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Thinking about the War on Terrorism

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Just War Theory, Legitimate Authority, and the “War” on Terror

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According to the most straightforward interpretation of traditional just war theory, there can be no such thing as a “war on terror,” for wars can be fought only between states and certainly not between one state and an abstract entity. Nonetheless, the post-9/11 U.S.-led war on terror has been conducted in largely the same fashion as conventional wars, especially in its initial stages, and certainly *seems* to be a war. If traditional just war theory does not recognize the current war on terror to be an actual war, does this entail that there is something inherently wrong with the war on terror, or that there is something inherently wrong with just war theory? Those who endorse the view that there is something wrong with the war on terror face the urgent problem of explaining how a country is to respond to terrorist acts short of declaring a war on terror. Those who endorse the latter view, that there is something wrong with just war theory, run the danger of appearing to try to justify the immoral by rejecting the doctrine that declares it immoral.

If just war theory is truly antiquated and ill-equipped to address contemporary international politics, we should either dismiss it or completely overhaul it. But we must be careful not to jump to this conclusion too quickly. Simply because a doctrine does not legitimize a particular course of action does not mean it is outdated, so long as it can provide a convincing account of why we should not view that

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course of action as legitimate. In what follows I explore exactly what just war theory has to say about the war on terror, and in particular, look into the reasons underlying its requirement that wars must be fought between states. Perhaps unsurprisingly, I argue that just war theory must condemn the war on terror. Once we uncover the real reasons for this condemnation, however, we see that the reasons just war theory offers are both substantial and morally relevant. Just war theory is not an antiquated doctrine, although some of its more basic formulations might be.

There are two stages to my argument. The first stage, which comprises the bulk of my discussion, examines just war theory's requirement that wars must be fought between states—the requirement of legitimate authority. Here, I explore the two main ways to interpret this requirement and develop and defend my own interpretation, which is loosely based on Michael Walzer's view. With this understanding of the legitimate-authority requirement in hand, I then move to the second stage of my argument, where I apply it to a war on terror. Here I argue that the requirements of just war theory, and the legitimate-authority requirement in particular, must be applied bilaterally. I conclude by showing how, on the basis of this bilateral application, a so-called war on terror is not, in fact, a war and, if conducted as a war, will inevitably entail a violation of state rights.

Traditional just war theory is comprised of two sets of rules: the *jus ad bellum*—the rules guiding decisions of who can go to war and under what circumstances; and the *jus in bello*—the rules governing how to fight, once a war has already been declared. In this paper, I focus only on the *jus ad bellum*, and in particular on its legitimate-authority requirement. And while I will not here concentrate much on either the remaining *jus ad bellum* requirements (just cause, proportionality, right intention, and last resort), or the *jus in bello*, whose requirements include noncombatant immunity, military necessity, and proportionality, we should keep in mind that in order for a war to be just it must fulfill all of these requirements.

Central to the notion of *jus ad bellum* is the requirement that wars must be declared by and fought between authorities that are recognized in some sense as legitimate either in the international arena, or by the groups that they represent. This is the requirement of legitimate authority. It is the first requirement of the *jus ad bellum* and, I think, is the most essential. It is also, unfortunately, the most neglected. The requirement of legitimate authority distinguishes groups with belligerent status and the right to go to war from groups

that are made up of criminals and aim only to create violence. When Timothy McVeigh bombed the federal building in Oklahoma City, the act of bombing may in itself have looked like an act of war: it was directed at a political target, it involved mass killing, and so on. The reason we do not think this bombing was an act of war is that McVeigh was acting as an individual (or with a group of individuals). Were it determined that he was an agent acting on behalf of a foreign state, then we most likely would have deemed the bombing an act of war and our response to it would have been different. The requirement of legitimate authority is essential to helping us make this distinction.

Coates brings up a similar example, writing about IRA prisoners' efforts to be recognized as having legitimate authority: "In defense of their special category (of claiming to have legitimate authority), the IRA prisoners in the Maze were prepared to commit collective suicide. What they were affirming was their right to war, so that their acts of killing could thereby be lifted out of the criminal category of common murder and into the lawful category of acts of war."¹

The legitimate-authority requirement tells us how to classify groups, so that we know how to classify and respond to their actions. In so distinguishing these groups that have legitimate authority and the right to go to war from groups that lack legitimate authority, the legitimate-authority requirement sets up the playing field, as it were, and determines from the beginning when a war exists. In this respect it is distinctive from the other rules. The remaining *jus ad bellum* requirements (just cause, proportionality, right intention, and, on some accounts, last resort) are all requirements that help to determine whether or not a war is just; however, as Douglas Lackey aptly notes, "just war must, first of all, be war."² The requirement of legitimate authority is supposed to help us to determine when we have a war, which the rest of the *jus ad bellum* and the *jus in bello* rules can then declare to be just or not.

Despite the centrality of the legitimate-authority requirement to just war theory, there is much debate and corresponding divergence over what entities count as having legitimate authority. This debate is of particular concern to the issue of terrorism, for whether or not a war on terror falls within the jurisdiction of just war theory depends

¹ A. J. Coates, *The Ethics of War* (New York: Manchester University Press, 1997), 123.

² Douglas Lackey, *The Ethics of War and Peace* (New Jersey: Prentice Hall Press, 1989), 29.

on whether a terrorist group can be a legitimate authority in the relevant sense. There are two broad approaches to determining legitimate authority: The first is to take a *de facto* approach and declare that groups that, in fact, have authority also have legitimate authority. An example of a *de facto* authority would be the Mafia. Members of the Mafia take charge of certain communities, and members of these communities recognize them as being in charge—as having power over them, regardless of whether or not this authority is legally recognized or morally justified. The second way of interpreting the legitimate-authority requirement is to take a *de jure* approach. The *de jure* approach focuses on whether or not *de facto* authorities are, in fact, “legitimate” in its robust sense. In order for an entity to have *de jure* authority, it is not enough that they have power over a certain group. Their power must be justified, either on legal or moral grounds. These approaches lead to different interpretations of whether or not terrorist groups can have legitimate authority. After reviewing defenses of both approaches, I will argue that a *de jure* approach best satisfies the needs and purposes of a just war theory and, moreover, that the *de jure* interpretation must be grounded in a theory of state rights, although sometimes we must use a *de facto* theory of state rights to ground it. The implications of this discussion for our evaluation of a war on terror are twofold: First, we will see that terrorist groups lack legitimate authority; and second, we will see exactly why this lack makes a war on terror impermissible: because conducting a war on terror entails an unjustifiable violation of state rights.

Lackey presents the most straightforward *de facto* interpretation of the legitimate-authority requirement. In deriving his interpretation, he looks first to the definition of a war, which he takes to be “a controlled use of force, undertaken by persons organized in a functioning chain of command . . . directed to an identifiable political result,” where “an identifiable political result is some change in a government’s policy, some alteration in a form of government, or some extension or limitation of the scope of its authority.”³ From this definition of war, Lackey’s interpretation of the legitimate-authority requirement, what he terms the “competent authority” requirement, easily follows: to have belligerent status, a group must have a chain of command and some political orientation. If a group fulfills these two requirements, then its acts are acts of war, as opposed to acts of criminal violence.

³ Lackey, *Ethics of War and Peace*, 30.

Lackey’s conception of legitimate authority allows for many non-state groups to be recognized as having legitimate authority. Under Lackey’s conception, acts performed by rebels and revolutionaries are acts of war; indeed, Lackey thinks it a merit of his approach that such groups can be granted belligerent status regardless of whether they are associated with a particular territory—something with which states are inherently associated. It also follows from Lackey’s interpretation that terrorist groups can have legitimate authority, so long as there exist the requisite chain of command and political purpose—requirements that many terrorist groups satisfy.

The upshot of Lackey’s *de facto* interpretation is that any group that can organize itself with a political purpose in mind can have belligerent status, thereby transforming acts of violence from crimes into acts of war (although not necessarily *just* acts of war). Many have argued that this interpretation is too lenient and fails to preserve the spirit of just war theory, which was meant to separate and define acts of war as something inherently distinct from criminal violence.⁴ On Lackey’s account, any group that has the ability to organize, as long as they have political purposes in mind, can commit an act of war. It is indeed a *de facto* approach to the concept of legitimate authority: if there is authority, then it is legitimate.

This is a far cry from the original intent of just war theorists such as Aquinas, who sought from the very beginning to distinguish groups with legitimate authority from mere private individuals, who, on Aquinas’s account, regardless of their purposes, did not have the right to go to war. This basic thought guides the legitimate-authority requirement, although in contemporary society it becomes substantially more difficult to instantiate, as there are numerous cases of “private” individuals who have conducted wars that many think are legitimate instances of war—revolutionary wars, for one, are wars conducted by “private” persons. It is instances like these that lead Lackey to his minimal interpretation of the authority requirement; however, it seems that Lackey has gone too far in trying to include nonstate groups. In an effort to recognize nonstate groups as having legitimate authority, Lackey ends up with a conception of authority that amounts to self-authorization and thereby loses the normative force that lies at the core of just war theory. There must be a better way to understand legitimate authority.

⁴ See, for example, Coates, *Ethics of War*, 126.

A de jure approach towards interpreting legitimate authority looks more promising, at the very least because it captures the regulative ideals of the *jus ad bellum* rules of just war theory. A de jure approach takes seriously the “legitimate” aspect of the authority requirement and looks past the existence of de facto authority (whether it be Lackey’s interpretation, or simply a state-recognized authority) in an effort to determine whether or not a given entity has the authority to engage in an act of war. It is an open question on this approach whether or not states have legitimate authority, and whether or not a nonstate could have legitimate authority. The deciding factors, and in particular, the question of whether the deciding factors are legal, moral, or some combination of both, are relative to the particular interpretations of the approach. As we will see, the crucial question that defenders of this approach must answer is not, as it was for Lackey, whether or not a group could commit what looks like an act of war, but rather whether or not a given entity has the authority to declare belligerent status and to subject its members to the repercussions that result from acts of war.

A. J. Coates presents a thorough defense of the de jure approach, grounded in the idea of legal justification. He argues that only states that govern through the rule of law can have legitimate authority. According to Coates, a state’s legitimate authority must possess both *external* and *internal* authority. External authority involves (1) being a member of an international community; and (2) acting consistently for the international common good. The general idea underlying this external-authority requirement is that wars are fought within the public sphere and between public parties. As such, Coates argues that in order for an act of violence to be an act of war and authoritative, it must be conducted by a state defending its publicly recognized interests: “In order to be authoritative the defense of [a state’s] ‘particular’ right must constitute at the same time an upholding of the rule of international law and of the shared values in which the common good of the international community consists. Without such simultaneous justification the state has no right to war, although of course its power may enable it to wage ‘war’ regardless.”⁵

In addition to externally recognized authority, Coates believes that legitimate authorities must also have internal authority. A state has internal authority when it is “properly public and legal” that is, when it has been legally instituted and is run through a rule of law. The

United States government provides a nice model of a state with internal authority: it was legally instituted through the constitution, and, to the extent to which its legal actions reflect the constitution; it is run through a rule of law. This requirement of internal authority rules out forms of governments whose “exercise of force is wholly without public sanction or authority,” for example, those that systematically oppress their citizens.⁶

On Coates’s account, being a state is a necessary yet not sufficient condition for attaining legitimate authority; it is possible for states to lose their claim to authority. This happens when a state fails to act for the good of the international community, when a state misuses its authority internally, or when the state’s power was attained through unjust means, and thus was not legally instituted. The problem with Coates’s account is that it is too exclusionary. His legitimate-authority requirement excludes many states that we ordinarily think of as having legitimate authority from having legitimate authority. It would also deny that many historical wars were wars at all. The American Revolution, for example, could not have been a literal war on this interpretation, for Americans (1) lacked a legally recognized government that could even be a candidate for having internal authority; and (2) seemed to be challenging the international order and thus apparently lacked external authority as well.

Moreover, if in order to have legitimate authority a state must be acting for the sake of the international community, then states that threaten the international community lack belligerent status and, if they do commit violence, it is criminal violence, rather than war. By tying legitimate authority to legal foundations, Coates’s conception, I think, takes the de jure approach too far and ends up granting legitimate authority only to those states whose *cause* is legal and just (that is, whose purpose in using force is to uphold international values). This move, however, conflates the requirement of legitimate authority with the requirement of just cause. We see this conflation in the following passage where, arguing explicitly against the de facto approach endorsed by Lackey, Coates writes:

When an individual state acts ostensibly on its own behalf, if it acts in defense of its legitimate interests or in vindication of its rights, it acts at the same time as the agent and representative of the international community. In order to be authoritative the defense of its “particular” right

⁵ Coates, *Ethics of War*, 128.

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must constitute at the same time an upholding of the rule of international law and of the shared values in which the common good of the international community consists. Without such simultaneous justification the state has no right to war, though of course its power may enable it to wage “war” regardless.⁷

This claim, that authority is derived ultimately from the international community, is grounded in Coates’s belief that acts of war must be seen in legal terms as acts that are carried out in “defense of the international order”;⁸ presumably, acts carried out that are not in defense of the international order, or are explicitly against international order, are not acts of war.

Surely this cannot be right. An act of war need not be in defense of the international order; if this were the case then acts of war would only be unilateral, as presumably, in any given conflict, only one side can be fighting in defense of the international order.⁹ We need to distinguish between a just act of war, and an act of war itself; Coates’s requirement of external authority does not make this distinction and so ends up declaring war only when we have a just war.

Is there a better interpretation that maintains the regulative force of the requirement that *de facto* approaches seem unable to do, yet nonetheless does not make Coates’s mistake of placing too much regulative force on the conception of legitimate authority? I think there is and that the way to develop such an interpretation is to look at why the legitimate-authority requirement is a morally important part of the *jus ad bellum* conditions.

From the outset we have seen that the *jus ad bellum* and, in particular, the legitimate-authority requirement, is set up to define acts of war, as opposed to acts of criminal violence. Just war theorists accept the reality of war, and try to define acceptable conduct within it in an attempt to limit the atrocities committed in the name of war. The *jus ad bellum* works to regulate the decision to go to war and, ideally, ensures that wars are fought for just causes—only when war is a last resort and the expected damage of war is proportional to the expected benefits, and that the decision to go to war is made by some-

⁷ Coates, *Ethics of War*, 128

⁸ Coates, *Ethics of War*, 127.

⁹ Although this point can be debated. Coates himself believes that just cause must be interpreted on the assumption that two sides can be just. On this account, which is controversial, two sides can have just cause to go to war and so two sides could have legitimate authority.

one with the authority to do so. One of the reasons why it is important that wars involve groups with the authority to go to war is because wars inherently involve and affect the people represented by the group. When the United States decides to go to war, it does so with the authority of the people, knowing that it is these actual people (as opposed to some abstract entity of the “United States”) whose lives will be affected by the war. The danger that arises when a group lacking authority goes to war is that it puts people’s lives on the line, without having the authority to do so. This is why violence conducted by a group that lacks authority, or directed towards such a group, is criminal violence, rather than an act of war.

A defensible interpretation of the legitimate-authority requirement thus must take as central the internal politics of an entity, and, most importantly, whether or not a given entity has been allotted authority over the whole. Such an interpretation requires more than Lackey’s chain of command and political purpose; yet, on the other hand, it must recognize that nonstates could have legitimate authority, thus accommodating the possibility that revolutionary groups could declare war. To develop this interpretation, I first look at the role that the legitimate-authority requirement plays within the just war theory tradition, arguing that any interpretation of legitimate authority must cohere with the basic motivations underlying just war theory itself. I then go on to defend an interpretation of legitimate authority loosely based on Walzer’s conception of state rights. I argue that the most plausible way to understand legitimate authority is within the context of state rights.

The Roots of Just War Theory: Self-Defense

We have seen already that the goal of just war theory is to establish guidelines that constrain acts of violence; when these guidelines are followed, we have a war—ideally a just war—as opposed to mere criminal violence. This distinction is a morally important one, as most agree that, under certain circumstances, war is justifiable, whereas criminal violence is never justifiable. One way of understanding the purpose of just war theory is to see it as helping people, states, and so on, to make this distinction—to determine when violence is justifiable, and then, to see what sorts of acts are justifiable once the violence has been defined as a war.

The general model that just war theory assumes for determining justifiable violence at the level of states or political groups is that of

the aggressor-defender. This model is made explicit in the traditional (yet increasingly controversial) interpretation of the just cause requirement: that the only just cause to go to war is in defense against an act of aggression. This aggressor-defender paradigm has its roots in individual cases of self-defense. Just as we think cases of individual violence are justifiable in situations of self-defense, the so-called domestic analogy holds that incidences of group/state violence are also justifiable in situations of self-defense. In order to understand fully when acts of group/state violence fall under the aggressor-defender paradigm of self-defense, we must first focus on the individual level and look at what justifies violence between individuals.

Most agree that when an individual acts in self-defense, she is justified in her actions—even if those actions would be considered criminal or morally reprehensible under other circumstances. Exactly what are the circumstances, though, that make this sort of violence justifiable? Presumably, the individual must be acting in defense of something—most frequently, in defense of some right that the aggressor has violated. The most common right that “justifies” an act of self-defense is that of bodily integrity. When an aggressor attacks a person, she violates her victim’s right to bodily integrity and, in most circumstances, we think the victim is justified in fighting back against the aggressor. Another right that warrants self-defense is that of private property—when an aggressor enters into one’s house with intent to do harm, the owner of that house is justified in using force against that aggressor.

One feature of an act of self-defense, then, is that there is one party—the aggressor—who violates the right of another. However, rights violation alone does not justify acts of defensive violence. That is, though a party’s established rights may have been transgressed, this alone is not enough to justify an act of violence. In order for violent retaliation to be justifiable, it stands to reason that we must know something more about the *aggressor*. For example, we must know that the aggressor was acting on her own accord. She was not being forced by someone else to violate another’s rights, nor was she inadvertently doing so. In cases where acts of self-defense are truly warranted and so justifiable, the aggressor must have been committing the act of aggression based on her own free will and thereby forfeiting one or more of *her* rights.

This claim may come as a surprise to many who feel that acts of self-defense are justifiable *whenever* one’s rights are violated, so long as the act of self-defense is somehow proportional to the violation.

While this may be true when the act of self-defense is a *preventive* one that, for example, saves one’s life in the face of an attack, the situation changes when we consider acts of self-defense on a more retributive level, which is the level on which just war theory primarily draws. Just war theory is not interested primarily in preventive self-defense, but rather in defense against an attack that has already been committed.¹⁰

To see how the conditions change on this level, consider a typical case of “justifiable” self-defense. Without being provoked, Jack hits Matt in the nose. Let us call this scenario case A. Most people would think that Matt was justified in fighting back, for Jack has transgressed Matt’s right to bodily integrity. The situation changes remarkably, however, if we learn that an enemy of Matt’s, who has threatened the life of Jack’s son unless Jack starts a fight with Matt, has taken Jack’s son hostage. In this case (call it case B), it seems that Matt would not be justified in fighting back—as long as he knew that Jack’s actions were, in fact, not his own. *If Matt knew that Jack had been forced to hit him*, then it is reasonable to conclude that were Matt to go ahead and fight back anyway, Matt’s act of violence would not be justifiable.

What exactly has changed between these two scenarios? In both cases, Jack has violated Matt’s rights. In case A, we think that Matt could justifiably act in self-defense, yet in case B, we would hesitate to call any retribution by Matt against Jack justifiable. The morally relevant difference between these two instances is this: in case A Jack knowingly chooses to violate Matt’s rights and, in doing so, implicitly forfeits his own rights against Matt. In case B, Jack does not forfeit his own rights against Matt, for he did not freely decide to violate Matt’s rights. In choosing to commit violence against another, one opens oneself to harm, and puts one’s life on the line. This is why we think acts of self-defense are justifiable; they are not justifiable simply because one party’s rights have been transgressed, but additionally, because the aggressor forfeits her own rights through her aggressive action.

¹⁰ The contrast between retributive and preventive self-defense is not one that easily fits onto the level of states. In saying that state defensive actions are retributive, my point is not that they are made solely with the intent to punish, but simply that they are made after an offensive attack has already occurred. In this sense they are not preventive, because the attack has already occurred, although theoretically they are meant to prevent further attacks.

To draw an analogy from individual cases of self-defense to group cases of self-defense, then, two conditions must hold. First, we must establish the rights of *each* party involved. Second, we must establish that there is one party whose rights are violated, and another party whose rights are forfeited. It is on the basis of these conditions, modeled through the aggressor-defender paradigm, that the *jus ad bellum* requirements find their footing; by bringing the aggressor-defender paradigm to the foreground, we can reach a better understanding of the importance and nature of the legitimate-authority requirement.

The reason why it is important that the aggressor knowingly choose to transgress another's rights is because in doing so, the aggressor forfeits her rights and puts her life on the line. As we move from the individual to the group level, this requirement becomes even more important. When a state attacks another state, the aggressing state forfeits its rights, just as an individual aggressor forfeits her rights. In forfeiting its rights, however, a state in effect forfeits the rights of each of its individual members who stand to be impacted by the defending state's act of self-defense. While it is tempting to think that when a state goes to war, its actions only affect its soldiers, this is simply not true, given the overwhelmingly large number of civilian casualties incurred during wartime. This is why it is so essential to just war theory that states or groups have legitimate authority—because when a state or group involves itself in a war, be it as an aggressor or defender, its actions inevitably affect the people who comprise the group. It is the people's lives that are at stake, and the people's rights that are forfeited when an aggressor attacks another group or state. When the aggressor has legitimate authority, then this rights forfeiture is voluntary, in the sense that Jack voluntarily hits Matt in case A; however, when an aggressor lacks legitimate authority, then that aggressor does not forfeit the rights of its members (technically, the aggressor has no members whose rights it can forfeit), and so we have a situation similar to case B, where Jack has been forced to hit Matt, and so has not forfeited his rights. The aggressor may have forfeited her individual rights, but she has not forfeited the rights of those with whom she is associated or those that surround her.

As war and violence are essentially matters of rights violation, legitimate authority must essentially be a matter of having rights. The two rights distinctive of states are the right to territorial integrity, and

the right to political sovereignty.¹¹ These are the rights over which wars are fought; these are the rights that, to a certain degree, are forfeited when a state attacks another. These rights are unique in that they belong to abstract entities, yet their violations and forfeitures are felt by the individuals who comprise the group or state. States thus must derive rights essentially from their members and, given what is at stake when a state either fights in defense of those rights, or forfeits those rights, a state will have the *de jure* legitimate authority to make these sorts of decisions only when its members grant it *de jure* legitimate authority through the transference of their rights. This is how we should understand legitimate authority, as having everything to do with the possession of rights, and very little to do with chain of command, political purpose, or even possession of a just cause. These features are all secondary to the question of whether or not a state has the *de jure* legitimate authority to put its members' rights at risk.

In order to determine whether a particular group has legitimate authority, we must determine whether or not it has been granted the rights in question (political sovereignty and territorial integrity) by its members. There are several different accounts of how we should go about doing this; one that I find most compelling is Michael Walzer's theory of state rights. His theory of state rights draws loosely on the social contract tradition, according to which members "contract" and agree to transfer their rights to the state. Yet, rather than positing the unrealistic existence of actual contracts and transfers, Walzer instead appeals to the development of a common life as representative of forming a contract. People develop a common life through the shared experiences and cooperative ventures that evolve inevitably among people living together, and states derive their rights to the extent that they provide them with this common life and protect them in it. This protection involves not only protecting people in their basic individual rights, but also in "their shared life and liberty [and] the independent community they have made, for which individuals are sometimes sacrificed."¹² When a state provides and protects this common life, it attains moral standing: "The moral standing of any particular state depends upon the reality of the common life it protects and the extent to which the sacrifices required by that protection

¹¹ For simplicity's sake, I will now refer to the groups in questions as "states"; yet my use of the term is meant to apply to any entity capable of having these sorts of rights.

¹² Michael Walzer, *Just and Unjust Wars* (New York: Basic Books, 1992), 54.

are willingly accepted and thought worthwhile. If no common life exists, or if the state doesn't defend the common life that does exist, its own defense may have no moral justification."¹³

Essential to Walzer's account is that members of a particular group identify with the group with which they live, see their participation in the group as something worthwhile, and see that state as being the entity that will protect that shared life. It is through this identification that groups/states derive their rights.¹⁴

Walzer's theory of state rights lays the foundation for a morally grounded *de jure* interpretation of legitimate authority. It is relatively easy to see how an entity that enables this conception of a common life and thus enjoys state rights also has the legitimate authority to put its member's lives at risk through endangering those rights. When a state has rights, it has them in virtue of providing a service for its members, and in exchange, its members authorize the state to act on their behalf.

I think Walzer's interpretation sets an ideal of legitimate authority that states should try to approximate. In particular, I hope to have shown that this interpretation of the legitimate-authority interpretation is the one that best fits the requirements and purpose of just war theory. It allows for the possibility that some states could lack moral standing, through failing to provide for and protect the common life, and presumably it allows for the possibility that some nonstates could have moral standing, thus allowing for the possibility that certain revolutionary groups could have legitimate authority. For example, on Walzer's account the African National Congress plausibly had moral standing and legitimate authority, even during the time of white minority rule in South Africa. However, his conception of the moral foundation of state rights is one that is too idealistic to serve as a plausible and realistic requirement for an entity's having legitimate authority. On Walzer's account, too few states would end up having legitimate authority and this implication leads to very counterintuitive results. What we need, then, is an interpretation that preserves the spirit of Walzer's morally grounded *de jure* approach, yet nonetheless lowers the standard for what counts as granting state rights.

¹³ Walzer, *Just and Unjust Wars*, 54.

¹⁴ One advantage of this account of state rights is that it allows for the possibility that nonstates could have "state rights," so long as they fulfill the requirements of the common life.

Walzer's most important insight is the idea that essential to a state is the common life. This is what binds people together and what warrants their inclusion in the entity of the "state." This is also what leads us to think they are somehow accountable for their government's action, and allows us to think that, on some level, their rights are forfeited when their leaders commit aggressive acts. The existence of a common life—be it glued together by mutual respect, or by the happenstance of living and working together—that is somehow regulated or protected by a governing body is, I think, enough to grant that governing body state rights and give that body legitimate authority.

Why is the common life so important for the question of whether or not a governing body has legitimate authority? One reason is that the presence of a common life is a sign that the people have deferred to the power to the governing body. This does not mean that they have actively consented to the authority of the government; nor does it mean that they see their government as having legitimate authority over them. What it means is that, in virtue of being involved in a common life that exists under the power of a governing entity, people grant that entity authority.

Trudy Govier writes, "A person can have power only if other people are prepared to defer to him or her."¹⁵ No matter how tyrannical a dictator, he will only have power to the extent that people around him defer to that power. This was one of Gandhi's most fundamental messages: to end domination, people need to resist the power that dominates them. They need to stop cooperating with the power, and stop seeing that power as an authority. Only when people resist the power of another, will that person cease to have power over them. When people continue to live and exist as subjects to an authority, they are granting that authority power over them. Being part of a common life made possible and/or governed by a given entity thus amounts to granting that entity authority.

This interpretation of legitimate authority is *de jure* in spirit, yet because it severely weakens the moral foundation of state rights, is not far from a *de facto* interpretation. Regardless of where it falls on the scale of robust legitimacy, it reflects the moral purpose of the legitimate-authority requirement while nonetheless maintaining a realistic grasp on contemporary politics, where very often we have states whose rulers are there by force, not by right.

¹⁵ Trudy Govier, *A Delicate Balance* (Boulder, CO: Westview Press 2003), chap. 6.

War on Terror

This interpretation of legitimate authority helps us to determine whether or not terrorist groups have legitimate authority and so are proper initiators or subjects of war. The deciding factor is whether or not terrorist groups can have the rights to political sovereignty and territorial integrity, and the test at hand is whether or not they provide for, and protect their members in having, a common life, understood in a morally unloaded way to include, for example, dictatorships.

While it is certainly the case that terrorists groups enable cooperative ventures and appear to enjoy a degree of political sovereignty, they are not candidates for having the full state rights of both political sovereignty and territorial integrity, as most terrorist groups fail to occupy a unified territory that is essential to the development of a common life. The common life essential to the granting of state rights involves people living together, working together, fighting together, reconciling together and, importantly, making sacrifices together. By living in a society, people essentially agree to restrict their behavior in ways necessary to enable society to function smoothly. This agreement, be it implicit or explicit, forced or unforced, is what grants states the authority to govern, and is what grants them the moral standing to defend their rights. It is essential to this picture of the common life, and the resulting conceptions of legitimate authority, that there be a particular territory inhabited by members of the group in question. Without a particular territory gluing its members together, they would fail to develop the common life from which a state derives its rights.

The inhabitation of territory is also important for more practical reasons. Wars are always fought within a given territory and territories always belong (or are at least inhabited by) some group. If a given group, say a terrorist group, lacks a territory that is in some sense their own, any wars with which they are involved will put *another group's* territory at risk, as well as the lives of the people who inhabit that territory.

Territorial occupation is thus essential to the concept of legitimate authority and state rights. Absent common territory, groups are simply that: mere groups. They can be held together by common political bonds, as the group of Republicans is, or they can be held together by certain hero worship, as a group of Elvis impersonators are. What makes a particular group a "state" with state rights is partly that they

occupy a particular territory. As terrorist groups typically lack a unified, central territory to call their own, they lack the moral standing of a state. Because they lack moral standing, they lack state rights, and so lack legitimate authority.

Groups that are candidates for having legitimate authority, on the other hand, are groups that (1) occupy a particular territory, thus allowing for the development of a common life; and (2) in some sense "govern" or lead the people that have formed the common life. On this reading, almost all states will have legitimate authority and some, but certainly not all, nonstates will have legitimate authority. Revolutionary groups may have legitimate authority; groups trying to secede from their original state may have legitimate authority. Yet, again, most—if not all—terrorist groups will not have legitimate authority.

This claim is not a unique one; many have argued that terrorists lack legitimate authority, and thus acts of terrorism are not appropriately called acts of war. What is unique about this understanding of what exactly terrorist groups lack is the implication it has for a war on terror. As I will now argue, when acts of large-scale, state-sponsored violence are carried out against terrorist groups, they (1) are not acts of war; and (2) essentially involve the violation of another state's rights to political sovereignty and territorial integrity.

The first thing we need to realize is that legitimate authority, and indeed all of the *jus ad bellum* conditions, are requirements that apply bilaterally, to both sides of a conflict. The distinction is important especially for consideration of a war on terror, although it is one that easily gets lost in discussions of just war theory. The *jus ad bellum* requirements are most often viewed *from the point of view of an entity* deciding to go to war. In this regard, the requirements give an entity a checklist to determine whether its proposed actions are just. Do they have the legitimate authority to go to war? Do they have just cause? Is this their last resort? And so on. While this is the typical application of the *jus ad bellum*, we must also recognize that *both sides* of a dispute are also subject to the *jus ad bellum* requirements. In particular, we must recognize that, in order to have a war, we must have two legitimate authorities. We do not have a war, not even an unjust war, when one legitimate authority attacks random and unassociated civilians; the fact that one party may have legitimate authority does not make all of its actions acts of war. As we know well, states can commit crimes and violence against certain parties, and commit acts of war against other parties. What makes the latter acts of war is that

they are committed against entities considered to have legitimate authority.

In order to decide whether a war on terror is, in fact, a war recognized as such by just war theory, it is not enough to decide whether one entity has legitimate authority. We must look at both sides, and ensure that both sides have legitimate authority. What we see when we do so is that a so-called war against terror is not a war.

To show that acts of violence against terrorist organizations are not justifiable acts of war because terrorist groups lack legitimate authority, we need only to revisit our discussion of self-defense and the aggressor-defender paradigm. We have seen that there are two conditions that must hold in order for an act to be an act of self-defense. First, there must be two parties with rights. Second, there must be one party whose rights have been transgressed, and one party whose rights have been forfeited. In a situation where a terrorist group attacks a state, the state's rights have been transgressed; however, the terrorist group has not forfeited its rights in the relevant sense.

The first worry is that the terrorist group lacks the appropriate rights in question (territorial integrity and political sovereignty) and so cannot forfeit rights it does not have. Certainly a terrorist group has forfeited individual rights to life and liberty; however, they have not forfeited state rights of territorial integrity and political sovereignty. This makes the situation importantly different from a case where a state attacks another state, and calls for a different sort of response than a simple case of self-defense. While large-scale violence may be a justifiable and appropriate response against a state that has forfeited its right to political sovereignty and territorial integrity, it is not likewise appropriate against individuals, regardless of the nature of their crime. Were such large-scale violence to occur, it would not be a justifiable act of war, primarily because it is conducted against a group that lacks legitimate authority.

This brings us to the second concern, one about what actually happens when a state brings large-scale violence against individuals in the name of "war." It is the nature of large-scale violence that it is aimed not at individuals, but rather at groups, and in particular, groups that inevitably occupy a certain territory and that are governed by a particular government. These groups are the ones affected by acts of large-scale violence. This, after all, is why it is so important that states have legitimate authority—for it is their member's lives that they stand to put at risk through their actions. A unique situation arises when the target of large-scale violence is not a state, represent-

ing its citizens, but is rather a group of terrorist individuals who happen to be living in a particular state. What ends up happening is that the state and its members inevitably become the target of the large-scale violence simply because certain individuals are inhabiting their territory. As it is the terrorists who have forfeited their individual rights, and not the states who have forfeited their state rights, such acts of large-scale violence constitute acts of unprovoked aggression and as such violate the just war requirements.

The U.S.-led war on terror provides a clear example of the repercussions of conducting a war on terror. Most agree that Al Qaeda, despite having a clear chain of command and political purpose, nonetheless lacks the rights to territorial integrity and political sovereignty essential to having legitimate authority. And while Al Qaeda certainly violated the United States' rights on September 11, 2001, retributive acts of large-scale violence made by the U.S. are not justifiable as acts of war, for Al Qaeda is simply a group of individuals, not a state. The individual members of Al Qaeda feasibly have forfeited their individual rights; however, they have not forfeited the rights of Afghans, simply because their leader happens to inhabit Afghanistan. This is especially true, as not a single Afghan has been named by the FBI to be involved in the September 11 attacks.

In bringing large-scale violence, and aerial bombings in particular, against Al Qaeda, the U.S. has, in effect, declared war against Afghanistan. And along with war comes the inevitable civilian casualties. An estimated 3,767 Afghani civilians died in the first two months of the U.S.-led war on individual members of Al Qaeda.¹⁶ The U.S. tries to justify these civilian casualties through their appeal to the self-defensive war on terror; however, the war on terror is neither a war, nor justifiable. Rather, it amounts to an unprovoked attack on Afghanistan and a violation of their rights to political sovereignty and territorial integrity.¹⁷

¹⁶ See Marc Herold, "A Dossier on Civilian Victims of United States' Aerial Bombing of Afghanistan," in *September 11 and the U.S. War: Behind the Curtain of Smoke*, ed. Roger Burbach and Ben Clarke (San Francisco: Freedom Voices Press, 2002).

¹⁷ This situation is complicated by the fact that the existing government at the time of the first attacks on Afghanistan was a systematically oppressive one and an attack on the Taliban government may have been warranted on humanitarian grounds (as I tend to think it was). My point here is that the attack on Afghanistan was not justifiable as a war on terror. This holds true, I think, regardless of the fact that the Taliban refused to turn over Osama bin Laden. Such a refusal does not constitute an attack against the United States, which is the justification necessary to warrant the attacks.

Conclusion

I hope to have shown that just war theory has some important insights into the war on terror, and that, rather than being an antiquated theory, the requirements of just war theory, when properly interpreted, are ones that have strong foundations and should be looked to for guidance even when, and especially when, we are faced with new circumstances that appear to go beyond the scope of just war theory. I especially hope to have shown that the requirement of legitimate authority is of particular importance, even though it is perhaps the most neglected requirement of the *jus ad bellum*.

The requirement of legitimate authority traditionally has been seen from the point of view of the aggressor, rather than the target of that aggression, and many people tend to think that as long as a state is conducting large-scale violence, then it is an act of war. By understanding the potential dangers of this assumption, we will better be able to limit and regulate acts of large-scale violence, and, in particular, we will be able to determine when such violence is justifiable and appropriate. Large-scale violence is not a justifiable response to terrorist attacks. Rather, because terrorists groups lack legitimate authority, the appropriate response is to persecute terrorists as individuals.

We must start to think of the “war on terror” only in figurative terms; for it is not a literal war and should not be conducted as such. Rather, we should think of the war on terror as being akin to the war on drugs. We should hunt down terrorists the way we hunt down drug lords; we should track terrorist money the way we track drug money; we should arrest terrorists and their associates the way we arrest drug dealers and users. The war on drugs is the appropriate model for our response to terrorism, not a literal war against a state.

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Moral Justification for Violent Responses to Terrorism

BRETT KESSLER

A war to protect other human beings against tyrannical injustice; a war to give victory to their own ideas of right and good, and which is their own war, carried on for an honest purpose by their free choice—is often the means of their regeneration.

—John Stuart Mill

Introduction

The attacks of 9/11 and subsequent U.S.-led military action have, in many ways, redefined the world in which we live. Most people now know that international terrorism and responses to it have become a permanent fixture in our world, changing the shape of our future through dramatic foreign policy shifts and a position called preemption.¹ The questions are obvious. How are we to understand our radically different world? How do we make sense of terrorism and the

The ideas expressed in this paper are the author's alone and are not necessarily representative of those of the U.S. government, the Department of Defense, the U.S. Army, or the United States Military Academy.

¹ I am making a clear distinction up front between domestic terrorism and international terrorism, a distinction based simply on the idea of boundaries, the arbitrary though often contested lines we draw on a map. Terrorist activities directed from the top down, or what we might call State Terrorism, are cases of domestic terrorism. Likewise, terrorist activities directed from the bottom up, directed at the government from the people governed, are cases of domestic terrorism. International terrorism as I understand it is directed outward, directed towards people or a government outside national boundaries, within the international arena.