to tolerate an intolerant sect that has somehow arisen in their well-ordered society,

...we assume that the tolerant sects have the right not to tolerate the intolerant...when they sincerely and with reason believe that intolerance is necessary for their own security. This right follows readily enough since, as the original position is defined, each would agree to the right of self-preservation. Justice does not require that men must stand idly by while others destroy the basis of their existence.²⁸

Rawls goes on to point out that the intolerant sect does not have a right to complain and/or fight back when it is not tolerated in a well-ordered society; this is exactly in line with the traditional view of the individual right of self-defense, which, as we have seen in previous chapters, does not permit defensive responses to justified threats or attacks.²⁹ Significantly, the invocation of the individual right of self-defense here is a direct response to the worrying possibility that there will be, in a closed, well-ordered society, nevertheless some instances of partial compliance and noncompliance with the ideal principles of domestic justice. The individual right of self-defense, then, while it is not included in the two ideal principles of domestic justice that are generated by the persons in the original position when they are considering a strictly compliant, closed, well-ordered society, does seem, for Rawls, to be accepted and included in the principles of domestic justice that the persons in the original position regard as appropriate for a closed, well-ordered society that is non-ideal in the sense that it contains some instances of partial compliance and noncompliance.³⁰

²⁸Rawls, *A Theory of Justice*, 191-2.

²⁹Rawls, *A Theory of Justice*, 191-3. See especially Chapter 2 of this dissertation, “The Lockean Justification for State Rights of Self-Defense.”

³⁰Of course, it is an important question why citizens in the actual world should adopt the ideal principles of domestic justice that result from the deliberations of the persons in the original position. Rawls argues that citizens in the actual world should adopt these principles because they are fair (e.g. because they were decided on without biases or particular affections playing a role in the decision-making process of the persons) and because they reflect our sense of ourselves as free and equal moral agents and our sense of society as a long-term fair system of cooperation. In addition, Rawls thinks that his two principles of domestic justice will be supported by the moral tenets of any reasonable comprehensive doctrine. Whether Rawls is correct that we (presumably reasonable people) in the non-ideal world should accept his two ideal principles of domestic justice as the basic tenets of justice for our society is a

While this is a brief sketch of Rawls' compelling and rigorous argument for his principles of domestic justice, hopefully it makes clear the nature of his argument for the individual right of self-defense. The individual right of self-defense is not included in Rawls' two ideal principles of domestic justice for a well-ordered, strictly compliant, closed domestic society. Rather, the individual right of self-defense is included in the principles of domestic justice by the persons in the original position only in response to the existence of some instances of partial compliance and noncompliance in their well-ordered, closed society.

II. The Analogous Rawlsian Argument for State Rights of Self-Defense

In *The Law of Peoples*, Rawls turns his attention from domestic society to international society, and, “proceeding in a way analogous to the procedure in *A Theory of Justice*,” argues for eight principles of justice for international society.³¹ Basically, Rawls develops a series of three international original positions, each somewhat analogous to the domestic original position except that they take as their object of deliberation the ideal principles of justice for international, rather than domestic, society. Roughly, the first international original position concerns only the relations between perfectly just liberal states, the second concerns only the relations between such liberal states and decent states, and the third considers only the relations between liberal and decent states on the one hand and outlaw states on the other hand.³² Because the object of deliberation in *The Law of Peoples* is the ideal principles of justice for international society, rather than domestic society, there are some important disanalogies with the domestic original position, which Rawls recognizes. However, these disanalogies, Rawls thinks, do not make it so

question that I will not pursue here; it is enough for my purposes to simply lay out the shape of his argument for the ideal principles of domestic justice. For more on this question, see, among others, Susan Moller Okin, *Justice, Gender, and the Family*, and Onora O'Neill, *Towards justice and virtue*.

³¹Rawls, *The Law of Peoples*, 36.

³²I discuss the differences between the three international original positions in more detail below. See Rawls, *The Law of Peoples*.

that the baseline argument does not succeed. Rather, Rawls argues that, by considering what representatives in the various international original positions would agree to, we can conclude which principles of international justice we ought to adhere to (*viz*, what the 'Law of Peoples' ought to be). The argument for the ideal principles of international justice thus parallels the argument for the ideal principles of domestic justice that Rawls puts forth in *A Theory of Justice*.

Importantly, Rawls differentiates between states and peoples in his discussion of international justice; he conceives of states as purely self-interested (that is, as rational but not reasonable) and as having traditional powers of sovereignty.³³ He takes this conception of states to be the standard one that is commonly accepted in political theory, international relations, and international law (such as it is).³⁴ Given this understanding of states, Rawls argues that representatives of liberal peoples, rather than of states, are the persons who we ought to conceive of as being in the first international original position. This is because liberal peoples, in contrast to states, are both rational and reasonable; as Rawls puts it, they have “a certain moral character.”³⁵ He goes on to elaborate:

Like citizens in domestic society, liberal peoples are both reasonable and rational, and their rational conduct, as organized and expressed in their elections and votes, and the laws and policies of their government, is similarly constrained by their sense of what is reasonable. As reasonable citizens in domestic society offer to cooperate on fair terms with other citizens, so (reasonable) liberal (or decent) peoples offer fair terms of cooperation to other peoples. A people will honor these terms when assured that other peoples will do so as well.³⁶

It is this moral nature that leads the representatives of liberal peoples in the first international original position to agree on ideal principles of international justice that are fair. Thus, it is

³³Rawls, *The Law of Peoples*, 25-30.

³⁴Rawls, *The Law of Peoples*, 25-30.

³⁵Rawls, *The Law of Peoples*, 25.

³⁶Rawls, *The Law of Peoples*, 25.

essential for Rawls that we conceive of each of the international original positions as being populated by the representatives of liberal peoples, rather than the representatives of purely rational, wholly self-interested states. Liberal peoples, and thus their representatives, have a fundamental interest in creating fair terms of international cooperation; states, and thus their representatives, as Rawls conceives of them, do not.³⁷

In addition, liberal peoples have a “reasonably just constitutional democratic government that serves their fundamental interests” and are united by what Rawls, following Mill, calls “common sympathies.”³⁸ In short, liberal peoples have a government that is more or less under their control and that is more or less effective at fulfilling their fundamental interests in the primary goods, and they also self-identify as members of the same people, insofar as they have more or less the same political values and share a desire to be under the same democratic government.³⁹ Taken together, Rawls identifies these features as the three essential features of liberal peoples, and argues that these features set the fundamental interests of liberal peoples. And it is these fundamental interests of liberal peoples that the representatives in the first international original position take into account when they are deciding on the ideal principles of international justice. (Unsurprisingly, this is analogous to the way that the persons in the domestic original position take their fundamental interest in the primary goods into account when deciding on the ideal principles of domestic justice.)

More determinately, Rawls argues that liberal peoples have fundamental interests in

³⁷Another way to put this point is that Rawls thinks that the traditional conception of states assumes, rather than argues for, a particular understanding of the appropriate relations between states. To avoid this set of assumptions, Rawls considers the relations between peoples instead.

³⁸Rawls, *The Law of Peoples*, 23, and Mill, *Considerations on Representative Government*, 546.

³⁹Rawls admits that this issue of 'common sympathies' is very difficult to cash out, given the vagaries of history. Nevertheless, he thinks that we must appeal to it to make sense of the idea of what it is for some group to be, as he calls it, a 'people.' His account here is similar to Yael Tamir's understanding, in *Liberal Nationalism*, of what it is to be a nation.

protecting their territory, in ensuring the safety and security of their citizens, in preserving their just political institutions, civil liberties, and free culture, and in assuring reasonable justice for both their own citizens and for all people of the world.⁴⁰ The representatives of liberal peoples, then, unlike the persons in the domestic original position, are not purely mutually disinterested. When they deliberate about the ideal principles of international justice, they are motivated to ensure that not only their own people, but all people, live in reasonably just societies.⁴¹ (This motivation is unsurprising, given that the representatives are of Rawlsian liberal societies, which, as Rawls points out in *A Theory of Justice*, are set up so as to, and do, cultivate a love of the liberal conception of justice in their members.⁴²) In addition, liberal peoples, and thus their representatives, have a fundamental interest in being recognized and respected as equals by other peoples, and are willing to reciprocate such recognition and respect when it is granted to them.⁴³ The representatives of the liberal peoples that go behind the veil of ignorance in the first international original position are aware of these fundamental interests and, just as we saw in the domestic case, they attempt to decide on ideal principles of international justice that will maximize the position of the worst off liberal people in relation to these fundamental interests.⁴⁴ These fundamental interests of liberal peoples are thus equivalent to the primary goods of citizens, which, as we saw, play a key role in the domestic original position.

⁴⁰Rawls, *The Law of Peoples*, 29.

⁴¹Of course, this is not a contentious issue in the first international original position, which concerns only the relations between perfectly just liberal peoples or states. However, as we shall see, it plays an important role in both the second and third international original positions, when decent and outlaw states come into play.

⁴²Rawls, *A Theory of Justice*, 416-19.

⁴³Rawls, *The Law of Peoples*, 34-5. Rousseau refers to this as *amour-propre*.

⁴⁴Here, I assume that the representatives in the international original position use maxi-min reasoning—as it relates to peoples rather than to individuals—to decide on the ideal principles of international justice. I assume this because it is analogous to the domestic original position; however, Rawls does not explicitly discuss which rule of reasoning the representatives in the first international original position have reason to use. Thomas Pogge points this interesting omission out in his “Rawls on International Justice,” 252.

However, although the representatives of liberal peoples in the first international original position know about the fundamental interests of liberal peoples, they are also behind a veil of ignorance; they do not know which particular liberal people they represent, nor do they know any of the reasonable comprehensive doctrines that can be found among their fellow citizens (although they do, like their counterparts in the domestic original position, know the fact of reasonable pluralism). In addition, while they have basic historical and psychological knowledge, they do not know either the size of their territories or the relative strength of their people, and they lack information about their society's economic system and development and the nature and extent of their natural resources.⁴⁵ And furthermore, they do not know about the existence of non-liberal societies; for them, international society is closed in the sense that they do not consider the existence of noncompliant or partially compliant peoples outside of the society of liberal peoples about which they are deliberating. As Rawls puts it, the “first part of ideal theory [in *The Law of Peoples*] concerns the extension of the general social contract idea to the society of liberal democratic peoples.”⁴⁶ So, the representatives in the first international original position are considering *only* how best to regulate the interactions between perfectly just liberal peoples. This is analogous to the domestic original position—the society of perfectly just liberal peoples under consideration in the first international original position is both well-ordered and closed, and, as I shall argue below, strictly compliant. Ultimately, given the representatives' limited knowledge, and their desire to further their fundamental interests, Rawls argues that they will accept as the ideal principles of international justice what he calls the “familiar and traditional principles of justice among free and democratic peoples.”⁴⁷

⁴⁵Rawls, *The Law of Peoples*, 32-3.

⁴⁶Rawls, *The Law of Peoples*, 4-5; see also 86.

⁴⁷Rawls, *The Law of Peoples*, 37.

Rawls lists eight principles, many of which are familiar both from international law and the just war tradition. For my purposes, I will focus on the fifth principle, which states that “Peoples have the right of self-defense but no right to instigate war for reasons other than self-defense.”⁴⁸ In addition to this principle, which has to do with the right to go to defensive war, Rawls also lists principles regarding *jus in bello* and *jus post bellum*. While my arguments below might apply to these principles as well—insofar as they also have to do with questions of war and self-defense—for reasons of brevity and clarity, I will not explicitly discuss them. Although Rawls is careful to put his principles of international justice in terms of peoples, rather than states, the two appear to be functionally equivalent, at least in Rawls' working out of his ideal theory of justice for international society. In his distinction between peoples and states, Rawls is attempting to distance his work from the strictly rationalistic, wholly self-interested understanding of states, as well as the traditional assumptions about states' “powers of sovereignty,” that perennially appear in both international relations theory and political philosophy more generally.⁴⁹ After all, if he accepted the traditional assumptions about both the nature of states and unlimited state sovereignty, some of the questions that he wants to consider would be settled in advance. However, if we move away from this traditional—according to one historically prevalent, but by no means the only, line of theorizing⁵⁰—understanding of states as purely rationally self-interested and of state sovereignty as unlimited, we can see that Rawls'

⁴⁸Rawls, *The Law of Peoples*, 37.

⁴⁹Rawls, *The Law of Peoples*, 25. This understanding of the state as purely rational and wholly self-interested, and the assumption of state sovereignty as unlimited, appear first (in the Western European tradition) in Thucydides' *History of the Peloponnesian War*. They can also be seen in Hobbes' *Leviathan* and Machiavelli's *The Prince*, as well as in Hedley Bull's *The Anarchical Society*, among others. In contemporary political philosophy, these are often referred to as realist understandings of the state and state sovereignty. See Robert Gilpin, “The richness of the tradition of political realism,” and Brian Orend, *The Morality of War*, especially chapter 8.

⁵⁰For non-realist understandings of the state, and different conceptions of state sovereignty, see, among others, Augustine's *The City of God*, Locke's *Two Treatise of Government*, and Kant's *Perpetual Peace*, as well as Walzer's *Just and Unjust Wars* and Simon Caney's *Justice Beyond Borders: A Global Political Theory*.

liberal peoples are more-or-less equivalent, for our purposes, to liberal states (i.e., to states that are rational and reasonable, and that operate on the basis of and in accordance with his two principles of domestic justice, and that do not necessarily—depending on the outcome of the arguments in *The Law of Peoples*—have unlimited sovereignty).

This functional equivalence between liberal peoples and liberal states is made more plausible by Rawls' mentions of territory and natural resources throughout his discussion of the first, second, and third international original positions and the ideal principles of international justice. Nowhere in his discussion of the essential features of a liberal people does Rawls mention either the need for or the having of a bounded territory, and yet he seems to assume throughout that liberal peoples do have territories; recall his claim that liberal peoples have a fundamental interest in protecting their territory, and his note that the representatives in the first international original position do not know the size of their territories nor the nature and extent of their natural resources.⁵¹ But typically, it is states, not peoples, that have territories and natural resources. As we learn from Weber, a somewhat neutral way to think of states is just as those institutions that have de facto political and physical power over the people and natural resources within a bounded territory.⁵² (This definition is neutral in that it says nothing about either the rational or reasonable nature of states or states' normative powers of sovereignty.) Roughly, we can read Weber here as saying that it is this combination of successfully ruling over people plus successfully ruling over the territory in which they live that is essential to some institution's being a state. So, insofar as Rawls regards the inclusion of territory and natural resources to be essential to the discussion of the ideal principles of international justice, then it seems that although he is ostensibly talking in the first international original position about the relations

⁵¹Rawls, *The Law of Peoples*, 29 and 33.

⁵²Max Weber, *Politics as a Vocation*.

between liberal peoples, he is thinking about the relations between liberal states.⁵³

Given this, we can then read Rawls' fifth ideal principle of international justice as the claim that such liberal states have rights of self-defense that sometimes justify going to war, but no right to instigate war for reasons other than self-defense. The representatives operating in the first international original position would accept this principle, according to the Rawlsian picture, because it protects and furthers the fundamental interests of just liberal states and, in conjunction with the other ideal principles of international justice, reflects their conviction that an international society of just liberal states is, at its base, a closed, well-ordered, fair cooperative system that operates over time.

Of course, it is an important question why liberal states in the actual world should adopt the ideal principles of international justice that result from the first international original position; after all, the actual world is dissimilar in many important ways from the idealized world that the representatives are considering in the first international original position. Much like in the domestic case, Rawls argues that we, “here and now,” should accept the ideal principles of international justice that he lays out because they reflect our sense of ourselves as free and equal liberal peoples and our sense of international society as a fundamentally fair cooperative

⁵³The distinction between peoples and states is complicated, and has led, in recent years, to discussions in political and international relations theory of the so-called “nation-state.” This concept seems to be an attempt to elide the worries raised by the distinction between peoples and states, as it combines some of the essential features of being a people (most notably the idea of common sympathies invoked by Rawls above, following Mill) with some of the essential features of being a state (most notably the control of people within a bounded territory). However, there are also problems with the idea of the nation-state, insofar as it is possible for people to have common sympathies, in Rawls' sense, without being members of the same nation (or of the same state, for that matter). In addition, some theorists have suggested that the distinction between peoples and states is artificial, and depends entirely on a realist understanding of the state that we need not—and indeed, should not—accept. So there are multiple worries surrounding this distinction, which pull in multiple directions. I will not attempt to give a full account of how to understand the differences between peoples, states, and nations here; it is enough for my purposes to point out that Rawls, in *The Law of Peoples*, appears to be thinking about liberal states when he argues for his ideal principles of international justice. For more on this distinction, see, among others, Yael Tamir, *Liberal Nationalism*, Gerald Doppelt, “Walzer's Theory of Morality in International Relations,” Charles Taylor, “Can liberalism be communitarian?,” Michael Walzer, “The Moral Standing of States: A Response to Four Critics,” David Estlund, “Liberal Associationism and the Rights of States,” and Anna Stilz, “Nations, States, and Territory.”

system.⁵⁴ So, we should accept the principle that liberal states have a right of self-defense that sometimes justifies going to war, but no right to instigate war for reasons other than self-defense.

Importantly, this is *not* the claim that is at the heart of the contemporary just war tradition; as just war theory is commonly understood today, the claim is that *all* states have rights of self-defense, but no right to go to war for reasons other than self-defense.⁵⁵ So insofar as contemporary just war theorists look to Rawls for a full validation of this claim, they will not get it. As it stands so far, Rawls' theory of just war is significantly revisionary, in that it ideally limits state rights of self-defense solely to liberal states. In the remainder of this chapter, I attempt to show first that Rawls' allocation of the state right of self-defense to liberal states in the first international original position does not succeed, and secondly, that his allocation of the state right of self-defense to all decent states and to all non-aggressive (both internally and externally) states in the second and third international original positions respectively does not succeed. Ultimately, although I think that Rawls' ostensible conclusion at the end of *The Law of Peoples* is mostly correct, that all non-externally-aggressive states that are protective of the human rights of their populations have state rights of self-defense⁵⁶, his argument does not successfully provide us with such a conclusion.

III. A Methodological Concern with the First International Original Position

Rawls' discussion of the ideal principles of international justice in *The Law of Peoples* is both illuminating and compelling. He provides an impressive argument for the claim that liberal states have rights of self-defense that sometimes justify going to war, but no right to instigate war for reasons other than self-defense. As Walzer helpfully puts it, “the defense of state rights is

⁵⁴Rawls, *The Law of Peoples*, 30.

⁵⁵For iterations of this claim, see Walzer's *Just and Unjust Wars*, David Luban, “Just War and Human Rights,” and David Rodin, *War and Self-Defense*, as well as footnotes 5 and 8 of this chapter.

⁵⁶Rawls, *The Law of Peoples*, 91-2.

a reason for fighting. I want now to stress again, and finally, that it is the only reason...every other sort of war [is ruled out].”⁵⁷ This is an intuitive way to think about the morality of going to war, and Rawls gives, as we have seen, a detailed argument in support of it, an argument that moreover has its roots in the domestic analogy. Nevertheless, his argument does not succeed, because the methodology of the domestic original position does not allow the representatives in the first international original position to consider questions of war and self-defense.

Recall that Rawls is attempting, in the first instance of ideal theory in *The Law of Peoples*, to derive the ideal principles of international justice for a closed international society of perfectly just liberal states. He is explicit that the representatives in the first international original position are of liberal states, and that they come together to determine the ideal principles of international justice that will regulate the interactions between their various liberal states. Given this set-up, it is clear that the representatives know about both the essential features of liberal states and the fact of reasonable pluralism between and among liberal states; but what is not clear is whether they are to assume strict compliance with the ideal principles of international justice. Whether such strict compliance is built in to the idealizing assumptions of the first international original position is essential, because, as we saw in the domestic original position, that is what determines whether instances of partial compliance or noncompliance need to be taken into consideration by the persons in the original position when they are determining the ideal principles of domestic justice.

Although Rawls is not explicit about the nature or level of compliance in his discussion of the first international original position in *The Law of Peoples*, I think that the appropriate parallel to draw from the domestic original position as described in *A Theory of Justice* is that the first international original position contains fully, or strictly, compliant liberal states. (Of course,

⁵⁷Walzer, *Just and Unjust Wars*, 72.

as we saw above, it is possible to read Rawls as saying that the domestic original position contains some instances of partial compliance or noncompliance. I consider this possibility below.) If we assume, as I think the parallel with the domestic original position supports, that the first international original position is constructed to consider the ideal principles of international justice for a closed society of states that is composed entirely of strictly compliant perfectly just liberal states, then there is no good reason for the representatives in the first international original position to consider or endorse the principle that all states in that society of states have rights of self-defense.

Recall that in the domestic case, the individual right of self-defense is invoked only as a justification for various kinds of otherwise impermissible responses to instances of partial compliance and noncompliance, that is, to unjust aggressive behavior by others. It is a corollary of the individual rights that we have to autonomy and bodily integrity, etc., but it is a corollary that is only necessary because we recognize the strong possibility of unjust threats to and unjust attacks on our autonomy and bodily integrity, etc., by unreasonable, noncompliant people. If we did not think that such unjust aggression were either possible or likely, then we would not recognize the individual right of self-defense as part of a fully adequate scheme of rights and liberties. The persons in the domestic original position do not, in the first instance, recognize the existence of unreasonable, noncompliant people; they make the idealizing assumption that everyone in their closed society “act[s] justly.”⁵⁸ Thus, in their deliberations about the ideal principles of domestic justice, they (rightly) do not consider or endorse principles that have to do with how to respond to unjust aggressive (*viz*, non-compliant) behavior.

Moving back to the international case, we can plausibly conclude that the representatives in the first international original position, like their counterparts in the domestic original position,

⁵⁸Rawls, *A Theory of Justice*, 8.

assume strict compliance with the principles of international justice. As Charles Beitz points out, “the law of nations, in Rawls, applies to a world of just states.”⁵⁹ Given this idealizing assumption, it seems strange, and perhaps even perverse, to think that the representatives would seriously consider, much less endorse, Rawls' fifth principle of international justice, which asserts that all states in the closed society of just liberal states have the right to go to war in self-defense, but no right to go to war for reasons other than self-defense. The representatives have no good reason to think about the possibility of war breaking out between two or more of the just liberal states in the society of states, because this would necessarily involve assuming that one of the just liberal states had committed an act of unjust aggression against another one of the just liberal states in the closed society of states. And this assumption is ruled out by the condition of strict compliance that I have concluded is built into the first international original position. So, for the representatives in the first international original position to focus on questions of war and self-defense, when they are considering the ideal principles of international justice for their closed society of perfectly just liberal states, would be for them to go against the assumptions of their own deliberative position. Following the methodology of the domestic original position, then, I conclude that the representatives in the first international original position should skip the question of the state right of self-defense; for them to consider it is to go off-topic in a crucial respect. By Rawls' own lights, the principle of the state right of self-defense should not be included in the ideal principles of international justice that are accepted and endorsed by the representatives of liberal states in the first international original position.

However, let us assume that I am mistaken that the first international original position includes the condition of strict compliance. As we saw in the domestic case, it is possible to read Rawls as indicating that the well-ordered, closed society under consideration by the persons in

⁵⁹Charles Beitz, “Justice and International Relations,” 365.

the domestic original position need not be one of strict compliance. If this is correct, then the appropriate parallel to draw in the international case is that the first international original position contains a society of just liberal states that are mostly, but need not be strictly, compliant with the ideal principles of international justice. The possibility thus seems to exist in the first international original position for some instances of partial compliance or noncompliance to occur in the society of just liberal states. So, following the reasoning above, if the representatives in the first international original position know that some partial compliance or noncompliance is practically possible in their closed society of just liberal states, then it would be reasonable for them, we might think, to accept and endorse the ideal principle of international justice that all states in their society of states have rights of self-defense.

But, as Rawls acknowledges, the situation in the first international original position is importantly different from the domestic original position in the following sense: the representatives know that they are representatives of just liberal states, and they know that just liberal states do not go to war with each other, because “liberal peoples have nothing to go to war about.”⁶⁰ Following Michael Doyle, Rawls subscribes to this idea of “democratic peace,” and states that “the absence of war between major established democracies [i.e., just liberal states] is as close as anything we know to a simple empirical regularity in relations among societies.”⁶¹ This knowledge, that just liberal states do not go to war with each other, gives the representatives in the first international original position good reason to think that, although an instance of partial compliance or noncompliance in the society of liberal states is strictly speaking possible, it will not actually occur. And knowing the extreme unlikelihood of instances of unjust aggression occurring, it seems that the representatives in the first international original position

⁶⁰Rawls, *The Law of Peoples*, 47.

⁶¹Rawls, *The Law of Peoples*, 51-3, and especially fn 65. See also Michael Doyle, “Kant, Liberal Legacies, and Foreign Affairs,” and “Kant, Liberal Legacies, and Foreign Affairs, Part 2.”

would have good reason not to accept and endorse the ideal principle of international justice that all liberal states have rights of self-defense that sometimes justify going to war.

In support of this claim, consider that many situations are strictly speaking possible in the first international original position, but that the representatives do not generate principles of international justice for all of these possible situations. The representatives are meant to generate a short⁶² list of ideal principles of international justice that will serve as a guide to regulate the ordinary, day-to-day interactions between and among the various just liberal states in the closed society of states. So, they must be sensitive to the sorts of interactions that are at least somewhat likely to occur between and among just liberal states. Unjust aggression between and among just liberal states is, as we have seen, considered by the representatives to be extraordinarily unlikely to occur. As Rawls writes, “peace reigns among them [just liberal states].”⁶³ Thus, the representatives have good reason to dismiss the bare possibility of unjust aggression between and among just liberal states as a scenario that need not concern them in their deliberations about the ideal principles of international justice. So, contrary to the domestic original position, even if we assume that strict compliance does not hold in the first international original position, there is still good reason for the representatives not to accept and endorse the principle that all states in the society of just liberal states have rights of self-defense. For them to accept and endorse such a principle as an ideal principle of international justice for the first international original position would be to erroneously grant high likelihood to the possibility of a situation occurring (namely, one just liberal state unjustly aggressing against another just liberal state) that they know simply does not occur in the normal course of events. So again, if we take seriously Rawls' own

⁶²As Rawls points out in *A Theory of Justice*, having fewer principles of justice is better than having more principles of justice, all things considered. I think that this point uncontroversially carries over to the international case. See *A Theory of Justice*, 8-9.

⁶³Rawls, *The Law of Peoples*, 8.

methodology for generating ideal principles of international justice for the first international original position, we see that it would not result in the principle that all states (in the closed society of just liberal states) have rights of self-defense, because the representatives in the first international original position would not accept and endorse such a principle. Ultimately then, regardless of whether I am correct that strict compliance is a condition of the first international original position, it seems that Rawls' argument from the first international original position does not, despite what he claims, support the principle that all just liberal states have rights of self-defense.⁶⁴

Now, an initial objection to my argument here might be that the first international original position is different enough from the domestic original position that it, unlike the domestic original position, naturally gives rise to the principle that states have rights of self-defense. The persons in the domestic original position know that they are deciding on principles of justice for a political society (i.e., a society with an ultimate political authority); conversely, the representatives in the first international original position know that they are deciding on principles of justice for an anarchic society (i.e., a society of independent states that lacks an ultimate political authority). Perhaps this general fact of political anarchy that Rawls builds into the international case makes a difference.⁶⁵ It might be that the representatives in the first international original position, when they consider that the society of just liberal states is anarchical in nature, are thereby led to accept and endorse the principle that states have rights of

⁶⁴Note that this is not an argument about whether such a principle of international justice ought to hold in the actual world. It is rather an argument that Rawls is wrong to conclude that the representatives in the first international original position, when deliberating about the ideal principles of international justice, would consider, accept, and endorse such a principle.

⁶⁵Rawls views the society of states as an anarchic society. He writes that, while the principles of international justice will “make room for various forms of cooperative associations and federations among peoples [states],” they “will not affirm a world-state.” Rawls, *The Law of Peoples*, 36, see also 28. For more on the idea of an anarchic society, see especially Hedley Bull, *The Anarchical Society*.

self-defense that sometimes justify going to war.

But while the fact of political anarchy at the international level does mark an important difference between the domestic and international cases, it cannot do the work that the objection claims for it. The fact of political anarchy would only lead the representatives in the first international original position to accept the relevant principle if they thought that such anarchy would necessarily, or even possibly, lead some states in the society of states to be unjustly aggressive. However, they have no reason to accept this. Recall that the society of states, in the first international original position, is composed of just liberal states. As we have seen, Rawls argues that such states “do not go to war with one another. This is not because the citizenry of such societies is peculiarly just and good, but more simply because they have no cause to go to war with one another. ...Since constitutional democratic societies [just liberal states] are safe from each other, peace reigns among them.”⁶⁶ Just liberal states are peaceful; thus, the representatives in the first international original position, because they know the basic nature of the states that compose the closed society of states with which they are concerned, have no reason to think that war might break out, even given the general fact of political anarchy at the international level. So, while the anarchic nature of international society is an important feature of the international case, it does not suffice to raise the specter of aggressive war for the representatives in the first international original position when they are deliberating about the ideal principles of international justice.

However, perhaps the representatives in the international original position would include the state right of self-defense in their list of ideal principles of international justice, not because of worries about partial compliance or noncompliance (which, as I have tried to show, are ruled

⁶⁶Rawls, *The Law of Peoples*, 8. See also Section 5, and 90-1. Rawls here follows the claim made by Democratic peace theory (prominently espoused by Michael Doyle) that constitutional democracies do not and will not go to war against each other. See Michael Doyle, “Kant, Liberal Legacies, and Foreign Affairs,” and “Kant, Liberal Legacies, and Foreign Affairs, Part 2.”

out for the first international original position), but because of worries about stability. Going back to the domestic case, Rawls points out that the persons in the domestic original position are concerned to find ideal principles of domestic justice that, if implemented, would lead the relevant society to be both just and stable over time.⁶⁷ This concern for stability leads Rawls to argue that a system of criminal law, including penal sanctions, is necessary, “even for ideal theory.”⁶⁸ In short, a system of criminal law is necessary even for well-ordered domestic societies in order to solve the assurance problem, which generates instability.⁶⁹ People will fully comply with the principles of justice, Rawls claims, only when they know that the other people in their society will comply also; and the system of criminal law assures them of this, because it a) gives everyone in the society good reason to comply, through the creation and equal enforcement of public penalties for non-compliance and b) makes it public knowledge what counts as compliance.⁷⁰ So, in Rawls' domestic ideal theory, having a system of criminal law is what ensures full compliance, and thus is what allows the assumption of full compliance that is both one of the markers of a well-ordered society, and that guarantees social stability over time.

Now, moving back to the international case, we can assume that the representatives in the first international original position are also concerned with stability. Other things being equal, the preferred ideal principles of international justice are those that will lead the society of just liberal states to be stable over time. Given the concern for stability, perhaps a system of criminal

⁶⁷Rawls, *A Theory of Justice*, 436. As he puts it, “other things being equal, the preferred conception of justice is the most stable one.”

⁶⁸Rawls, *A Theory of Justice*, 212.

⁶⁹Rawls, *A Theory of Justice*, 277. As Rawls points out, in a well-ordered society, such penal sanctions will probably never be imposed; they serve solely to solve the assurance problem. This problem is most prominently introduced by Thomas Hobbes in *Leviathan*. Hobbes points out that men, in order to be willing to comply with the rules, need some guarantee that others are complying with the rules as well. The guarantor, for Hobbes, is the coercive sovereign. See Rawls, *A Theory of Justice*, 211, and Hobbes, *Leviathan*, chapters 13-18.

⁷⁰Rawls, *A Theory of Justice*, 208-212.

law is needed for a well-ordered international society, as well. But as we just discussed, the society of states, according to Rawls, is an anarchic society; by definition, there is no ultimate coercive political authority to implement a system of international criminal law. So, the assurance problem, which presumably also exists at the international level, cannot be solved as it is in the domestic case, via a system of domestic criminal law. So perhaps the representatives, knowing this, include the state right of self-defense among their ideal principles of international justice as a sort of second-best; perhaps it is meant to provide stability in the absence of a system of international criminal law.

It is undoubtedly correct that the representatives in the first international original position should concern themselves with the stability of the society of just liberal states. But their concern for stability should not lead them to accept the principle of the state right of self-defense, because that principle cannot actually provide stability. Rights, by definition, are under the control of the rights-holder; traditionally, rights-holders have the freedom to decide whether to exercise their rights or not.⁷¹ And importantly, because they have this freedom, rights-holders need not be consistent in their exercising of their rights. Some days, they may exercise their rights, and other days, they may refrain from doing so, all without failing to act permissibly. So, in the normal case, there can be no assurance regarding how a rights-holder will act; we never know whether another rights-holder will comply with how we think she ought to exercise her rights in any given situation. On the assumption, then, that Rawls' proposed state right of self-defense is a traditional (that is, a normal) right, it is up to the right-bearing state whether it defends itself in any given situation. As a result, the assurance problem in the first international original position

⁷¹This is the traditional understanding of rights; see especially Judith Jarvis Thomson, *The Realm of Rights*, Ronald Dworkin, *Taking Rights Seriously*, and Joseph Raz, *The Authority of Law: Essays on Law and Morality*. However, this understanding of rights as always under the control of their bearers has recently come into question; see especially Jeremy Waldron, "A Right to Do Wrong," and William A Galston, "On the Alleged Right to Do Wrong: A Response to Waldron."

is not solved by the introduction of the state right of self-defense; the states within the society of states do not know when, if, or how their counterparts will defend themselves, and so they do not have any assurance that their fellow states have good reason to comply with the principles of international justice. In the domestic case, the system of criminal law guarantees that noncompliance will be publicly sanctioned; the state right of self-defense in the international case provides no such guarantee, because it is up to the unjustly attacked or threatened state to decide whether and how to respond to noncompliance. So, the state right of self-defense does not serve, in the international case, to “remove the grounds for thinking that others are not complying with the rules;” it does not provide assurance of compliance.⁷² In the face of the instability generated by the assurance problem at the international level, then, the representatives in the first international original position would not turn to the principle of the state right of self-defense; it cannot play the appropriate stabilizing role.

This concern about stability at the international level might lead us to ask why the representatives in the first international original position do not simply affirm the justice of a world state. Rawls follows Kant in denying the justice of a world state; as he writes,

These principles [of ideal international justice], I assume...will not affirm a world-state. Here I follow Kant's lead in *Perpetual Peace* (1795) in thinking that a world government—by which I mean a unified political regime with the legal powers normally exercised by central governments—would either be a global despotism or else would rule over a fragile empire torn by frequent civil strife as various regions and peoples tried to gain their political freedom and autonomy.⁷³

Whether we accept Rawls', and by extension, Kant's, arguments against a world state is, for the purposes of this chapter, somewhat beside the point. If we conclude that Rawls does not successfully argue against a world state, so much the better for me, because a world state would

⁷²Rawls, *A Theory of Justice*, 211.

⁷³Rawls, *The Law of Peoples*, 36.

preclude the ideal principle of international justice with which I am concerned, namely the state right of self-defense that is espoused by the just war tradition. And if we conclude that Rawls does successfully argue against a world state, that does not hurt my argument, because the mere existence of independent just liberal states in a society of just liberal states does not, as I have attempted to show, give rise to the conclusion (on the part of the representatives in the first international original position) that such states have rights of self-defense. Of course, it is difficult to show conclusively that the representatives in the first international original position, when deliberating about the ideal principles of international justice, would or would not consider, accept, or endorse any particular principle of international justice. However, I have tried, in this section, to suggest that there are good reasons for thinking that the representatives in the first international original position, when they are deliberating about the ideal principles of international justice, would not, despite what Rawls concludes, generate or accept the principle that (just liberal) states have rights of self-defense.

IV. Methodological Concern Aside, Would the Representatives Agree?

At this point, I have argued that Rawls' methodology does not, in the first instance, support his proposed ideal principle of international justice that states have rights of self-defense. The representatives in the first international original position, given their idealized assumptions and concerns, simply would not consider, accept, or endorse it as an ideal principle of international justice for the society of just liberal states. However, let us assume that I am mistaken, and that Rawls' methodology can be successfully applied to questions of war and self-defense in the first international original position, so as to generate the principle that all states in the society of states have rights of self-defense. The question then becomes whether or not the representatives would extend the state right of self-defense to decent states in the second and

third international original positions, and also whether the existence of outlaw states in the third international original position makes a difference to which principles the representatives would reasonably adopt. In short, what would the representatives agree to in regards to questions of war and self-defense when they entertain considerations (such as the existence of decent and outlaw states) that arise in non-ideal theory? In this section, I argue first that the existence of outlaw states in the third international original position would lead the representatives to accept and endorse state rights of self-defense solely for those states that are not outlaw states. I think that this is a fairly uncontroversial interpretation of Rawls (although it does show that he has a revisionary theory of just war). Then, I argue that the representatives in both the second and third international original positions would *not* extend state rights of self-defense to decent states, despite what Rawls claims, because such toleration goes against the representatives' fundamental interest in justice for all the people of the world. So, the representatives, faced with decent states in the second international original position and decent and outlaw states in the third international original position, would reserve the state right of self-defense solely for just liberal states.

To be clear, the main difference between the three international original positions is as follows: in the first, the question is about the ideal principles of international justice for a society of just liberal states. In the second, the question is whether decent (that is, non-liberal, but not internally or externally aggressive) states should be recognized by the representatives—who are still of just liberal states—as “equal participating members in good standing of the Society of Peoples.”⁷⁴ Broadly, this is the question that arises in non-ideal theory of how to respond to partially compliant states. In the third international original position, the question is what principles of international justice are appropriate for a world that includes both liberal and decent

⁷⁴Rawls, *The Law of Peoples*, 59.

states and outlaw (that is, non-liberal and externally and/or internally aggressive) states. Broadly, this is the question that arises in non-ideal theory of how to respond to noncompliant states. I take up this question first.

Importantly for Rawls, such noncompliant, or outlaw, states are outside of the society of states; their internal and/or external aggression makes it so that they are not members of the society of states.⁷⁵ This is a disanalogy with the domestic original position; although Rawls does consider issues of noncompliance for the domestic case, he considers primarily instances of noncompliance that arise within a closed society⁷⁶, rather than noncompliance by outsiders. Conversely, the representatives in the third international original position are considering noncompliance by outsiders (*viz.*, outlaw states). However, insofar as the representatives are considering international society, this disanalogy need not worry us overmuch; the representatives are supposed to focus on questions of international justice after all, and so must pay attention to the question, which immediately arises in international non-ideal theory, of how to respond to aggressive outlaw states, which, although they may be rational, are neither reasonable nor just. So just as the persons in the domestic original position can consider what principles of domestic justice to espouse in response to the existence of intolerant sects within a well-ordered society, so too the representatives in the third international original position can consider what principles of international justice to espouse in response to the existence of unjustifiably aggressive states. The question for us, then, is whether the representatives in the third international original position, knowing that outlaw states exist, would accept and endorse the principle of international justice, familiar from the first international original position, that all states have a right to go to war in self-defense, but no right to go to war for reasons other than

⁷⁵Rawls, *The Law of Peoples*, 90-1.

⁷⁶See both his discussion of intolerant sects within a well-ordered domestic society, discussed in section 1 above, and his discussion, squarely in non-ideal theory, of civil disobedience. See *A Theory of Justice*, 319-23.

self-defense.

On the face of it, it seems that the representatives in the third international original position, knowing that some outlaw states exist, would not accept or endorse such a universal principle. As Charles Beitz argues,

In a world including [unjust states], one can easily imagine situations in which the principle of non-intervention would prevent other nations from intervening in support of an oppressed minority fighting to establish a more just regime, and this might seem implausible. More generally, one might ask why a principle which defends a state's ability to pursue an immoral end is to count as a moral principle imposing a requirement of justice on other states.⁷⁷

Beitz's point here has to do primarily with the second half of Rawls' principle, which establishes a requirement of non-intervention. The requirement of non-intervention is conventionally accepted within the just war tradition, because it seems to follow straightforwardly from the claim that all states have rights of self-defense that inter-state intervention is generally ruled out as unjustified. From this, many political theorists working in the just war tradition, including J.S. Mill, Rawls, and Michael Walzer, among others, conclude that non-intervention among states should be the (moral) rule.⁷⁸ As David Luban puts it, "Each state...has a duty of non-intervention into the affairs of other states: indeed, this includes not just military intervention, but is widely accepted to include any action amounting to the denial of the independence of the State."⁷⁹ Now, this is not to say that the state right of self-defense cannot be overridden in some extreme cases; both Rawls and Walzer explicitly acknowledge this.⁸⁰ However, both insist that the straits must be quite dire before intervention becomes possibly justified, because even unjust, unreasonable

⁷⁷Beitz, "Justice and International Relations," 365.

⁷⁸Mill, "A Few Words on Non-Intervention," 238-63, Rawls, *The Law of Peoples*, and Walzer, *Just and Unjust Wars*.

⁷⁹David Luban, "Just War and Human Rights," 164.

⁸⁰See Rawls, *The Law of Peoples*, 93 footnote 6, and Walzer, *Just and Unjust Wars*, 86-102. Walzer allows for more kinds of cases where an intervention might be possibly justified than Rawls does; nevertheless, both emphasize that inter-state interventions are in general ruled out as straightforward rights violations.

states (*viz*, outlaw states) have rights of self-defense that are, so to speak, morally weighty.

As Beitz rightly points out, it is not clear why the representatives in the third international original position (on the assumption that they know about the existence of outlaw states with which their own liberal states will have to interact) would accept such a principle of non-intervention. The principle of non-intervention, after all, predictably leads to the sorts of serious, large-scale harms that occur when non-liberal, unreasonable states have, and know that they have, free reign over their populations. Such harms include massive violations of political rights, such as the rights to free speech, free assembly, and *habeas corpus*, and massive violations of human rights, such as the rights to autonomy, bodily integrity, and life. For example, in the actual world, where the principle of non-intervention has been a recognized part of international law since at least World War II,⁸¹ it is estimated that 15-20 million Russians were killed by the Soviet state over the course Stalin's thirty year reign⁸², and that over two million Cambodians were killed during the four-year reign (1975-79) of Pol Pot and the Khmer Rouge.⁸³ In North Korea currently, it is estimated that over 200,000 people are being held in political prison camps without trial.⁸⁴ There are many more examples I could cite here; the point is that an international principle of non-intervention predictably leads to such domestic harms, because outlaw states know that, as a result of the widespread acceptance of the non-intervention principle, other states are very unlikely to attempt to interfere in their domestic affairs. And furthermore, outlaw states know that this is especially true of liberal states, who might otherwise be the most likely to

⁸¹The duty of non-intervention is codified in Article 2(4) the United Nations Charter, written in 1945, which reads, "All members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the purposes of the United Nations." Quoted in David Luban, "Just War and Human Rights," 161.

⁸²Norman Naimark, *Stalin's Genocides*.

⁸³Henri Locard, "State Violence in Democratic Kampuchea (1975-1979) and Retribution (1979-2004)," 121-143.

⁸⁴*North Korea: Political Prison Camps*.

intervene, because liberal states, as such, often have the greatest respect for international law and for what they regard as the correct principles of international justice.⁸⁵

Ultimately, if the representatives in the third international original position know that oppressive outlaw states both exist and commonly use the principle of non-intervention as a shield against outside interference with their very unjust, large-scale domestic programs, then the representatives would have a very good reason *not* to agree with the proposed principle of international justice, which, as we saw, establishes a general principle of non-intervention. It is essential to note here that the representatives *care* about injustice; recall that one of the fundamental interests of liberal states is to assure reasonable justice both for their own citizens and for all the people of the world. Given this fundamental interest of liberal states, it is implausible to think that the representatives—who are of liberal states—would view the large-scale domestic injustices that predictably come with the principle of non-intervention with equanimity. They would reject such a principle as having much too high a cost.⁸⁶

But this is not to say that the representatives in the third international original position would have nothing principled to say about questions of war and self-defense; it is simply to say that the representatives have good reason to accept and endorse a principle of international justice having to do with war and self-defense that is altered from the original principle in some

⁸⁵It is instructive here to consider the Carter administration's response to Vietnam's 1979 intervention in Cambodia in response to the atrocities committed by Pol Pot and the Khmer Rouge. The Carter administration, despite repeatedly asserting that Pol Pot's regime was the worst human rights violator in the world, strongly denounced Vietnam's intervention as a violation of Cambodia's territorial integrity and sovereignty; the UN soon followed suit. And this in spite of the fact that the Vietnam-installed Cambodian regime's first announcement concerned the restoration of human rights in Cambodia. See *Amnesty International Report 1978*, 167-70, and Henry Kamm, "The Cambodian Dilemma," 54-5.

⁸⁶Note that this is similar, but not identical, to the claim sometimes made by political theorists working on non-ideal theory that *we* (that is, persons in the actual, non-ideal world) would reject such a principle as having much too high a cost. Amartya Sen, Thomas Pogge, and Charles Beitz all make suggestions along these lines; they more or less accept Rawls' ideal principles as the correct ideal principles of international justice, but reject their application to the actual, non-ideal world. See especially Sen, "What Do We Want from a Theory of Justice," Pogge, "Rawls on International Justice," and Beitz, "Justice and International Relations."

relevant way. An acceptable principle would either explicitly allow interventions in cases of non-liberal, unreasonable regimes, or limit the state right of self-defense to liberal or, at a minimum, to wholly non-aggressive states. I discuss each of these possibilities in turn; however, the key point is that there is good reason to think that the representatives in the third international original position would accept one of my altered principles over the traditional just war principle under consideration, because the representatives fundamentally care about the massive injustices that would be allowed, and in some cases furthered, by the principle as it stands.

The two alternative principles that I mentioned above are variations on a theme: they allow interventions in cases of outlaw states, either by adding an exception clause to the proposed principle that all states have rights of self-defense or by limiting the state right of self-defense solely to those states that are neither externally nor internally aggressive. In either case, the result would be same; reasonable states would not be morally required by the law of peoples to stand by as an outlaw state aggresses against its own population. And in some places, Rawls seems to want to allow this; he writes, “If the offenses against human rights are egregious and the society does not respond to the imposition of sanctions, such [forceful] intervention in the defense of human rights would be acceptable and would be called for.”⁸⁷ This suggests that Rawls wants to allow, when considering the question of outlaw states that arises in non-ideal theory, an exception to the ideal principle of international justice that he initially proposes. However, he also writes that “*any* society that is [externally] nonaggressive and that honors human rights has the right of self-defense...it always has the right to defend itself against invasion of its territory.”⁸⁸ This suggests that rather than an exception clause, Rawls thinks that all and only those states that are not starting wars and that are properly protecting their citizens

⁸⁷Rawls, *The Law of Peoples*, 93-94, footnote 6.

⁸⁸Rawls, *The Law of Peoples*, 92, italics in original.

(i.e., only those states that are non-aggressive externally and that are honoring human rights internally) actually have rights of self-defense.⁸⁹ Unfortunately, Rawls does not provide a full argument in support of limiting the state right of self-defense solely to wholly non-aggressive states; these hints in the text are merely brief suggestions on which he does not elaborate.

But what he does provide suggests that, rather than inserting an exception clause into the principle in the third international original position, he instead wants to change the principle to limit the state right of self-defense to those states that are, at the least, non-aggressive and honoring human rights. This is a substantial revision to the contemporary just war tradition, which, as we have seen, maintains that all states have rights of self-defense vis-a-vis other states, regardless of how those states act domestically.⁹⁰ But perhaps it is the correct change, given the existence of unjustifiably aggressive states both in the third international original position and in the actual world. Intuitively, we might think that Rawls is heading in the correct direction when, in response to the existence of outlaw states, he attempts to limit the state right of self-defense solely to those states that are neither externally nor internally aggressive (i.e., that are neither starting wars nor violating the human rights of their population).

However, I do not think that the representatives in the third international original position have the resources to accept this precise change, except on an *ad hoc* basis. The representatives in all three international original positions, remember, have fundamental concerns about furthering (a liberal political conception of) justice; why then would they accept in the third

⁸⁹This is basically the view that I argue for in the following chapter, although I (importantly) do not put it in terms of human rights. In addition, my argumentative strategy is very different than Rawls'.

⁹⁰For helpful descriptions of the just war tradition's position on the universal state right of self-defense, see Michael Walzer, *Just and Unjust Wars*, Helen Stacy, "Humanitarian Intervention and Relational Sovereignty," and Larry May, *Crimes Against Humanity*. For an application of this view, see the Organization of African Unity's strong condemnation of Tanzania's intervention in Idi Amin's Uganda, despite the notorious human rights violations that were widely acknowledged to be occurring in Uganda under Amin. See *Amnesty International Report 1978*, 89-92, and *Amnesty's Human Rights in Uganda*, 1978.

international original position such a broad and inclusive, although not universal, baseline for granting the state right of self-defense? And it is a broad and inclusive baseline—recall that Rawls concludes that not only liberal and so-called decent states, but also “benevolent absolutism[s],” all have state rights of self-defense (so long as they are not being externally aggressive or internally violating human rights).⁹¹ Why not instead grant the right of self-defense solely to liberal states, and in so doing further the cause of assuring justice for all the people of the world? As Kok-Chor Tan argues, in regards to whether decent states should be included in the Rawlsian society of states in both the second and third international original positions, “liberals, after all, are concerned ultimately with individual well-being; why should they, then, tolerate regimes whose institutions sustain domestic inequality and are antithetical to any liberal aspiration citizens of these regimes may have?”⁹² And although Tan is discussing decent states here, it seems that we can unproblematically extend his argument to benevolent absolutist states as well. Given the representatives' fundamental interest in furthering a liberal political conception of justice for all the people of the world, there is good reason to think that, in response to the existence of non-liberal states in the second international original position, and unreasonable and aggressive states in the third international original position, they would accept and endorse a much more restricted principle of international justice having to do with war and self-defense, namely one that extends the state right of self-defense solely to liberal states.

Now, Rawls does insist on the importance of toleration in *The Law of Peoples*; he writes that “decent [reasonable but non-liberal] peoples do exist, or could exist, and...they should be tolerated and accepted by liberal peoples.”⁹³ Rawls' point here seems to be that the

⁹¹Rawls, *The Law of Peoples*, 91-2.

⁹²Kok-Chor Tan, “Liberal Toleration in Rawls's Law of Peoples,” 282.

⁹³Rawls, *The Law of Peoples*, 79.

representatives in primarily the second, but also the third, international original position, when they are deliberating about the principles of international justice, should include decent states in their deliberations and in the society of states. But as Pogge points out, while Rawls asserts the importance of including decent states in the society of states as a matter of justice, he does so without fully explaining why, which suggests that there is a worrying gap in his reasoning.⁹⁴ Tan is more explicit; he suggests that while Rawls wants toleration at the international level to be a liberal principle, it appears in fact to be a purely pragmatic response to global diversity, and to the need to be unified, at least in the third international original position, against outlaw (*viz*, unjustly aggressive) states.⁹⁵ Considering the second international original position, Rawls likens the toleration of decent (i.e., reasonable but non-liberal) states within the society of states to the toleration of different reasonable comprehensive doctrines within a well-ordered domestic society.⁹⁶ However, these are not the same; in domestic society, according to Rawls, different reasonable comprehensive doctrines are to be tolerated to the extent that they contain, enable, or allow for reasonably liberal political views. Conversely, non-liberal political views (which arise out of unreasonable comprehensive doctrines) need not be tolerated in a well-ordered domestic society; they might well be tolerated for pragmatic reasons, but they need not be tolerated as a matter of domestic justice.⁹⁷ Following this line of reasoning, it seems that we should conclude, *contra* Rawls, that reasonable but non-liberal states need not be tolerated in the society of states under consideration by the representatives in the second and third international original

⁹⁴Thomas Pogge, "Rawls on International Justice," 247-8.

⁹⁵Kok-Chor Tan, "Liberal Toleration in Rawls's Law of Peoples," 284-5.

⁹⁶Rawls, *The Law of Peoples*, 59-62.

⁹⁷For arguments that this is Rawls' view, see Kok-Chor Tan, "Liberal Toleration in Rawls's Law of Peoples," Marilyn Friedman, "John Rawls and the Political Coercion of Unreasonable People," and Ajume Wingo, *Veil Politics in Liberal Democratic States*.

positions, precisely because such decent states have, by definition, non-liberal political views.⁹⁸ Rawls' insistence on toleration in the second and third international original positions thus seems to be mistaken; as Tan puts it, “at the international level, Rawls advocates tolerating regimes with nonliberal *political* institutions. ...[N]onliberal politics, unreasonable in the domestic context, becomes reasonable in the international context...[and] this seems blatantly inconsistent.”⁹⁹ Rawls instead should concede that the representatives in the second and third international original positions need not, as a matter of international justice, tolerate non-liberal states, decent or otherwise. (I am here thinking of Rawls' remark concerning the toleration of benevolent absolutist states).

Of course, to say that states with non-liberal political views need not be tolerated by the representatives in the second and third international positions as a matter of international justice is not yet to say that liberal states should not tolerate them in the actual, non-ideal world. There may well be good instrumental reasons to include decent states in the actual, non-ideal society of states, not the least of which is the desire to have them as allies against outlaw states. In addition, the actual, non-ideal world puts practical constraints on liberal states; states may be compelled to put up with the non-liberal practices of other states, not because a liberal political conception of justice requires them to be tolerant at the international level, but because they do not, in many cases, have the practical ability to act justly on their judgment that the non-liberal practices of other states are unjust.¹⁰⁰ But simply because there are good instrumental reasons for tolerating

⁹⁸This is more or less Kok-Chor Tan's line of reasoning in the first half of his “Liberal Toleration in Rawls's Law of Peoples.”

⁹⁹Kok-Chor Tan, “Liberal Toleration in Rawls's Law of Peoples,” 283, italics in original.

¹⁰⁰For instance, a liberal state may decide to ignore the partial implementation of sharia law in Iran, not because the liberal state is being tolerant, but because it recognizes that it cannot act to stop the implementation of sharia law in Iran without thereby unjustly coercing its own citizens, or ignoring multi-lateral treaties that it has signed with other liberal states, or starting a war that it is unable to stop.

reasonable but non-liberal states in the actual world, does not mean that liberal states ought to tolerate them as a matter of international justice; they are, after all, despite their so-called decency, illiberal. So while liberal states in the actual world may well have good reasons to welcome reasonable but non-liberal states into the fold, so to speak, the representatives in the second and third international original positions, when deliberating about the principles of international justice, should not include decent states as “*bona fide* members” of the society of states.¹⁰¹ To do so would be for the representatives to go against their own fundamental interest in justice for all the people of the world. So, rather than accepting the broad and inclusive—though not universal—principle regarding state rights of self-defense that Rawls ostensibly ultimately endorses, the representatives in the second and third international original positions would accept and endorse a principle of international justice that limits the state right of self-defense solely to liberal states.

Importantly, such a restricted principle need not lead to more justified inter-state interventions. Simply because a non-liberal state lacks a right of self-defense does not mean that interventions against it are always justified; it merely means that such interventions might be justified, if the relevant circumstances arise. Such circumstances will include, among others, that various types of widespread aggression are being practiced by the non-liberal state against its own population, that various inter-state and international diplomacy efforts and non-military sanctions have failed to stop the relevant aggression, that the intervening state is able to intervene without harming or wronging its own population, and that the intervening state is able to help bring about a new, more just state in place of the relevant non-liberal state.¹⁰² This might well be

¹⁰¹Rawls, *The Law of Peoples*, 61.

¹⁰²This list of conditions is similar to, although more extensive than, both Michael Walzer's and Helen Stacy's lists of conditions that must be met for an inter-state intervention to be justified. See Walzer, *Just and Unjust Wars*, and Stacy, “Humanitarian Intervention and Relational Sovereignty.” See also the final section of the following chapter, which deals with inter-state interventions in much more depth.

a list of the necessary conditions that an intervention must meet in order to be justified; however, there is no reason to think that the conditions I have listed are sufficient. At this point, going into the fine details of the ethics of inter-state interventions would lead us too far astray from the main argument; I merely raise the issue in order to respond to an intuitive objection to the proposed alternative principle of international justice, which limits the state right of self-defense solely to liberal states. One might think that the representatives in the second and third international original positions would not accept and endorse such a limited principle because it would lead to more justified inter-state interventions, that is, to more wars. I have briefly argued that this does not follow, because a state's lacking a right of self-defense is a necessary, but by no means a sufficient, condition for interventions against it to be justified. In addition, as I mentioned in the previous paragraph, in the actual world, liberal states have good instrumental reasons for not intervening in non-liberal states. Thus, thinking that it will lead to more wars is not a good reason for the representatives in the second and third international original positions to reject the proposed alternative principle of international justice, which limits the state right of self-defense solely to liberal states.¹⁰³

Alternatively, the representatives in the second and third international original positions might grant decent states, as well as non-liberal but wholly non-aggressive states, rights of self-defense because they (the representatives) know that liberal states, although they do not go to war with other (recognized) liberal states, do “often engage in war against nondemocratic states.”¹⁰⁴ This tendency of liberal states to be warlike towards non-liberal states goes hand in hand with their tendency to be peaceful towards other liberal states; so presumably the

¹⁰³I discuss the ethics of inter-state interventions further in the final section of the following chapter, which contains my positive view.

¹⁰⁴Rawls, *The Law of Peoples*, 51.

representatives know this fact about liberal states as well.¹⁰⁵ Perhaps, then, the representatives in the second and third international original positions would grant state rights of self-defense to decent states as well as to non-liberal but wholly non-aggressive states, not because such states deserve rights of self-defense, so to speak, but because liberal states need (another) normative barrier in place to stop them from unjustifiably intervening in non-liberal states.

Initially, it is important to note that such state rights of self-defense would not be the only barrier to liberal states unjustifiably intervening in non-liberal states; if it were, this objection to my argument might have much more force. But as I discussed above, for interventions to be justified, a whole host of other normative conditions must be met as well. These conditions also act as normative barriers to stop liberal states from unjustifiably intervening in non-liberal states. In addition, and perhaps more seriously, this smacks of being a sort of noble lie;¹⁰⁶ non-liberal states do not really have rights of self-defense, the representatives might think, but we will claim that they do so as to help stop liberal states from acting badly. If this were the representatives' reasoning, it would be worrying, because it would suggest that the agenda of the representatives in the second and third international original positions is primarily the creation of international social harmony and stability, and only secondarily the creation of international justice. But, as we learn from Rawls, the representatives, like their counterparts in the domestic original position, are primarily concerned with international justice, and only secondarily concerned with international social harmony and stability.¹⁰⁷ So, I think that the representatives in the second and third international original positions would not extend state rights of self-defense to decent, as

¹⁰⁵Rawls cites Jack S. Levy, "Domestic Politics and War," 87, in support of this claim. See also John M. Owen, "How Liberalism Produces Democratic Peace," 87-125.

¹⁰⁶The concept of the noble lie is first introduced, at least in the western tradition, by Plato in *The Republic*. His noble lie is of a religious nature; however, there is no reason to think that a noble lie could not be of a political nature instead. See Plato, *The Republic*, Book 3, 382a4-d3, 414b6-415e4.

¹⁰⁷Rawls, *The Law of Peoples*, 45.

well as to non-liberal but wholly non-aggressive, states as a sort of noble lie. Rather, in both cases, they would accept and endorse the principle of international justice that limits state rights of self-defense solely to liberal states, because that is the principle that, I have argued, arises from their careful consideration of their fundamental interests in conjunction with the set conditions of their deliberative positions.

Another intuitive objection to the thought that the representatives in the second and third international original positions would accept and endorse a more restricted principle of international justice is that, insofar as it restricts the state right of self-defense solely to liberal states, the principle goes against the basic concept of a right. The underlying suggestion here is that rights are unconditional and universal, and so it is contradictory to restrict a right to only certain members of a given class. However, this is simply to misunderstand the nature of rights; they need be neither unconditional nor universal. Consider the right to vote; it is conditional on a person's being a citizen in good standing, and so can be forfeited or lost if the person acts in such a way so as to no longer be either a citizen or in good standing (e.g., if she emigrates or commits a felony). This shows that it is possible, and in fact may be common, for rights to be conditional in certain ways. In addition, while some rights are universal—usually human rights are considered to hold universally—not all are. Consider again the right to vote; it is not held universally, but only by adult citizens of the relevant state. Children and foreigners simply do not have the right to vote in a state's elections. Hopefully this example shows that there is nothing contradictory in the idea of a right being conditional and non-universal; thus, when the representatives in the second and third international original positions consider the proposed alternative principle of international justice, which maintains that only liberal states have rights of self-defense, they need not worry that they are considering a principle of international justice

that is inherently contradictory.

V. Conclusion: Rawls' Overly Revisionary View of Just War

The principle that I have argued that the representatives in the second and third international original positions would accept, namely that only liberal states have rights of self-defense, is both a) an enormous revision of the cornerstone of the just war tradition and b) an exceptionally high standard for having a state right of self-defense. Given this standard, it is not clear whether many (if any) states in the actual, non-ideal world do have rights of self-defense. Intuitively, this does not seem correct, and it is clearly not the result that either contemporary just war theorists or Rawls ostensibly want. Rawls wants instead, as we have seen, to extend the state right of self-defense, as a matter of principle, to all states that are non-aggressive externally and that are honoring human rights internally.¹⁰⁸ Unfortunately, as I have tried to show, he does not have the theoretical resources available to make this move successfully. The representatives in the first, second, and third international original positions are, quite simply, bound by their fundamental concern for justice for all the people of the world, and so, to the extent that they would consider questions of war and self-defense at all, would not accept and endorse a principle of international justice that contains such a broad and inclusive—though not universal—standard. Rather, they would accept and endorse a principle of international justice that limits the state right of self-defense solely to liberal states. Thus, although Rawls' way of cashing out the domestic analogy initially seems quite promising, it ultimately cannot support the claim that is at the cornerstone of the just war tradition, that all states have rights of self-defense. Instead, Rawls' arguments support a very, and I think overly, revisionary view of just war, namely, that only liberal states have rights of self-defense.

However, as has become apparent, there is an intuitive view that is somewhat close to

¹⁰⁸Rawls, *The Law of Peoples*, 91-2.

this claim: this is the view that Rawls tries to take up but does not successfully argue for, that all states that are non-aggressive externally and that are honoring human rights internally have rights of self-defense. Broadly speaking, although Rawls' arguments do not support this conclusion, I think that it is nevertheless substantially correct. So, in the following chapter, I provide an argument for a view that is very close, although not identical, to this Rawlsian claim. Although my view is a departure from the just war tradition, it is not as great a departure as the principle that only liberal states have rights of self-defense, and it is not dependent on Rawls' somewhat controversial theoretical machinery. Rather than make use of the original position, or even the domestic analogy more generally, I provide an independent argument that some, but not all, states have rights of self-defense that sometimes justify going to war.

CHAPTER 5: JUSTIFYING THE STATE RIGHT OF SELF-DEFENSE¹

States regularly go to war in order to defend their sovereignty and their territory against unjust aggression. Both statesmen and political theorists justify a state's going to defensive war by appealing to that state's right of self-defense. All states have a moral right to defend their sovereignty and their territory from unjust aggression, they claim, just like all individuals have a moral right to defend their autonomy and bodily integrity from unjust aggression.² And while the state right of self-defense does not always justify going to war (just like the individual right of self-defense does not always justify the use of lethal force), in certain circumstances—when the relevant conditions are met—the use of defensive war, like the use of individual lethal force, is thought to be justified. (Of course, it is one thing to say that going to war is justified, and another thing to say that particular actions taken in the course of prosecuting a war are justified. My focus in this chapter is on the former, not the latter.³)

As I have noted in previous chapters, this claim that all states have rights of self-defense that sometimes justify going to war is one of the cornerstones of both modern international relations and the just war tradition in political philosophy. But while the idea is intuitively plausible, it is not obviously true. We need a reason for thinking that states have rights of self-

¹Many thanks to Bernie Boxill, Tom Hill, Carl Ficarrotta, Geoff Sayre-McCord, the audience at the 2015 Association for Practical and Professional Ethics Conference, the members of the Spring 2015 Dissertation Research Seminar at UNC-Chapel Hill, and the Philosophy Departments at Utah Valley University and UNC-Asheville for their many and varied helpful comments on this chapter.

²Throughout, I am discussing moral rights, not legal rights. While the interplay between moral and legal rights is interesting and complex, my focus is on the morality of war, rather than its legality.

³Typically, this distinction between the justice of going to war and the justice of particular wartime actions is referred to as the distinction between *jus ad bellum* and *jus in bello*. There is some debate in the literature as to whether these two are logically independent; I follow Jeff McMahan in thinking that they are connected but not co-extensive. See Jeff McMahan, "The Ethics of Killing in War," 693-733.

defense that sometimes justify going to defensive war, especially considering the host of serious, large-scale harms that inevitably come with war. As an example, 2.5% of the world's population—over 60 million people—died in World War II, which is often cited as the paradigm case of a justified defensive war.⁴

The reason commonly offered by both just war theorists and international relations theorists in support of the claim that states have rights of self-defense that sometimes justify going to war is the so-called 'domestic analogy.'⁵ This analogy is between states and individuals, and maintains that just as individuals have rights of self-defense that sometimes justify the use of lethal force, so too do states have rights of self-defense that sometimes justify going to war. The domestic analogy is both suggestive and intuitive, especially given our natural tendency to personify states. We speak of states “taking decisive action”—or failing to do so—in response to terrorism, of their “consenting” to trade agreements and the like, and of their “having special relationships” with other states. Given this, it is intuitively plausible to think that states, like individuals, have rights of self-defense that sometimes justify otherwise impermissible actions (such as going to war).

But while the domestic analogy is a persuasive, and pervasive, idea, it is not yet an argument for the claim that states have rights of self-defense that sometimes justify going to war. For the domestic analogy to provide an analogical argument for this claim, it would have to show that the reasons we have for accepting that individuals have rights of self-defense provide grounds for concluding that states have rights of self-defense as well. In my previous chapters, I have attempted to show that such an analogical argument, however it is cashed out, will not

⁴I.C.B. Dear, *Oxford Companion to World War II*.

⁵Hedley Bull calls it the domestic analogy in *The Anarchical Society*, as does Michael Walzer in *Just and Unjust Wars*. Although he does not call it by that name, the analogy is readily apparent in Plato's *Republic* (he considers what justice is for the city in order to determine, by analogy, what justice is for the individual).

succeed in justifying the claim that all (or, following Rawls, even most) states have rights of self-defense that sometimes justify going to war. Whatever reasons we have for thinking that all individuals have rights of self-defense cannot, I maintain, ground the analogous claim that all states have rights of self-defense. So, assuming that we want to continue to endorse some variation of this claim, we need a new and different argument for it.

In this chapter, I provide such an argument. I argue that states have rights of self-defense that sometimes justify going to defensive war when they are organized so as to properly protect their populations. I begin with the widely accepted claim that individuals have rights of self-defense. Initially, I assume rather than argue for this claim, because it is a point of agreement between myself and those who accept the domestic analogy. We all agree that individuals, when they have done nothing to forfeit their rights of self-defense, have and continue to have rights of self-defense. And furthermore, to the extent that individuals are not able to effectively exercise their rights of self-defense, they deserve protection. From here, I move on to determining how such protection should be provided. By considering what has happened historically to individuals, I argue that the entity best situated, in the world as it is, to provide such protection is the state. This protective role is one of the primary functions of the state.

Then, I argue that when states are fulfilling their protective role, they have rights of self-defense that sometimes justify going to war, because state rights of self-defense enable states to better protect their populations. Conversely, states that are not fulfilling their primary protective role do not have rights of self-defense that sometimes justify going to war. Put simply, the state right of self-defense, unlike the individual right of self-defense, is conditional on a state's being organized so as to fulfill its primary protective role.⁶ This means that, contrary to common opinion, the presumption is not in favor of all states having rights of self-defense. Only those

⁶It does not follow from this that a newly created state does not have a right of self-defense. I explain more below.

states that are organized so as to properly protect their populations have rights of self-defense, because only they meet the necessary condition for having a state right of self-defense.

I then discuss what it takes for a state to count as providing protection to the members of its population. I argue that what counts as protection will depend on the justification provided for the claim that individuals have rights of self-defense. I develop a Kantian argument for the individual right of self-defense, and from that develop an account of what a state must do to fulfill its primary protective role. Broadly, a state fulfills its primary protective role when its deliberative processes, laws, institutions, and policies recognize and respect the dignity of its individuals, considered as rational autonomous agents. And when states fulfill their primary protective role in this way, they have rights of self-defense that sometimes justify going to defensive war.

My argument has a number of implications for just war theory, perhaps the most important of which concerns inter-state interventions. In my final section, I point out that interventions are not straightforwardly ruled out as instances of rights violations in my proposed system, but rather may be justified in certain circumstances. (Of course, it does not follow from a state's not having a right of self-defense that all, or even most, interventions against it are justified.) I conclude that my proposed system of state rights is better than the current system, which tends to straightforwardly rule out interventions as unjust aggressions in all but the most extreme cases. Given this, we should adopt my proposed system: not only does it provide a justification for the claim that (at least some) states have rights of self-defense that sometimes justify going to defensive war, but it is also better—in terms of protecting individuals—than our current system.

I. The Individual Right of Self-Defense: An Assumption (For the Time Being)

The default view among many moral and political philosophers is that all individuals have moral rights of self-defense. Put simply, having the moral right of self-defense means that it is morally permissible for individuals to defend against unjust threats to and unjust attacks on them. Importantly, for the purposes of such defense, individuals may perform otherwise impermissible actions.⁷ For example, let us assume that interrupting is normally impermissible. Despite this, Ashley may permissibly stop Zed from unjustly interrupting her by interrupting his interruption (on the assumption that interrupting him is necessary to get him to stop). She may do this because she is defending against Zed's unjust attack; it is a way of forcing Zed to acknowledge that Ashley has a right to speak uninterrupted. On the other end of the spectrum, Ashley may permissibly—assuming that it is necessary—maim or kill Zed to stop him from unjustly maiming or killing her. She may do this because she is entitled to defend herself against unjust aggression in whatever way is necessary to stop or block the unjust aggression.⁸ I refer to this entitlement to defend herself as her individual right of self-defense.

The individual right of self-defense thus justifies normally impermissible actions, when those actions are necessary to block or stop the relevant unjust aggression.⁹ However, it is important to note here that the individual right of self-defense does not extend to defending oneself against *justified* aggression. If you act wrongly and others defend themselves against

⁷Judith Jarvis Thomson brings out this point in her paper, "Self-Defense," 283-310.

⁸David Rodin, *War and Self-Defense*, 40-1. Rodin, like Thomson and others, agrees that you may only do what is necessary to stop or block the unjust aggression against you. The individual right of self-defense does not justify doing anything you like in your own defense; it only justifies those actions that are needed to stop or block the relevant unjust aggression.

⁹There is widespread (although not universal) agreement that unjustly threatened individuals may not kill innocent bystanders in order to save themselves, even when doing so is necessary to the threatened individuals' survival. I tend to think that this so-called 'bystander exception' is correct, although I cannot provide an argument for it here. See, among others, Judith Jarvis Thomson, "Self-Defense," Yitzhak Benbaji, "Culpable Bystanders, Innocent Threats and the Ethics of Self-Defense," 585-622, and George Fletcher, "Proportionality and the Psychotic Aggressor," 367-90.

you, you may not in turn defend yourself against their defense. By acting wrongly, you forfeit your right of self-defense in that situation. For example, Zed may not defend himself against Ashley's justified interruption, because, by unjustly interrupting her in the first place, he forfeits his right to defend himself against her justified defense.¹⁰ Of course, Zed does not forfeit his right of self-defense permanently; rather, he forfeits it only in relation to his unjust aggression.¹¹ So, he may not defend himself against Ashley's interruption, because her interruption is a justified defensive response to his unjust aggression against her. However, he may defend himself against the random person who attempts to mug him. The mugger unjustly aggresses against Zed, and so Zed, notwithstanding his unjust aggression against Ashley, is entitled to defend himself against the mugger.

This is a very quick sketch of the basics of the individual right of self-defense. We need not go into more detail just yet.¹² So long as an account can be given in support of the claim that individuals have rights of self-defense that sometimes justify otherwise impermissible actions, including the use of lethal force, my argument goes through. Furthermore, this claim is a point of agreement between myself and those who endorse the domestic analogy; we all start from the claim that individuals have rights of self-defense, and that those rights of self-defense operate roughly in the way that I have described.¹³ So at this point, I simply accept without argument that

¹⁰Jeff McMahan has a nice discussion of this in chapter 1 of his book, *Killing in War*.

¹¹See Joel Feinberg's discussion regarding forfeiting rights in "Voluntary Euthanasia and the Inalienable Right to Life," 93-123.

¹²The specifics of the individual right of self-defense have been discussed at length in the philosophical literature. See, among others, Judith Jarvis Thomson, "Self-Defense," George Fletcher, "Proportionality and the Psychotic Aggressor," Yitzhak Benbaji, "Culpable Bystanders, Innocent Threats and the Ethics of Self-Defense," and Jeff McMahan, *Killing in War*.

¹³In fact, it is hard to find anyone working in the just war tradition who does *not* endorse this claim. For prominent endorsements of this claim among those who utilize the domestic analogy, see Michael Walzer, *Just and Unjust Wars*, Thomas Hurka, "Proportionality in the Morality of War," 39, Brian Orend, *The Morality of War*, and Charles Beitz, *Political Theory and International Relations*, 69.

individuals have rights of self-defense that sometimes justify otherwise impermissible actions.

II. The Case for States: A Historical Argument

Individuals have rights of self-defense because they need—given the world as it is—protection against unjust aggression. However, as at least two major political philosophers point out, individuals in isolation do not often succeed at protecting themselves. Thomas Hobbes argues that life for individuals without a state is full of “continual fear and [the] danger of violent death;” it is, famously, “solitary, poor, nasty, brutish, and short.”¹⁴ Although individuals have the right to defend themselves, according to Hobbes, that right does not do them much good in the so-called state of nature, because they are simply not able to successfully protect themselves against all or even most of the aggression that is likely to occur.¹⁵ John Locke also argues that life for individuals without a state will go badly for those individuals. He argues that “nothing but confusion or disorder will follow” from living in a so-called state of nature, because individuals will not be able to perform all of the actions needed in order to successfully defend themselves and their property.¹⁶ We are simply not able, because of individual human limitations, to fully protect ourselves on our own. (As a modern rights theorist might put it, the individual right of self-defense in the state of nature is a formal right, but not an effective one.¹⁷)

Both Hobbes and Locke argue from the claim that individuals with rights of self-defense are unable to protect themselves in the state of nature to the conclusion that a state is needed to provide that protection. However, this is too quick; all Hobbes and Locke have shown is that some form of protection is needed, because individuals are not able to exercise their rights of

¹⁴Thomas Hobbes, *Leviathan*, chapter 13.

¹⁵Thomas Hobbes, *Leviathan*, chapter 13.

¹⁶John Locke, II, 2, 13-15.

¹⁷Tim Anderson, “The Political Economy of Human Rights,” 200-227.

self-defense effectively on their own. Hobbes and Locke have not yet shown that that protection should, or needs to, take the form of a *state*. Their argument is, as it stands, unfinished. So, to complete their argument, I provide a historical argument for the claim that the protection of individuals is best provided by states. By a state, I simply mean a political organization that successfully claims a monopoly on the use of legitimate physical force within a bounded territory and that successfully claims authority, disseminated via the rule of law, over the individuals within that territory.¹⁸ This is the common sociological view of what it is for something to be a state, and as such, I think that it is what most international relations theorists, just war theorists, and statesmen have in mind when they refer to states.¹⁹ However, there is no consensus on the most appropriate definition of a state; there are many ways in which the understanding that I have provided can be questioned.²⁰ Despite this debate in the literature, I will work with the sociological view of the state that I have put forth, as it is the most commonly accepted definition among the theorists and statesmen with whom I hope to engage.

To see that states are the entities best situated to provide protection for individuals, let us consider what has happened historically to individuals that do not have states. Typically, when individuals do not have states to protect them, they neither flourish nor, in some cases, survive. Consider the plights of the Jewish people in Eur-Asia, the Roma people in central Europe, and the Irish Travellers in Great Britain and the United States. The Jewish people in Eur-Asia were, throughout much of the medieval and early modern periods, considered outcasts and

¹⁸This sociological understanding of a state is most famously put forward by Max Weber in *Politics as a Vocation*.

¹⁹See, for example, John Rawls, *Political Liberalism*, Michael Walzer, *Just and Unjust Wars*, David Rodin, *War and Self-Defense*, Charles R. Beitz, *Political Theory and International Relations*, 52, Thomas Hobbes, *Leviathan*, chapter 13, and *The Charter of the United Nations*.

²⁰For a good introduction to this topic, see Erika Cudworth, *The Modern State: Theories and Ideologies*, Brian T. Nelson, *The Making of the Modern State: A Theoretical Evolution*, and Colin Hay, "State Theory," 1469-1475. For an earlier version of this debate, see John Locke, II, 7, 89-93.

undesirables.²¹ To name two prominent examples, the Russian pogroms in the nineteenth and twentieth centuries and the Holocaust during World War II were both aimed at the extermination of the Jewish people.²² In each case, although the Jewish people who were attacked and killed lived in the relevant states, they were not considered to be members of those states.²³ The Jewish people were not protected by the state, and so, lacking a monopoly on legitimate physical power and de facto political authority, they were unable to protect themselves against state-sanctioned attacks. In a world of states, individuals need states in order to protect themselves. (Notably, the Jewish people themselves recognized this: the persecution they suffered led directly to the creation of the Zionist movement, i.e. the movement to create a Jewish state.²⁴)

Importantly, the history of the Jewish people, considered in this context, is not a special case; other peoples without states have fared poorly throughout history as well. Throughout the eighteenth, nineteenth, and early twentieth centuries, both the Roma people in central Europe and the Irish Travellers in Great Britain and the United States were, like the Jewish people, not under the protection of any state, although they were recognized as members of distinct communities by the states in which they lived and through which they passed.²⁵ Considered to be inherently criminal, both Roma and Irish Travellers were regularly attacked by state authorities. At several points throughout Great Britain's history, there were concerted efforts to wipe out, not only

²¹Salo Wittmayer Baron, *A Social and Religious History of the Jews in Three Volumes*, and Raymond P. Scheindlin, *A Short History of the Jewish People: From Legendary Times to Modern Statehood*.

²²See, among others, John Klier, "The pogrom paradigm in Russian history," 352-55, Dinah Shelton, *Encyclopedia of genocide and crimes against humanity*, Jonathan Dekel-Chen, *Anti-Jewish Violence: Rethinking the Pogrom in East European History*, Jack Fischel, *The Holocaust*, and Yehuda Bauer, *Rethinking the Holocaust*.

²³See, among others, Richard J. Evans, *In Hitler's Shadow*, Christopher Browning, *The Origins of the Final Solution: The Evolution of Nazi Jewish Policy, September 1939 – March 1942*, John Klier, "What was a Pogrom?," and David Engel, "What's in a Pogrom?"

²⁴Isaiah Friedman, "Theodor Herzl: Political Activity and Achievements," 46-79.

²⁵David M. Crowe, *A History of the Gypsies of Eastern Europe and Russia*, Angus Fraser, *The Gypsies*, and Judith Okely, *The Traveller-gypsies*.

individual Irish Travellers, but their people as a whole.²⁶ And although the Roma people were romanticized in literature²⁷, the reality of their situation was far more harsh. They were put into forced labor camps by Spain in 1749²⁸, were considered slaves in Romania until the 1850s²⁹, were forbidden from immigrating to some areas outside of Europe (the United States outlawed the entry of the Roma in 1885, as did Argentina in 1880)³⁰, and were targeted by the Nazis during the Holocaust.³¹ Although both the Roma and the Irish Travellers attempted to defend themselves against state authorities, they were unable to do so because they lacked the concerted physical power, as well as the de facto political authority, of a state. As a result, many of their members died, and much of what made them culturally unique has been lost.

Although I have chosen to focus on three particular examples of peoples that have been unable to protect themselves successfully in the absence of a state, there are other examples that we might give. Most notably, we could consider the history of the Native American peoples, or that of the Aboriginal peoples of Australia. But what these histories tell us, in sum, is that in a world of states, individuals are not able to protect themselves without a state. States, because of their monopoly on legitimate physical power and de facto political authority, are the entities best situated, in the world as it is, to protect individuals. (To see this, imagine what would have happened if the Jews, Roma, and Irish Travellers had had states; it seems plausible that their histories would have been very different, because they would have been able to utilize the

²⁶Anthony Drummond, “The Construction of Irish Travellers (and Gypsies) as a Problem,” 2-42, and Judith Okely, *The Traveller-gypsies*.

²⁷Heathcliff, of *Wuthering Heights* fame, is of Roma origin.

²⁸Antonio Gómez Alfaro, “The Great “Gypsy” Round-up in Spain.”

²⁹Viorel Achim, *The Roma in Romanian History*.

³⁰David M. Crowe, *A History of the Gypsies of Eastern Europe and Russia*.

³¹János Bársony, “Facts and Debates: The Roma Holocaust,” 1-12.

legitimate physical power and de facto political authority of their states for their protection.) This provides a good reason for endorsing the existence of states: states are worth having, we might say, because they protect their populations from unjust aggression and, by so doing, enable them to survive and flourish.

Of course, the state's protection of its individuals may not be its only worthwhile role; however, the evidence of history gives us good reason to think that this protective function is one of the state's primary roles. (Evocatively, states that fail to protect their members are often referred to as “failed states.”³²) Historically, states originated in many different ways and for several different ostensible purposes, many of which had nothing to do with protection. For example, South Africa was created by Great Britain primarily for trading purposes,³³ while China was forcibly unified by the Emperor Ying Zheng in order to enrich his family's power.³⁴ But origins aside, by considering the role that states play—because of their monopoly on legitimate physical power and their de facto political authority—in the protection of individuals from unjust aggression, we can see that one of the primary roles of the state is the protection of its population.

III. The State Right of Self-Defense

So far, I have attempted to show that individuals deserve protection (in virtue of having rights of self-defense that they cannot effectively exercise in the absence of a coercive political authority) and that one of the state's primary roles is to provide that protection (because, in a world of states, individuals cannot successfully protect themselves without a state). In this section, I argue that a state has a right of self-defense only when it is internally organized so as to

³²Stewart Patrick, “‘Failed’ States and Global Security: Empirical Questions and Policy Dilemmas,” 644–662.

³³William Beinart, *Twentieth-Century South Africa*.

³⁴Derke Bodde, “The State and Empire of Qin,” 20-103.

provide the protection that its population deserves. A state's right of self-defense enables it to protect itself justifiably against both external—foreign threats and attacks—and internal—domestic threats and attacks—unjust aggression with the use of otherwise impermissible actions, e.g., by going to defensive war. And by protecting itself against both external and internal unjust aggression, a state is able to maintain the conditions (namely, its continued existence) that are conducive to the continued protection of its population.

But, if a state is not fulfilling its protective role with regard to its population, then it is hard to see why it should be able to protect itself justifiably against instances of external or internal unjust aggression. When a state is not internally organized so as to provide the protection that its population deserves, it does not have the right to defend itself, because the main reason for having a state right of self-defense is so that a state can more effectively protect its population. So if a state is not attempting, through its internal organization, to protect its population in the first instance, then it does not meet the conditions necessary for having a right of self-defense that sometimes justifies going to defensive war. Ultimately, only those states that are internally organized so as to protect their populations have rights of self-defense, because only they meet the necessary condition—the fulfillment of their primary protective role—for having a state right of self-defense.

This is one of the main ways in which my view differs from the domestic analogy. Consider the individual case: regardless of the moral worth of an individual, she has the right to defend herself against unjust aggression. Now, it is true that an individual may forfeit or lose her right of self-defense in a variety of ways. Most commonly, she forfeits or loses her right of self-defense by unjustly aggressing against another. Her right of self-defense also may be overridden in some cases—e.g., her right to defend her property might be overridden by another individual's

right to life.³⁵ (Notice that, in the overriding case, the individual does not forfeit or lose her right of self-defense; it is simply overridden by other concerns. That this is true may make certain other actions, such as apologizing and paying reparations if possible, appropriate on the part of the person with the overriding right to life.) However, in general, individuals do not have to fulfill any positive necessary conditions in order to have rights of self-defense; all they need to do to maintain their rights of self-defense is refrain from unjustly aggressing against others. The default understanding of individuals is that they have rights of self-defense.³⁶

The same is not true of states. States' rights of self-defense, unlike individuals', are conditional on their fulfillment of their primary protective role. If states fail to be organized so as to provide the protection that their populations deserve, they do not have the right to defend themselves against external or internal unjust aggression. (However, just because a state lacks a right of self-defense, does not mean that another entity is justified in threatening or attacking it. Whether an instance of aggression is justified depends on many factors, not simply on whether the object of the aggression has a right of self-defense. I explain more below.) Because a state's right of self-defense is dependent on its fulfillment of a positive necessary condition, the default view of states should be that, to determine a state's international standing, we must consider not only how that state acts vis-a-vis other states, but also how it acts domestically. This goes against the view that, in dealing with international relations, we should treat all states as identical "black boxes."³⁷ Of course, there is much more to a state's international standing than its right of self-

³⁵Joel Feinberg discusses a nice case of this in "Voluntary Euthanasia and the Inalienable Right to Life," 93-123.

³⁶See, among others, Judith Jarvis Thomson "Self-Defense," David Rodin, *War and Self-Defense*, Jeff McMahan, *Killing in War*, George Fletcher, "Proportionality and the Psychotic Aggressor," Yitzhak Benbaji, "Culpable Bystanders, Innocent Threats and the Ethics of Self-Defense," Tony Honoré, "The Right to Rebel," and C.A.J. Coady, "Terrorism and Innocence."

³⁷The United Nations Charter treats states as black boxes: it claims that, regardless of domestic status, all states have a right of self-defense. See Article 2(4) and Chapter VII of the UN Charter. Although Helen Stacy's view is different than mine, she agrees that, on the international level, states should not be treated as black boxes. See her "Humanitarian Intervention and Relational Sovereignty."

defense; however, in at least this one crucial respect, how a state acts domestically—*viz.*, whether it is organized so as to provide the protection that its population deserves—determines how it may justifiably respond to instances of external and internal unjust aggression.

Importantly, it does not follow from my view that a newly created state does not have a right of self-defense. A state fulfills its primary protective role both by being dedicated to the protection of its population and by creating and implementing laws, institutions, and policies that work to protect the members of its population. (I have not yet spelled out what counts as protection. I do this below.) A state does not fulfill its protective role if its laws, institutions, and policies just happen to protect the members of its population by accident; nor does it fulfill its protective role if its dedication to protecting its population never manifests itself in the creation and implementation of appropriately protective laws, institutions, and policies. However, laws, institutions, and policies are constantly being created, implemented, altered, annulled, and reinstated. So, although a newly created state might still be in the process of creating and implementing appropriately protective laws, institutions, and policies, so long as it is dedicated to protecting its population and is manifesting this dedication through that process, it has a right of self-defense.

Of course, this right of self-defense is provisional in a certain sense, in that it depends on the new state actually getting the appropriately protective laws, institutions, and policies up and running. But this is hardly surprising; because a state's right of self-defense is both important for enabling the state to better protect its population and conditional on the state protecting its population in the first instance, if the state is working to fulfill its protective role as it gets organized, it gets some leeway in terms of having a right of self-defense. However, once the state is organized, if the laws, institutions, and policies that it has in place are not appropriately

protective of the members of its population, or if it ceases to be dedicated to the fulfillment of its protective role, then it loses the provisional right of self-defense that it had as a newly created state. My view thus allows that some newly created states do have rights of self-defense, without having to accept the standard just war theory claim—which is supported by the domestic analogy—that all states, by default, start out with rights of self-defense.³⁸

Further regarding the state's fulfillment of its primary protective role, we might inquire of any particular law, institution, or policy whether it actually protects the members of the state's population. Given that there will undoubtedly be competing considerations and trade-offs among the various laws, institutions, and policies put into place by a state, it seems that requiring that every law, institution, and policy perfectly protect the members of a state's population is too high of a standard. Instead, we should say that the laws, institutions, and policies of a state must, for the most part and to the extent possible, protect its individuals, and more importantly, that the deliberative process by which the state comes to agree on various laws, institutions, and policies must show a deep appreciation of and regard for its individuals' protection. Reasonable people can and will disagree throughout the course of the political deliberative process, and that is perfectly acceptable, so long as they agree that the ultimate goal is to decide on and implement appropriately protective laws, institutions, and policies. That is, the state's deliberative process must manifest its dedication to the protection of its population. When these requirements are met, even if some laws, institutions, and policies do not perfectly protect some members of the state's population, the state is still organized so as to provide the protection that its population deserves and so has a right of self-defense that sometimes justifies going to war.

Of course, there is a balance to be struck between the state actually successfully

³⁸For discussion of this claim, see Michael Walzer, *Just and Unjust Wars*, Jeff McMahan, *Killing in War*, and Michael Doyle, "A Few Words on Mill, Walzer, and Nonintervention."

protecting its population and its failing to do so while nonetheless being organized to do so. A state can be well-organized and still fail to protect some members of its population in any given instance; however, this does not mean that the relevant state has lost its right of self-defense. A state maintains its right of self-defense so long as it is dedicated to protecting its population and is manifesting that dedication through the implementation of appropriately protective laws, institutions, and policies that come out of a deliberative process that is focused on the protection of its population. So while the well-organized state's actual failure to protect some members of its population in any given instance is a failure, it does not mean that the state loses its right of self-defense. Conversely, though, if the state is consistently failing to protect some portion of its population over time, then that is good evidence that its implemented laws, institutions, and policies are not actually appropriately protective. States, given their protective role, need to be sensitive to evidence regarding how well their laws, institutions, and policies are actually working to protect their populations, considered both independently and as a whole. So while actual perfect protection of a state's entire population is much too high of a standard, given the contingencies of implementation and the practical trade-offs that undoubtedly occur in politics, there is something important to be said in favor of states actually managing non-accidentally to protect their populations over time. A state's right of self-defense, then, is dependent on its organization, but its being well-organized importantly includes the ability to, over time, successfully implement laws, institutions, and policies that are, for the most part and to the extent possible, actually protective of its entire population.

Importantly, the state right of self-defense is a defensive right; it potentially justifies the use of war by the state only when that state is being unjustly threatened or attacked. Furthermore, because the state right of self-defense is conditional on the state's fulfillment of its protective

role, a state is justified in exercising its right of self-defense only when doing so will be conducive to its ability to better protect its population. So, when State A unjustly threatens or attacks State B, State B—assuming that it is fulfilling its protective role and so has a right of self-defense—has the right to defend itself with otherwise impermissible actions (including going to war). But, whether State B should defend itself in such a situation depends on whether its doing so will, in fact, be conducive to its overall ability to better protect its population.³⁹ This is a particular application of a more general question, namely, the question of under what circumstances ought we to exercise our rights.

Consider again (from Chapter 3) the case of Finland in World War II. Finland declared war against the Soviet Union (this is sometimes referred to by historians as the 'Winter War').⁴⁰ The Finnish declaration of war was in response to the Red Army invading 70 miles of Finland in order to block the eastern German offensive against Leningrad. Despite assurances from Moscow that the Red Army would retreat after Germany was defeated, Finland refused to cede the border territory to the Soviet Union, and, after negotiations failed, declared war in late 1939. After massive military and civilian casualties on both sides, Finland agreed to cede both the contested territory and additional territory to the Soviet Union, and the Moscow Peace Treaty between Finland and the Soviet Union was signed in March of 1940.⁴¹

Arguably, the Finnish defense of its territory was not conducive to the protection of the Finnish citizenry; Finland knew that its military forces were vastly outmatched by the Red Army, and had assurances not only from Moscow, but also from Great Britain, that the Soviet Union

³⁹This goes against Michael Walzer's view; he seems to argue that states should always exercise their rights of self-defense when it is permissible for them to do so, regardless of what the outcome of exercising those rights is likely to be. See *Just and Unjust Wars*, especially chapter 4.

⁴⁰Robert Edwards, *White Death: Russia's War on Finland 1939–40*.

⁴¹Robert Edwards, *White Death: Russia's War on Finland 1939–40*.

would return the contested territory to Finland after the German threat to Leningrad was neutralized. (Great Britain assured Finland that it would, if necessary, help to evict the Red Army after the German threat was neutralized.)⁴² Furthermore, Finland knew that having the Red Army on its border would block the eastern German offensive from possibly attacking Helsinki; the Soviet forces, by protecting Leningrad, would also inadvertently protect thousands of Finnish civilians.⁴³ So, it seems that although Finland permissibly exercised its right of self-defense when it declared war on the Soviet Union, its doing so was, all things considered, a serious mistake. Finland took heavy military and civilian casualties, as did the Soviet Union, and also ended up losing more territory than the Soviet Union had requested before the war.⁴⁴ In addition, the Winter War took both Soviet and Finnish attention away from the eastern German offensive, which arguably enabled the German offensive to maintain complete control over Poland, Latvia, Lithuania, and Estonia.⁴⁵ Following Jeremy Waldron, we should conclude (as my view does) that Finland acted wrongly in exercising its right of self-defense.⁴⁶

However, let us assume that State B should defend itself, i.e., that it both has a right of self-defense and that its exercise of its right of self-defense will be conducive to the better protection of its population. There is still a further question about *how* State B should defend itself. Unsurprisingly, the answer to this question also depends on State B's primary protective role; in particular, how State B ought to defend itself depends on what will best enable State B to better fulfill its protective role with regards to its population. If going to defensive war will best

⁴²William R. Trotter, *The Winter War: The Russo–Finnish War of 1939–40* (5th edition).

⁴³A. Chubaryan, "Foreword."

⁴⁴Edwards, *White Death*.

⁴⁵Needless to say, this was very bad: over 3 million of the 6 million Jewish victims killed in the Holocaust were Polish. Michael Berenbaum, *The World Must Know*, 104.

⁴⁶Jeremy Waldron, "A Right to Do Wrong."

enable State B to protect its population, then that is what State B ought to do. However, if surrendering to the unjust aggressor and then engaging in sabotage will better enable State B to protect its population, then that is what it ought to do. Notably, Denmark did just this in World War II. Denmark surrendered to Nazi Germany in 1940 and then promptly proceeded to sabotage the Nazi program, saving over 7,000 Danish Jews from being sent to concentration camps.⁴⁷ The Danish sabotage of the Nazi program was a form of state self-defense, albeit not a form that is often recognized as such in the just war tradition. But as Charles Beitz rightly points out, there is more to defense than putting boots on the ground; states can defend themselves in a multitude of ways.⁴⁸ And given the multiple forms that a state's self-defense can take, there is a question about what form it ought to take. Because the state right of self-defense is linked to the protective role of the state, the “shape” (so to speak) of the state right of self-defense is sensitive to questions of what will best enable states to better protect their populations. In the face of unjust aggression, this will sometimes, but not always, mean going to defensive war.

IV. What Counts as Protection? The Individual Right of Self-Defense Revisited

The state right of self-defense is conditional on the state's fulfillment of its primary protective role. A state, to fulfill its protective role, must a) be dedicated to the protection of its population, b) manifest that dedication in its deliberative process for creating and implementing laws, institutions, and policies, and c) have laws, institutions, and policies that, for the most part and to the extent possible, successfully protect the members of its population. In short, the state must be organized so as to provide the protection that its population deserves. However, to determine whether a state meets these criteria, and thus has a right of self-defense, we need to know what counts as protection. Schematically, a state protects its population when it does what

⁴⁷Henrik Dethlefsen, “Denmark and the German Occupation: Cooperation, Negotiation, or Collaboration,” 193–206.

⁴⁸Charles Beitz, “Justice and International Relations,” 387.

the individual right of self-defense is supposed to do. Recall that one of the main reasons (although, of course, not the only reason) why individuals need a state is because they are unable to exercise their individual moral rights of self-defense effectively in the absence of a state. One of the state's primary roles is to provide the protection that individuals deserve, but that they are practically unable to provide for themselves; so, states protect their individuals when they protect, through their deliberative processes, laws, institutions, and policies, that which individual rights of self-defense are supposed to protect.

Now, to determine what individual rights of self-defense are supposed to protect, we need an account of the justification for the claim that individuals have rights of self-defense. I provide a Kantian justification for this claim, although I think that it is possible to go different ways here. Most reasonable justifications of the individual right of self-defense will give similar pictures of what that right is meant to protect, and so will provide similar conditions for what a state must do in order to count as providing protection to its population. So, although I think that the Kantian justification for the individual right of self-defense that I provide below is correct, I do not want to tie the success of my main argument to this claim. My main argument works so long as there is a reasonable justification of the individual right of self-defense in the offing, one that both limits individual self-defense to recognizably defensive actions⁴⁹ and that permits and justifies some otherwise impermissible actions in self-defense when certain conditions (such as the imminence, proportionality, and necessity conditions) are met. Such a justification can be plugged in, so to speak, to the relevant place in my argument regarding the state right of self-defense, and will generate an understanding of what counts as protection that can then be brought to bear on the question of whether states are organized so as to properly protect their populations. Assuming that the relevant understanding of protection that arises from any reasonable

⁴⁹As opposed to a Hobbesian conception of self-defense, which allows that the best defense is a good offense.

justification for the individual right of self-defense requires some positive action on the part of the state, (that it can fail to do), my main argument goes through.

That being said, for the sake of completion, I now provide a Kantian justification for the individual right of self-defense. Individuals have a right to defend themselves because this enables them to protect their dignity, which they have in virtue of being rational autonomous agents. Dignity, according to Kant, is “not merely a relative value, that is, a price, but an inner value...[had by] that which constitutes the condition under which alone something can be an end in itself.”⁵⁰ Rational autonomous agency, as I explain below, constitutes the condition under which something can be an end in itself.⁵¹ So individuals' dignity just is their intrinsic, objective worth as rational autonomous agents; because individuals are and aspire to be rational autonomous agents and are thus ends in themselves, their worth is absolute, “beyond compare” and “above all price.”⁵² Our individual rights of self-defense are necessary to maintaining our dignity, we might say, because they enable us to demand and enforce the respect that we are owed as rational autonomous agents whose worth is beyond all price.⁵³

To be a rational agent is to be capable of both acting on the basis of reasons and being governed by the laws of our practical reason.⁵⁴ That is, we not only act for reasons, but we act for reasons because we recognize them as reasons to act. This rational nature is, Kant thought, unique to humans, and is what allows us to give the moral law to ourselves.⁵⁵ As James Rachels

⁵⁰Kant, *Groundwork of the Metaphysics of Morals*, 4:434-35.

⁵¹Kant, *Groundwork of the Metaphysics of Morals*, 4:428.

⁵²Kant, *The Metaphysics of Morals*, 6:434-35.

⁵³This is similar to Feinberg's view of the role of individual rights. See his “The Nature and Value of Rights,” 243-257.

⁵⁴David Velleman, “A Brief Introduction to Kantian Ethics,” 49-50.

⁵⁵Kant, *Lecture on Ethics*.

puts it, “the moral law is the law of reason.”⁵⁶ We, as rational agents, can comprehend what we should do according to the moral law and then can freely do it from a sense of duty. This capacity to freely choose to be governed by the moral law is the capacity of autonomy, and it also is unique to humans, according to Kant.⁵⁷ So individuals, insofar as we are and aspire to be both rational and autonomous agents, are the embodiment of the moral law itself in the world. As such, our value is absolute.

Furthermore, individuals are not just one more thing of value among others. Rather, as rational autonomous agents, we are ends in ourselves, that is, we are the determiners of value in the world.⁵⁸ Things have value because we, through our desires and goals, assign them value. As Velleman puts it, individuals “shed value” onto things; individuals “are things for the sake of which other things can have value.”⁵⁹ So, to treat an individual merely as one valuable thing among others is to make a mistake; it is to fail to recognize individuals as ends in themselves, as the source of value in the world. To take Velleman's example, why think that my happiness is valuable at all?⁶⁰ Well, it seems that my happiness matters because I matter. It is not straightforwardly that my happiness is valuable because it is a means to my self-preservation; rather, it is valuable because of the underlying concern that I have for my worth as a rational autonomous agent. I value my happiness, not for *its* own sake, but for *my* own sake. And more generally, we think that happiness is valuable because we think that people are valuable and so that their happiness matters. People are those things for the sake of which we care about

⁵⁶James Rachels, “Kantian Theory: The Idea of Human Dignity,” 115.

⁵⁷Kant, *Groundwork of the Metaphysics of Morals*, 4:435.

⁵⁸David Velleman, “A Brief Introduction to Kantian Ethics,” 47-9.

⁵⁹Velleman, “A Brief Introduction to Kantian Ethics,” 47-9.

⁶⁰Velleman, “A Brief Introduction to Kantian Ethics,” 47-8.

happiness (or justice, or well-being). Because individuals play this role, our worth is beyond compare; without us, the moral dimensions of the world would fall away.⁶¹

Because our value, as rational autonomous beings, is absolute and above all price, we should treat individuals with a certain respect; in Kant's own language, we should “act so that you treat humanity, whether in your own person or in that of another, always as an end and never as a means only.”⁶² This is one formulation of Kant's ultimate moral principle, from which he thinks all moral duties, obligations, rights, and privileges are derived. Kant refers to this ultimate moral principle as the *categorical imperative*. Now, there are other formulations of the categorical imperative in Kant's works, and there is a great deal of debate in the literature both about how the various formulations ought to be interpreted and about which formulation ought to be regarded as primary.⁶³ For the purposes of this chapter, I focus on the 'humanity as an end' formulation, because it most clearly brings out the moral status of individuals with which I am concerned.

To treat humanity as an end is to recognize and respect the absolute moral worth, i.e., the dignity, of both oneself and other individuals. On its face, this means that we (individuals) have a duty to treat individuals beneficently; we must avoid harming them, we must strive to promote their welfare, and in general, we must attempt to help further their ends.⁶⁴ More specifically, because individuals have dignity in virtue of being rational autonomous agents, we must recognize and respect their dignity by recognizing and respecting their rationality and autonomy. And this means that we must treat individuals as rational autonomous agents who are capable of

⁶¹Velleman, “A Brief Introduction to Kantian Ethics,” 49, and Rachels, “Kantian Theory: The Idea of Human Dignity,” 115.

⁶²Immanuel Kant, *Groundwork of the Metaphysics of Morals*, 4:429.

⁶³See, among others, the work of Onora O'Neill, Christine Korsgaard, and Thomas Hill.

⁶⁴James Rachels, “Kantian Theory: The Idea of Human Dignity,” 115.

setting their own ends, acting from reasons, and in general are capable of being governed by the moral law. More specifically, we may not use or manipulate individuals without their consent in order to further our own ends. To do so would be to fail to recognize and respect their dignity as autonomous determiners of value; it would be to treat individuals as only having the value that we shed onto them (*viz.*, as means), rather than as value-sources in their own right (*viz.*, as ends).

In addition, we (individuals) must allow other individuals to live their lives as they so choose, so long as they are not unjustly aggressing against anyone else. Failing to allow people to determine and carry out their own life plans, so long as those plans do not unjustly harm any other individuals, is a form of disrespect; it shows either a lack of recognition that people are rational autonomous agents, or a lack of caring that they are. (Some theorists argue that you cannot both recognize a person's dignity and fail to treat her as a rational autonomous agent; the inappropriate treatment, on this view, shows that you do not actually recognize her as having dignity. I take it that the correctness of this view turns on what is involved in recognition.⁶⁵) Regardless, the point is that the dignity of individuals makes a moral demand on us; it demands that we allow individuals to set and fulfill the course of their own lives, so long as they are not unjustly aggressing against others.

However, it is a commonplace that people do not always respect others' dignity. As both Hobbes and Locke surmised (although not using this precise language), and as we learn from history, people often fail to treat others as rational autonomous agents. People lie, steal, cheat, manipulate, and in general often seriously disrespect other individuals. More abstractly, in the world as it is, individuals often fail to adhere to the 'humanity as an end' formulation of the categorical imperative; they treat others as mere means to their own ends. Individual rights of self-defense thus play an important role; they enable individuals justifiably to demand for

⁶⁵J.L.A. Garcia discusses this in his paper, "The Heart of Racism."

themselves that others respect their rationality and autonomy, and they formally enable individuals justifiably to attempt to enforce their demands for respect with otherwise impermissible actions if necessary. Individual rights of self-defense are thus necessary for individuals' maintenance of their dignity in the actual world.⁶⁶

Recall Zed's unjust interruption of Ashley; in this instance, Zed is failing to respect Ashley as a rational autonomous agent. Ashley's individual right of self-defense enables her to demand—via defensively interrupting him—that Zed stop disrespecting her and recognize her privilege, as a rational autonomous agent, to speak uninterrupted. Similarly, when Zed unjustly attempts to kill or maim Ashley, her individual right of self-defense enables her to attempt, justifiably, to enforce the demand of morality that Zed respect her as a rational autonomous agent. (E.g., it permits her to attempt to stop his unjust aggression with whatever action, up to and including the use of lethal force, is necessary to do so.) Individuals have rights of self-defense, then, so that they can justifiably protect—with otherwise impermissible actions if necessary—their dignity as rational autonomous agents.

With this Kantian argument for the claim that individuals have rights of self-defense in hand, we can now turn back to the question that prompted it, namely, what must states do to count as protecting the members of their populations? As I said above, states protect individuals when they protect that which the individual right of self-defense is supposed to protect. Given that individual rights of self-defense are meant to protect the absolute moral worth of individuals, considered as rational autonomous agents, I conclude that states protect their individuals when those individuals are non-accidentally able to maintain their moral status as rational autonomous agents. This means, in the first instance, that the laws, institutions, and policies of the state must,

⁶⁶It is a further question whether individual rights of self-defense would be necessary in a world where everyone, without exception, adhered to the 'humanity as an end' formulation of the moral law. Joel Feinberg thinks so; I am not so sure. See his "The Nature and Value of Rights," 243-260.

for the most part and to the extent possible, recognize and respect the dignity of the members of its population. In addition, the state must be dedicated to recognizing and respecting the dignity of the members of its population, and must manifest that dedication in its deliberative process for creating and implementing its various laws, institutions, and policies.

Now, this is somewhat vague and schematic. As Thomas Hill has rightly pointed out, it is exceedingly difficult to say with certainty which specific deliberative processes, laws, institutions, and policies will recognize and respect individual dignity, because of the various considerations and real-world complications that have to be taken into account.⁶⁷ (Such considerations and complications include, among others, the practical bases of rational autonomy, the circumstances of history and contemporary contexts, the relative scarcity of resources, the impact on the economy, and the relative ease of communicating. I take up the issue of the practical bases of rational autonomy, in particular the need for community, in other work.) However, to say that states must recognize and respect the members of their populations as rational autonomous agents does provide us with some limitations on what a state can allow and still be fulfilling its primary protective role. And perhaps more importantly, it provides a principled basis for criticizing existent state deliberative processes, laws, institutions, and policies.

Broadly, any state that perpetrates or condones domestic mass killings, mass mutilations, and/or slavery is straightforwardly not recognizing and respecting the dignity of the members of its population, and so does not have a right of self-defense. (Again, it does not follow from this that threats or attacks against such a state are justified. I say more below.) But while a state's failure to recognize and respect the dignity of its individuals may well take the form of state-perpetrated or condoned massive human rights violations, it may also take the form of egregious

⁶⁷Thomas Hill, "In Defense of Human Dignity: Comments on Kant and Rosen."

neglect—for instance, allowing its population to suffer from large-scale unnecessary famines or treatable epidemics, or allowing some large set of private individuals systematically to persecute some other large set of private individuals without penalty—or the form of positive laws, institutions, and policies that manifestly do not recognize and respect the dignity of many of its individuals. For example, the structural racism that appears to be enshrined in current US laws, institutions, and policies may represent a failure of this sort.⁶⁸ Because there are a variety of ways in which a state can fail to recognize and respect the dignity of the members of its population, there are a variety of ways in which it can fail to fulfill its protective role. And if and when a state fails to fulfill its protective role, then it lacks a right of self-defense.

Of course, it is easy to recognize states that are so obviously failing to be internally organized so as to protect their populations. A more difficult question concerns states that are failing to protect their populations in some ways, but succeeding in others. I think that the correct way to consider this problem is to think of the state right of self-defense as being stronger or weaker, depending on how well, and to what degree, the relevant state is succeeding in being organized so as to protect its population. While there will be so-called “bright line” cases where states clearly are not internally organized so as to protect their populations, such as the situations mentioned in the paragraph directly above, there will also be many borderline cases.⁶⁹ For such cases, and in general, roughly, the better a state is at being organized so as to protect its population, the stronger its right of self-defense is (*viz*, the more it may do in its own self-defense). The worse a state is at being organized so as to protect its population, the weaker its right of self-defense is (*viz*, the less it may do in its own self-defense).⁷⁰ It is hard, if not

⁶⁸See Sally Haslanger, “Oppressions: Racial and Other,” and Joshua Glasgow, “Racism as Disrespect.”

⁶⁹Thanks to Tom Hill and Carl Ficarrotta for pushing me on this point.

⁷⁰Of course, regardless of how strong a state's right of self-defense is, that is, regardless of how well-organized so as to protect its population a state is, that state is still prohibited from committing aggressive actions in the name of its

impossible, to pinpoint the exact level of appropriately protective organization at which a state loses or gains a right of self-defense; but nevertheless, linking a state's right of self-defense to its being more or less well-organized in this way allows us to evaluate both the strength and existence of that state's right of self-defense.

V. An Implication for Just War Theory

It is possible, and indeed plausible, to think that at least some states that exist in the world today do not have rights of self-defense. Contrary to many views within the just war tradition and international relations theory,⁷¹ I maintain that only those states that have the proper domestic attributes have rights of self-defense that can justify their going to defensive war against instances of aggression. This has many implications for just war theory, one of the most important of which concerns inter-state interventions. As David Luban nicely points out, many theorists have taken it to follow from the claim that all states have rights of self-defense that inter-state intervention is generally ruled out as unjustified, and so non-intervention among states should be, as a matter of justice, the rule.⁷² Recently, some political theorists have argued that, although non-intervention is the rule, in certain extreme cases (most notably when members' basic human rights are being violated on a large scale by their own state), that state's right of self-defense can be overridden and so interventions into its domestic affairs by other states can

population. The state right of self-defense under discussion is not Hobbesian, and so it has to do only with defensive, not aggressive or preventative, actions. (In other words, the state right of self-defense under discussion is limited by the imminence condition, which I discuss in previous chapters.) Thanks to Bernie Boxill for pushing me on this point.

⁷¹For iterations of this view, see, among others, Michael Walzer, *Just and Unjust Wars*, David Rodin, *War and Self-Defense*, Thomas Hobbes, *Leviathan*, chapter 13, The Kellogg-Briand Pact of 1928 (quoted in J. L. Brierly, *The Law of Nations*), Yehuda Melzer, *Concepts of Just War*, 28-9, Hersch Lauterpacht, *International Law and Human Rights*, 167, *The Charter of the United Nations*, Article 2(4) and Chapter VII, and the Carter Administration's response to Vietnam's invasion of Cambodia during Pol Pot's regime, Henry Kamm, "The Cambodian Dilemma."

⁷²David Luban, "Just War and Human Rights," 164-6. John Stuart Mill also maintains that non-intervention should be the rule in international relations, although he reaches this conclusion by a different argument. J.S. Mill, "A Few Words on Non-Intervention."

be justified.⁷³ My view differs from this in that it does not maintain that a state's right of self-defense, in such cases, can be overridden; rather, in such cases the relevant state does not have a right of self-defense at all, and so interventions into its domestic affairs by other states are not straightforwardly—as rights violations—ruled out as unjustified.

Now, although interventions against states without a right of self-defense are not straightforwardly ruled out as unjustified, this is not yet to say that such interventions are ever, sometimes, or always justified. It is simply to say that states without a right of self-defense may not justifiably defend themselves against interventions, *regardless of whether those interventions are justified*. Of course, other entities, such as individuals, locally-organized community militias, and UN security forces, might well have the standing to defend against unjustified interventions in these sorts of cases. I have not said anything to rule this out. It is simply that the attacked state may not justifiably defend itself (e.g., it may not utilize its military to defend itself, nor seek to defend itself via nonmilitary measures such as sabotage, nor call for its international allies to defend it), because it does not have a right of self-defense.

A natural objection at this point is that my view seems to carry with it a very counter-intuitive response to a common occurrence in the actual world. Say that a so-called bad state—i.e., a state that is, in various ways, failing to be organized so as to recognize and respect the dignity of the members of its population and so does not have a right of self-defense—is invaded by a worse state.⁷⁴ Based on what I have said so far, it seems that, according to my view, the bad state may not defend itself against the worse state's invasion. And that response is, I agree, wildly counter-intuitive. But it is important to recall here that I have not ruled out the permissibility of

⁷³Michael Walzer, *Just and Unjust Wars*, and “The Moral Standing of States,” 209-229. See also Beitz, “Bounded Morality: Justice and the State in World Politics,” 405-424, and Doppelt, “Walzer's Theory of Morality in International Relations,” 26.

⁷⁴The situation, still occurring at the time of writing, between Ukraine and Russia (I am here referring to the Russian intervention that began in 2014) appears to be an instance of this sort.

other entities defending against unjustified invasions in these kinds of cases; although the bad state does not have a right of self-defense, the individual members of the bad state maintain their individual rights of self-defense and so may defend themselves from the worse state. In addition, they may form local community militias (through express consent), and they may call for international aid. However, the situation becomes more complicated if we assume that these individuals, due to being members of a bad state, do not have the resources necessary to defend themselves, and so are at serious risk of being slaughtered by the invading military forces of the worse state. What then?

In response to this kind of case, I maintain that the bad state does not have a right to defend itself. However, allowing its people to be slaughtered is also wrong. So, the bad state here faces a choice between two evils, and it should pick the lesser of the two. In almost every case, that will mean defending itself against the worse state, although this is true not as a matter of necessity or logic, but as a matter of the moral weight of various courses of action in the actual world. Importantly, though, when there is a choice between two evils, and you choose the lesser evil, you have not thereby done something right. You have still done something wrong, albeit less wrong than the relevant alternative. The bad state that defends itself against the worse state has, as it should, picked the lesser of two evils; but there is still an important sense in which it has done something wrong. Sometimes, and especially in these kinds of high stakes lesser-evil cases, it is possible both to do what you ought to do and to act wrongly.⁷⁵

To see this, consider the following example. Let us say that Al Capone is being threatened by a rival mobster encroaching on his territory. Capone chooses to fight back because he knows that this rival will kill all of Capone's own people and, in so doing, will create a dangerously chaotic situation throughout the midwest. And besides, Chicago is Capone's

⁷⁵Utilitarianism denies this, of course; but I say so much the worse for utilitarianism.

territory. Capone's choice to fight back, it seems, is the lesser of two evils all things considered, given that Capone is right about what his rival will do to his people. But the fact that Capone's fighting back is the lesser of two evils is not thereby enough to say that Capone's action is right, because what Capone is doing is defending his ability to carry on doing something wrong. (Let us assume—I think non-contentiously—that Capone's mob operations are wrong). In much the same way, a bad state defending itself against a worse state may well be choosing the lesser of two evils, but it is not thereby doing what is right, because it has no right to defend itself, that is, to defend its ability to carry on doing something wrong. (I here assume that a state that fails, in various ways, to be organized so as to recognize and respect the dignity of the members of its population is doing something wrong.) In this situation then, the bad state, like Capone, is merely doing what is less wrong when it defends itself against an unjustified intervention.⁷⁶

Importantly, while interventions are not straightforwardly ruled out by the fact that all states have standing rights of self-defense on my view, they may generally and for the most part be ruled out by other considerations. Assume that State B is not organized so as to provide the protection that its population deserves, and so does not have a right of self-defense. Despite this, State A's intervention against State B may be unjustified, because it might be practically impossible for State A to intervene against State B while fulfilling its primary protective role in regards to its own population. Say that State A, in order to intervene in State B's affairs, would have to create a military force out of unwilling conscripts. In this case, State A should not intervene against State B, because to do so would be to contravene State A's own primary protective role. More broadly, to see whether an intervention is justified, we must consider

⁷⁶This is a very brief analysis of how to think about some high stakes lesser-evil cases. It is not meant to be exhaustive, as there are many complex issues surrounding lesser-evil cases, but rather is meant merely to sketch a plausible answer to an intuitive objection to my view. For more on (political) lesser-evil cases, see, among others, Michael Walzer, "Political Action: The Problem of Dirty Hands," Yitzhak Benbaji, "Dehumanization, Lesser Evil and the Supreme Emergency Exemption," and Michael Ignatieff, *The Lesser Evil: Political Ethics in an Age of Terror*.

several factors, only one of which is whether the state against which we might intervene has a right of self-defense. Overall, my point here is that the question of intervention is more complicated than the just war tradition (with its strong emphasis on states' rights) would have it.

We must also consider what domestic and international effects a state's intervening in another state's affairs will plausibly have. Domestically, the key question is whether a state's intervening in another state's affairs is compatible with the first state's fulfilling its primary protective role. Internationally, the key question is whether the intervention will have the effect of making the world one in which individuals' dignity is more, rather than less, recognized and respected. Furthermore, we must consider whether it is practically possible to intervene in a way that recognizes and respects the dignity of the individuals in the state in which we are considering intervening.⁷⁷ After all, just because their state does not have a right of self-defense, does not mean that the individuals of that state have less dignity, or are less deserving of protection. Overall, only if an intervention will a) be against a state that lacks a right of self-defense, b) have on the whole more good effects than bad in terms of protecting the dignity of individuals, and c) be done in a way that recognizes and respects the dignity of the individuals in both the intervening state and the intervened-against state, is it justified.⁷⁸ So while justified interventions might be more common in my proposed system than in the current system (which generally straightforwardly rules out interventions as rights violations in all but the most extreme cases), they will not be so common as all that, because the bar for interventions to be justified is

⁷⁷As Helen Stacy puts it, interventions, to be justified, must have not only the end goal of improving respect for human rights in the relevant state, but also must proceed in such a way that those human rights are immediately more respected than they were prior to the start of the intervention. Stacy, "Humanitarian Intervention and Relational Sovereignty," 100-102.

⁷⁸My discussion focuses solely on inter-state interventions, because this is the type of intervention that is primarily discussed in the philosophical literature. However, we could discuss interventions by other groups, as well. The same considerations would apply, with the addition of questions of standing: do non-state entities have the appropriate standing to intervene in the affairs of states?

(appropriately, given the known difficulties of intervening well) high.

My proposed system, wherein states have rights of self-defense only when they fulfill their primary protective role, makes interventions possibly justified in precisely the right kinds of cases. It allows us to consider intervening not only when individuals are being brutally repressed and killed on a large scale by their state, but also when they are being allowed by their state to unnecessarily suffer and die, and also when they are being slowly, subtly robbed by their state of the dignity that is an essential part of living well. So considered in light of what matters most—protecting the dignity of individuals—my proposed system is better than the current system. Not only does it allow the possibility of intervening in precisely the right kinds of cases, but it also provides a much-needed justification for the widely accepted claim that at least some states have rights of self-defense that, in certain circumstances, justify going to defensive war.

REFERENCES

- Achim, Viorel, *The Roma in Romanian History*, Budapest: Central European University Press, 2004.
- Alfaro, Antonio Gómez, "The Great "Gypsy" Round-up in Spain," Madrid: Editorial Presencia Gitana, 1993.
- "America's combat veterans: The waiting wounded," *The Economist*, March 23rd, 2013.
- "American Model Penal Code," *The American Law Institute*, 1962.
- Amnesty International Report 1978*, London: Amnesty International Publications, 1979.
- Anderson, Tim, "The Political Economy of Human Rights," *Journal of Australian Political Economy* 50 (2002): 200-227.
- Anscombe, Elizabeth, "Mr. Truman's Degree," Oxford: Oxonian Press, 1956.
- Anscombe, Elizabeth, "War and Murder," *Nuclear Weapons: A Catholic Response*, edited by W. Stein, London: Burns & Oates, 1961, 43-62.
- Aquinas, Thomas, *The Treatise on Human Nature: Summa Theologiae Ia 75-89*, translated by Robert Pasnau, Indianapolis: Hackett Publishing Company, Inc., 2002.
- Aristotle, *Nicomachean Ethics*, in *The Basic Works of Aristotle*, edited by Richard McKeon, New York: Random House, Inc., 2001.
- "Assaulting or Willfully Disobeying Superior Commissioned Officer," *United States Military Code*, 2010, Title 10, Subtitle A, Part II, Chapter 47, Subchapter X, Section 890, Article 90.
- Audi, Robert, *The Architecture of Reason: The Structure and Substance of Rationality*, Oxford: Oxford University Press, 2001.
- Augustine, *The City of God against the Pagans*, edited by R.W. Dyson, Cambridge: Cambridge University Press, 1998.
- Austin, J.L., "A Plea for Excuses," *Proceedings of the Aristotelian Society*, New Series 57 (1956-1957): 1-30.
- Baron, Salo Wittmayer, *A Social and Religious History of the Jews in Three Volumes*, New York: Columbia University Press, 1937.
- Bársony, János, "Facts and Debates: The Roma Holocaust," *Pharrajimos: The Fate of the Roma During the Holocaust*, edited by János Bársony and Ágnes Daróczi, New York:

- International Debate Education Association, 2008, 1-12.
- Bauer, Yehuda, *Rethinking the Holocaust*, New Haven: Yale University Press, 2002.
- Beinart, William, *Twentieth-Century South Africa*, Oxford: Oxford University Press, 2001.
- Beitz, Charles, *Political Theory and International Relations*, New Jersey: Princeton University Press, 1979.
- Beitz, Charles, "Justice and International Relations," *Philosophy and Public Affairs* 4.4 (Summer 1975): 387.
- Beitz, Charles, "Bounded Morality: Justice and the State in World Politics," *International Organization* 33 (1979): 405-424.
- Benbaji, Yitzhak, "A Defense of the Traditional War Convention," *Ethics* 118.3 (2008): 464-95.
- Benbaji, Yitzhak, "Culpable Bystanders, Innocent Threats and the Ethics of Self-Defense," *Canadian Journal of Philosophy* 35.4 (2005): 585-622.
- Benbaji, Yitzhak, "Dehumanization, Lesser Evil and the Supreme Emergency Exemption," *Diametros: An Online Journal of Philosophy* 23 (2010): 5-21.
- Berenbaum, Michael, *The World Must Know*, United States Holocaust Museum, 2006.
- Bodde, Derke, "The State and Empire of Qin," *The Cambridge History of China: Volume I: the Ch'in and Han Empires, 221 B.C. – A.D. 220*, edited by Denis Twitchett and Michael Loewe, Cambridge: Cambridge University Press, 1987, 20-103.
- Brierly, J.L., *The Law of Nations: An Introduction to the Law of Peace*, 6th edition, edited by Humphrey Waldock, Oxford: Oxford University Press, 1963.
- Brown, Jessica, "Subject-Sensitive Invariantism and the Knowledge Norm for Practical Reasoning," *Noûs*, 42.2 (2008): 167-189.
- Browning, Christopher, *The Origins of the Final Solution: The Evolution of Nazi Jewish Policy, September 1939 – March 1942*, Jerusalem: Yad Vashem, 2004.
- Bull, Hedley, "Society and Anarchy in International Relations," *Hedley Bull on International Society*, edited by Kai Alderson and Andrew Hurrell, 2000, 77-94.
- Bull, Hedley, *The Anarchical Society*, New York: Columbia University Press, 1977.
- Burke, Edmund, *Reflections on the Revolution in France*, edited by Frank M. Turner, Connecticut: Yale University Press, 2003.

- Caney, Simon, *Justice Beyond Borders: A Global Political Theory*, Oxford: Oxford University Press, 2005.
- Chubaryan, A., "Foreword," *Stalin and the Soviet-Finnish War, 1939–1940*, edited by E. Kul'kov, O. Rzheshhevskii, and H. Shukman, London: Frank Cass, 2002.
- Churchill, Winston S., *Into Battle*, New York: Rosetta Books, LLC, 2013.
- Clements, Paul, and Emily Hauptmann, "The reasonable and the rational capacities in political analysis," *Politics & Society* 30 (March 2002): 85-111.
- Coady, C.A.J., "Terrorism and Innocence," *Journal of Ethics*, 8 (2004): 37–58.
- Croggon, Alison, *The Crow*, Cambridge: Candlewick Press, 2007.
- Crookston, Emily, "Strict Just War Theory and Conditional Pacifism," American Catholic Philosophical Association, *Proceedings of the ACPA* 79 (2006): 73-84.
- Crowe, David M., *A History of the Gypsies of Eastern Europe and Russia*, New York: St. Martin's Press, 1994.
- Cudworth, Erika, *The Modern State: Theories and Ideologies*, Edinburgh: Edinburgh University Press, 2007.
- Curry, Anne, *The Hundred Years War 1337–1453*, Oxford: Osprey Publishing, 2002.
- Dear, I.C.B., *Oxford Companion to World War II*, Oxford: Oxford University Press, 2005.
- Debo, Angie, *A History of the Indians of the United States*, Norman: University of Oklahoma Press, 1984.
- Dekel-Chen, Jonathan, et al., *Anti-Jewish Violence: Rethinking the Pogrom in East European History*, Indiana: Indiana University Press, 2011.
- Dethlefsen, Henrik, "Denmark and the German Occupation: Cooperation, Negotiation, or Collaboration," *Scandinavian Journal of History* 15.3 (1990): 193–206.
- "Displacement: The New 21st Century Challenge," *UNHCR Global Trends 2012*, UNHCR June 2013 (accessed 21 January 2015).
- Doppelt, Gerald, "Walzer's Theory of Morality in International Relations," *Philosophy and Public Affairs* 8.1 (Autumn 1979): 3-26.
- Doyle, Michael, "A Few Words on Mill, Walzer, and Nonintervention," *Ethics and International Affairs* 23.4 (Winter 2009): 349-69.

- Doyle, Michael, "Kant, Liberal Legacies, and Foreign Affairs," *Philosophy and Public Affairs* 12.3 (Summer 1983): 205-35.
- Doyle, Michael, "Kant, Liberal Legacies, and Foreign Affairs, Part 2," *Philosophy and Public Affairs* 12.4 (Autumn, 1983): 323–53.
- Drummond, Anthony, "The Construction of Irish Travellers (and Gypsies) as a Problem," *Migrants and Memory: The Forgotten "Postcolonials,"* Cambridge: Cambridge Scholars Press, 2007, 2–42.
- Dworkin, Ronald, *Taking Rights Seriously*, London: Gerald Duckworth & Co., 1978.
- Edwards, Robert, *White Death: Russia's War on Finland 1939–40*, London: Weidenfeld & Nicolson, 2006.
- Ellman, Michael, and S. Maksudov, "Soviet Deaths in the Great Patriotic War: a note—World War II," *Europe-Asia Studies*, July 1994.
- Engel, David, "What's in a Pogrom? European Jews in the Age of Violence," *Anti-Jewish Violence: Rethinking the Pogrom in East European History*, Indiana: Indiana University Press, 2010.
- Estlund, David, "Liberal Associationism and the Rights of States," *Social Philosophy and Policy* 30 (Winter 2013): 425-49.
- Evans, Richard J., *In Hitler's Shadow*, New York: Pantheon, 1989.
- Fabre, Cécile, "Cosmopolitanism and Wars of Self-Defence," *The Morality of Defensive War*, edited by Cécile Fabre and Seth Lazar, Oxford: Oxford University Press, 2014, 90-114.
- Fabre, Cécile, and Seth Lazar, "Introduction," *The Morality of Defensive War*, edited by Cécile Fabre and Seth Lazar, Oxford: Oxford University Press, 2014, 1-10.
- Feinberg, Joel, *Doing and Deserving*, Princeton: Princeton University Press, 1970.
- Feinberg, Joel, *Harmless Wrongdoing*, New York: Oxford University Press, 1988.
- Feinberg, Joel, "The Nature and Value of Rights," *Journal of Value Inquiry* 4.4 (1970): 243-260.
- Feinberg, Joel, "Voluntary Euthanasia and the Inalienable Right to Life," *Philosophy & Public Affairs* 7:2 (1978): 93-123.
- Fischel, Jack, *The Holocaust*, Connecticut: Greenwood Publishing Group, 1998.
- Fletcher, George, *A Crime of Self-Defense*, New York: The Free Press, 1988.

- Fletcher, George, *Basic Concepts of Criminal Law*, Oxford: Oxford University Press, 1998.
- Fletcher, George, "Proportionality and the Psychotic Aggressor," *Israel Law Review* 8 (1973): 367-90.
- Foot, Philippa, "The Problem of Abortion and the Doctrine of the Double Effect," *Virtues and Vices and Other Essays in Moral Philosophy*, Berkeley: University of California Press, 1978, 19-32.
- Fraser, Angus, *The Gypsies*, Oxford: Blackwell Publishers, 1992.
- Friedman, Isaiah, "Theodor Herzl: Political Activity and Achievements," *Israel Studies* 9.3 (2004): 46-79.
- Friedman, Marilyn, "John Rawls and the Political Coercion of Unreasonable People," *The Idea of a Political Liberalism: Essays on Rawls*, edited by Victoria Davion and Clark Wolf, Maryland: Rowman & Littlefield Publishers, Inc., 2000, 16-33.
- Galston, William A., "On the Alleged Right to Do Wrong: A Response to Waldron," *Ethics* 93 (January 1983): 320-24.
- Garcia, J.L.A., "The Heart of Racism," *Journal of Social Philosophy* 27.1 (Spring 1996): 5-45.
- Gilbert, Alan, "Marx on Internationalism and War," *Philosophy and Public Affairs* 7.4 (Summer 1978): 346-69.
- Gilpin, Robert, "The richness of the tradition of political realism," *International Organization* 38 (1984): 287-304.
- Glasgow, Joshua, "Racism as Disrespect," *Ethics* 120.1 (October 2009): 64-93.
- Goldstein, Joshua S., *The Real Price of War: How You Pay for the War on Terror*, New York: New York University Press, 2004.
- Goldstein, Joshua S., "War and Economic History," *The Oxford Encyclopedia of Economic History*, edited by Joel Mokyr, New York: Oxford University Press, 2003.
- Greste, Peter, "Congolese Children Forced to Fight," *BBC News*, November 12, 2008, <http://news.bbc.co.uk/go/pr/fr/-/2/hi/africa/7724088.stm> (accessed 5 January 2013).
- Grotius, Hugo, *De Jure Belli Ac Pacis Libri Tres*, translated by Francis W. Kelsey, New York: Kessinger Publishing, 2009.
- Hampton, Jean, *The Authority of Reason*, Cambridge: Cambridge University Press, 1998.
- Haslanger, Sally, "Oppressions: Racial and Other," *Racism in Mind*, edited by Michael P. Levine

- and Tamas Pataki, Ithaca: Cornell University Press, 2004, 97–123.
- Hay, Colin, “State Theory,” *Routledge Encyclopedia of International Political Economy: Entries P-Z*, edited by R.J. Barry Jones, New York: Routledge, 2001, 1469-1475.
- Heineman, Elizabeth, *What Difference Does a Husband Make? Women and Marital Status in Nazi and Postwar Germany*, Berkeley: University of California Press, 2003.
- Hill, Thomas, “In Defense of Human Dignity: Comments on Kant and Rosen,” *Understanding Human Dignity, Proceedings of the British Academy*, edited by Christopher M. McCrudden, Oxford: Oxford University Press, 2014, 315-27.
- Hobbes, Thomas, *Leviathan*, edited by Richard Tuck, Cambridge: Cambridge University Press, 1991.
- Hollister, Warren C., *Anglo-Saxon Military Institutions*, Oxford: Oxford University Press, 1962.
- Honoré, Tony, “The Right to Rebel,” *Oxford Journal of Legal Studies* 8.1 (1988): 34–54.
- Hooker, Brad, *Ideal Code, Real World: A Rule-consequentialist Theory of Morality*, Oxford: Oxford University Press, 2000.
- Human Rights in Uganda*, London: Amnesty International Publications, 1978.
- Hume, David, *A Treatise of Human Nature*, edited by David Fate Norton and Mary J. Norton, Oxford: Clarendon Press, 2007.
- Hume, David, “Of the Balance of Power,” *Essays: Moral, Political and Literary*, New York: Cosimo Inc., 2006, 339-48.
- Hurka, Thomas, “Proportionality in the Morality of War,” *Philosophy and Public Affairs* 33.1 (2005): 34-66.
- Ignatieff, Michael, *The Lesser Evil: Political Ethics in an Age of Terror*, Princeton: Princeton University Press, 2004.
- Johnson, James, *Just War Tradition and the Restraint of War*, Princeton: Princeton University Press, 1981.
- Kamm, Henry, "The Cambodian Dilemma," *The New York Times Magazine*, 4 February 1979, 54-5.
- Kant, Immanuel, *Groundwork of the Metaphysics of Morals*, in *Practical Philosophy*, edited and translated by Mary J. Gregor, Cambridge: Cambridge University Press, 1996.
- Kant, Immanuel, *Lectures on Ethics*, edited and translated by Mary J. Gregor, Cambridge:

- Cambridge University Press, 1997.
- Kant, Immanuel, *Perpetual Peace and Other Essays*, translated by Ted Humphrey, Indiana: Hackett Publishing Company, Inc., 1983.
- Kant, Immanuel, *The Metaphysics of Morals*, edited and translated by Mary J. Gregor, Cambridge: Cambridge University Press, 1996.
- Kavka, Gregory, *Moral Paradoxes of Nuclear Deterrence*, New York: Cambridge University Press, 1987.
- Kingsolver, Barbara, *The Poisonwood Bible*, New York: Harper Perennial, 1999.
- Klier, John, "The pogrom paradigm in Russian history," *International Handbook of Violence Research, Volume 1*, edited by Wilhelm Heitmeyer and John Hagan, The Netherlands: Kluwer Academic Publishers, 2003, 352-55.
- Klier, John, *Russians, Jews, and the Pogroms of 1881-1882*, Cambridge: Cambridge University Press, 2011.
- Lackey, Douglas, *The Ethics of War and Peace*, New York: Prentice Hall, 1989.
- Lauterpacht, Hersch, *International Law and Human Rights*, London: Stevens, 1950.
- Lazar, Seth, "National Defence, Self-Defence, and the Problem of Political Aggression," *The Morality of Defensive War*, edited by Cécile Fabre and Seth Lazar, Oxford: Oxford University Press, 2014, 11-39.
- Lerner, Melvin, *The Belief in a Just World: A Fundamental Delusion*, New York: Plenum Press, 1980.
- Lerner, Melvin, and Leo Montada, "An Overview: Advances in Belief in a Just World Theory and Methods," *Responses to Victimizations and Belief in a Just World*, edited by Melvin Lerner and Leo Montada, New York: Plenum Press, 1998, 1-7.
- Levy, Jack S., "Domestic Politics and War," *The Origin and Prevention of Major Wars*, edited by Robert Rotberg and Theodore Rabb, Cambridge: Cambridge University Press, 1989, 79-100.
- Lo, Ping-Cheung, "Introduction," *Chinese Just War Ethics: Origin, Development, and Dissent*, edited by Ping-Cheung Lo and Sumner B. Twiss, London: Routledge, 2015.
- Locard, Henri, "State Violence in Democratic Kampuchea (1975-1979) and Retribution (1979-2004)," *European Review of History* 12.1 (March 2005): 121-143.
- Locke, John, *Two Treatises of Government*, edited by Peter Laslett, Cambridge: Cambridge

- University Press, 1988.
- Luban, David, "Just War and Human Rights," *Philosophy and Public Affairs* 9.2 (Winter 1980): 160-181.
- Machiavelli, *The Prince*, edited by Quentin Skinner and Russell Price, Cambridge: Cambridge University Press, 1988.
- Mackie, John, "Can There Be a Right-based Moral Theory?," *Midwest Studies in Philosophy* 3 (1978): 350-59.
- May, Larry, *Aggression and Crimes Against Peace*, Cambridge: Cambridge University Press, 2008.
- May, Larry, *Crimes Against Humanity*, Cambridge: Cambridge University Press, 2005.
- May, Larry, "Killing Naked Soldiers: Distinguishing between Combatants and Noncombatants," *Ethics and International Affairs* 19.3 (2005): 39-53.
- McMahan, Jeff, "Just Cause for War," *Ethics & International Affairs* 19.3 (December 2005): 1-21.
- McMahan, Jeff, *Killing in War*, Oxford: Clarendon Press, 2009.
- McMahan, Jeff, "The Ethics of Killing in War," *Ethics* 114 (July 2004): 693-733.
- Melzer, Yehuda, *Concepts of Just War*, Leyden: A. W. Sijthoff, 1975.
- Mill, John Stuart, "A Few Words on Non-Intervention," *Dissertations and Discussions*, New York: E. P. Dutton & Co, 1873, 238-63.
- Mill, John Stuart, *Considerations on Representative Government*, Maryland: Serenity Publishers, 2008.
- Mill, John Stuart, *Utilitarianism*, in *The Blackwell Guide to Mill's Utilitarianism*, edited by Henry R. West, Massachusetts: Blackwell Publishing Ltd, 2006.
- Moore, Margaret, "Collective Self-Determination, Institutions of Justice, and Wars of National Defence," *The Morality of Defensive War*, edited by Cécile Fabre and Seth Lazar, Oxford: Oxford University Press, 2014, 185-202.
- Morgenthau, Hans, *Scientific Man versus Power Politics*, Chicago: University of Chicago Press, 1946.
- Nagel, Thomas, "War and Massacre," *Philosophy and Public Affairs* 1.2 (Winter 1972): 123-44.

- Naimark, Norman, *Stalin's Genocides*, Princeton: Princeton University Press, 2010.
- Nelson, Brian, *The Making of the Modern State: A Theoretical Evolution*, London: Palgrave Macmillan, 2006.
- Nickel, James, "Dworkin on the Nature and Consequences of Rights," *Georgia Law Review* 11 (1977): 1115-1142.
- Norman, Richard, *Ethics, Killing and War*, Cambridge: Cambridge University Press, 1995.
- Norman, Richard, "The Case for Pacifism," *Journal of Applied Philosophy* 5.2 (1988): 197-210.
- North Korea: Political Prison Camps*, London: Amnesty International Publications, 2011.
- Nozick, Robert, *Anarchy, State, and Utopia*, New York: Basic Books, Inc., 1974.
- Okely, Judith, *The Traveller-gypsies*, New York: Cambridge University Press, 1983.
- Okin, Susan Moller, *Justice, Gender, and the Family*, New York: Basic Books, Inc., 1989.
- Orend, Brian, *The Morality of War*, New York: Broadview Press, 2006.
- Otsuka, Michael, "Killing the Innocent in Self-Defense," *Philosophy and Public Affairs* 23.1 (1994): 74-94.
- Owen, John M., "How Liberalism Produces Democratic Peace," *International Security* 19.2 (Autumn 1994): 87-125.
- O'Brien, William V., *The Conduct of Just and Limited War*, New York: Praeger Publishers, 1981.
- O'Neill, Onora, *Towards Justice and Virtue*, Cambridge: Cambridge University Press, 1996.
- Patrick, Stewart, "'Failed' States and Global Security: Empirical Questions and Policy Dilemmas," *International Studies Review* 9.4 (2007): 644-662.
- Payne, B. Keith, Yujiro Shimizu, and Larry L. Jacoby, "Mental Control and Visual Illusions: Toward Explaining Race-Biased Weapon Misidentifications," *Journal of Experimental Social Psychology* 41 (2005): 36-47.
- Pettit, Philip, "The Consequentialist can Recognize Rights," *Philosophical Quarterly* 38 (1988): 42-55.
- Plato, *The Republic*, translated by C.D.C. Reeve, Indianapolis: Hackett Publishing Company, Inc, 2004.

- Pogge, Thomas, "Rawls on International Justice," *The Philosophical Quarterly* 51.203 (April 2001): 246-53.
- Rachels, James, "Kantian Theory: The Idea of Human Dignity," *The Elements of Moral Philosophy*, New York: Random House, Inc., 1986, 114-23.
- Rawls, John, *A Theory of Justice* (revised edition), Cambridge: Belknap Press, 1971.
- Rawls, John, *The Law of Peoples*, Cambridge: Harvard University Press, 1999.
- Rawls, John, *Political Liberalism*, New York: Columbia University Press, 1993.
- Raz, Joseph, *The Authority of Law: Essays on Law and Morality*, Oxford: Clarendon Press, 1979.
- Rodin, David, *War and Self-Defense*, Oxford: Clarendon Press, 2002.
- Rodin, David, "The Myth of National Self-Defence," *The Morality of Defensive War*, edited by Cécile Fabre and Seth Lazar, Oxford: Oxford University Press, 2014, 69-89.
- Rodrik, Dani, "Who Needs the Nation State?," Roepke Lecture in Economic Geography, delivered at Harvard University, May 2012.
- Roth, Brad, *Governmental Illegitimacy in International Law*, New York: Oxford University Press, 1999.
- "Rwanda—UNAMIR Background," *UN Peacekeeping*, <http://www.un.org/en/peacekeeping/missions/past/unamirS.htm> (accessed 9 September 2014).
- Ryan, Cheyney C., "Self-Defense, Pacifism, and the Possibility of Killing," *Ethics* 93.3 (1983): 508-24.
- Scheindlin, Raymond P., *A Short History of the Jewish People: From Legendary Times to Modern Statehood*, Oxford: Oxford University Press, 1998.
- Scholz, Sally J., "War Rape's Challenge to Just War Theory," *Intervention, Terrorism, and Torture: Contemporary Challenges to Just War Theory*, edited by S. P. Lee, The Netherlands: Springer, 2007, 273–288.
- Sen, Amartya, "What Do We Want from a Theory of Justice?," *The Journal of Philosophy* 103.5 (May 2006): 215-38.
- Shakespeare, William, *Hamlet*, edited by Sylvan Barnet, New York: Signet Classic, 1963.
- Shelton, Dinah, *Encyclopedia of Genocide and Crimes Against Humanity*, Michigan: Macmillan

- Reference, 2005.
- Sherlock, Ruth, "Syria: more than half of hospitals destroyed or damaged," *The Telegraph*, September 16, 2013.
- Simmons, A. John, "Ideal and Nonideal Theory," *Philosophy & Public Affairs* 38.1 (2010): 5-36.
- Simmons, A. John, "Locke's State of Nature," *Political Theory* 17.3 (1989): 449– 470.
- Simmons, A. John, *The Lockean Theory of Rights*, New Jersey: Princeton University Press, 1992.
- Stacy, Helen, "Humanitarian Intervention and Relational Sovereignty," *Intervention, Terrorism, and Torture: Contemporary Challenges to Just War Theory*, edited by S. P. Lee, The Netherlands: Springer, 2007, 89–104.
- Statman, Daniel, "Supreme Emergencies Revisited," *Ethics* 117 (October 2006): 58-79.
- Stilz, Anna, "Nations, States, and Territory," *Ethics* 121 (April 2011): 572-601.
- Strawson, P.F., "Freedom and Resentment," *Freedom and Resentment and Other Essays*, London: Routledge, 2008.
- Sumner, L.W., "Mill's Theory of Rights," *The Blackwell Guide to Mill's Utilitarianism*, edited by Henry R. West, Massachusetts: Blackwell Publishing Ltd, 2006, 184-198.
- Sumner, L.W., *The Moral Foundations of Rights*, Oxford: Oxford University Press, 1987.
- Tamir, Yael, *Liberal Nationalism*, New Jersey: Princeton University Press, 1993.
- Tan, Kok-Chor, "Liberal Toleration in Rawls's Law of Peoples," *Ethics* 108 (January 1998): 276-295.
- Taylor, Charles, "Can liberalism be communitarian?," *Critical Review: A Journal of Politics and Society* 8.2 (1994): 257-262.
- Tetlock, Philip E., and Aaron Belkin, "Counterfactual Thought Experiments in World Politics," *Counterfactual Thought Experiments in World Politics: Logical, Methodological, and Psychological Perspectives*, edited by Philip E. Tetlock and Aaron Belkin, New Jersey: Princeton University Press, 1996, 3-38.
- "The Execution of Private Slovik," *The Army Lawyer: A History of the Judge Advocate General's Corps, 1775-1975*, Honolulu: University Press of the Pacific, 1975.
- The Morality of Nationalism*, edited by Robert McKim and Jeff McMahan, Oxford: Oxford University Press, 1997.

- Thomson, Judith Jarvis, "Self-Defense," *Philosophy and Public Affairs* 20.4 (Autumn 1991): 283-310.
- Thomson, Judith Jarvis, *The Realm of Rights*, Cambridge: Harvard University Press, 1990.
- Thucydides, *History of the Peloponnesian War*, edited and translated by Robert B. Strassler, New York: Free Press, 1996.
- Tocqueville, Alexis de, *Democracy in America*, translated by Arthur Goldhammer, New York: Literary Classics of the United States, Inc., 2004.
- Trotter, William R., *The Winter War: The Russo-Finnish War of 1939-40* (5th edition), New York: Workman Publishing Company, 2006.
- Uggen, Christopher, Melissa Thompson, and Jeff Manza, "Crime, Class, and Reintegration: The Socioeconomic, Familial, and Civic Lives of Offenders," *Annals of the American Academy of Political & Social Sciences* 605 (2006): 281-310.
- Uniacke, Suzanne, *Permissible Killing*, Cambridge: Cambridge University Press, 1994.
- Uniacke, Suzanne, "Proportionality and Self-Defense," *Law and Philosophy* 30.3 (2011): 253-272.
- United Nations, *Charter of the United Nations*, <http://www.un.org/en/documents/charter> (accessed 19 November 2012).
- United Nations, *United Nations Security Council*, <http://www.un.org/en/sc> (accessed 1 March 2013).
- Velleman, David, "A Brief Introduction to Kantian Ethics," *Self to Self: Selected Essays*, New York: Cambridge University Press, 2006, 16-44.
- Vitoria, Francisco de, *Political Writings*, edited by A. Pagden and J. Lawrence, Cambridge: Cambridge University Press, 1991.
- Waldron, Jeremy, "A Right to Do Wrong," *Ethics* 92:1 (October 1981): 21-39.
- Waldron, Jeremy, "Superseding Historic Injustice," *Ethics* 103.1 (October 1992): 4-28.
- Wallace, R.J., *Responsibility and the Moral Sentiments*, Cambridge: Harvard University Press, 1994.
- Walzer, Michael, *Just and Unjust Wars*, New York: Basic Books, Inc., 1977.
- Walzer, Michael, "Political Action: The Problem of Dirty Hands," *Philosophy & Public Affairs*

- 2.2 (Winter 1973): 160-80.
- Walzer, Michael, "The Moral Standing of States: A Response to Four Critics," *Philosophy and Public Affairs* 9.3 (Spring 1980): 209-229.
- Watson, Gary, "Responsibility and the Limits of Evil: Variations on a Strawsonian Theme," *Responsibility, Character, and the Emotions*, edited by Ferdinand Schoeman, Cambridge: Cambridge University Press, 1987, 256-86.
- Watson, Gary, "Two Faces of Responsibility," *Philosophical Topics* 24.2 (Fall 1996): 227-248.
- Weber, Max, *Politics as a Vocation*, in *Weber: Political Writings*, edited by Peter Lassman and Ronald Speirs, Cambridge: Cambridge University Press, 1994.
- West, Henry R., *An Introduction to Mill's Utilitarian Ethics*, Cambridge: Cambridge University Press, 2003.
- Wietmarschen, Han van, "Peer Disagreement, Evidence, and Well-Foundedness," *Philosophical Review* 122.3 (2013): 395-425.
- Williams, Bernard, "Moral Luck," *Moral Luck: Philosophical Papers 1973-1980*, Cambridge: Cambridge University Press, 1981, 20-39.
- Wingo, Ajume, *Veil Politics in Liberal Democratic States*, Cambridge: Cambridge University Press, 2003.
- Wodehouse, P.G., *Very Good, Jeeves!*, New York: W.W. Norton and Company, Inc., 1958.
- Young, Iris Marion, "Humanism, Gynocentrism, and Feminist Politics," *Theorizing Feminisms: A Reader*, edited by Elizabeth Hackett and Sally Haslanger, Oxford: Oxford University Press, 2006, 174-87.
- Zimmerman, Michael, *An Essay on Moral Responsibility*, Michigan: Roman and Littlefield, 1988.