

Force Short of War in Modern Conflict

Jus ad Vim

Edited by
Jai Galliot

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to resolve conflict altogether (Howes 2010). My research on *jus ad vim* also addresses the inadequacies of the just war framework, by interrogating the limits of the just war (and law enforcement) frameworks as tools to address threats to international peace and security and by calling for a set of principles calibrated to the use of limited force.

The use of limited force challenges the simple dichotomy between peace and war insofar as the term 'war' does not adequately capture the full spectrum of lethal force states use to counter international threats (Zenko 2010). In particular, the use of limited force – drone strikes, punitive strikes, limited preventive strikes, setting up and maintaining no-fly zones, special forces raids and peacekeeping missions – are becoming more and more frequent, but it is unclear whether they fall under the morality of war.

Scholars have begun to question the very definition of war and with that, the notion of ethics also comes into question. Mary Kaldor talks about so-called 'new wars' which blur the distinction between war, organised crime and large-scale violations of human rights, arguing for an ethics called 'cosmopolitan law enforcement, [which] is somewhere between soldiering and policing' (Kaldor 2012: 213). Her argument for a new view of law enforcement favours reimagining how we understand the rules that govern the use of violence by clarifying and enforcing existing frameworks, specifically international humanitarian and human rights law. Ian Clark suggests that the challenge of defining war holds even deeper concerns:

International society itself, whatever moral philosophers might think, has been greatly exercised by its own negotiation of what 'counts as war' and what does not . . . As a result, when we apply ethics to war, we are left to shoot at a constantly moving target. (Clark 2015: 19)

This is important because the rules that govern the use of force distinguish between what is legitimate killing and what is essentially murder. For Clark, the danger is that our ethical thinking be constrained by the rigid categories of violence – war or not war – we use insofar as 'we are governed by the assumptions that are already imbedded' in these categories (Clark 2015: 144). Thus

14 In Defence of *Jus ad vim*: Why We Need a Moral Framework for the Use of Limited Force

Daniel Brunstetter

Introduction

Ethical debates about state use of force have long distinguished between the conditions of peace and war, with different ethical frameworks arguably governing each. In the former, the ethical constraints of law enforcement shape the extent to which a state can use force against a suspected criminal, while in the latter the laws of war apply to the use of force against combatants of the enemy's armed forces. To put it in more germane terms: police officers arresting a criminal are much more restricted in what they can do than what is permissible for soldiers in the context of war. Regarding war, the just war framework is one of the most storied tools of analysis when morally evaluating the use of force. The principles contained with the categories of *jus ad bellum* are seen as useful in helping to determine when one can morally go to war, while those of *jus in bello* help us to evaluate what one can ethically do in war. Yet, the adequacy of this framework has recently come into question by so-called revisionist just war thinkers who reject the view that the morality of war is distinct from the morality that governs during peace (McMahan 2009; Frowe 2016). Others suggest that we need to look more at the roles of those using force to understand the ethical implications (Miller 2016), while still others reject the efficacy of ethical uses of force

impetus to think outside existing categories. In the words of Rosa Brooks:

The international community needs to develop a *ius ad vim* to occupy the space between war and peace: a law and ethics relating to ongoing but discrete smaller scale uses of force . . . Perhaps we need new international institutions capable of refereeing such uses of force. (Brooks 2014: 99)

There exists a rich scholarship on just war in the twenty-first century that has remained anchored in the historical categories of *ius ad bellum*, *ius in bello* and *ius post bellum*, to explore the ethical issues associated with the use of force. This is because the just war framework provides statesmen with ‘a common normative language to justify their behaviour to others . . . and assess the legitimacy of others’ actions’ (Bellamy 2006: 7). Yet, the blurring of the lines between war and not war discussed above has raised questions about the viability of the traditionalist just war paradigm in certain circumstances – including in contexts of terrorism (Walzer 2007), drone strikes (Brunstetter and Braun 2013), preventive force (Walzer 2006; Doyle 2008; Totten 2010) and humanitarian intervention (Brunstetter 2018a). Let me make it clear that I do not mean to disqualify the just war framework altogether – indeed, my own work has explored its political usefulness in US politics (Brunstetter 2014), while also pointing to some of the shortcomings (Brunstetter and Braun 2011). Rather, the concept of *ius ad vim* seeks to contribute to the ethical debates about the use of force by asking us to look more closely at the dilemmas of limited force.

Ius ad vim means, literally, the just use of force and refers to a moral framework calibrated to the use of limited force (what others sometimes refer to as force short of war). As a point of departure, *ius ad vim* makes the assumption – challenged by some authors in this volume – that limited force is somehow different from war and that this difference warrants reformulating, reimagining and recalibrating the just war frameworks we have, to better take into account the moral dilemmas associated with limited force.

This chapter begins by charting the narrative of the emergence of *ius ad vim*. Not a mere literature review, the act of

unpacking this narrative highlights the global conditions that brought into question existing just war frameworks, the perceived theoretical lacunae the idea of *ius ad vim* was proffered to fill and the early concerns of establishing a new, seemingly more permissive, theory. This exercise in the history of ideas is important for two reasons: first, because it identifies how *ius ad vim* was a critical response to moral concerns in global affairs, and second, because it paints the *ius ad vim* project as an exercise in line with the critical-historical renegotiation of the just war tradition (Brunstetter and O’Driscoll 2017). I then briefly trace the initial development *ius ad vim* principles as distinct from *ius ad bellum* principles, offering insight into what the initial attempt to theorise about *ius ad vim* set out to accomplish. In the process, I identify the three criticisms levied against *ius ad vim* – that we do not need a new theory, that it is too permissive and that the probability of escalation principle is contained within other just war principles. In order to push the debate forward, I respond to these criticisms with a defence of *ius ad vim* as a broad research agenda that investigates the specific moral dilemmas associated with limited force and, in particular, the threat of escalation. I conclude by suggesting that *ius ad vim* can be not only a language of evaluation, but also a precise language of critique as states use and abuse the weapons available in their arsenals to respond to ever-evolving global threats.

The emergence of *ius ad vim*

The twentieth century saw the re-emergence of the idea that the normal state of international affairs was one of peace, with recourse to the use of force, even on a limited scale, as an exceptional act. The United Nations Charter sought to severely limit recourse to armed force. Article 2 (4) set out a general ban on the use of force by states against other states, while Chapter 7 delineated the two instances when force was justified: when it was sanctioned by the United Nations, or when a state exercised its inherent right to self-defence. This marked a general reversal of the legitimacy of limited force that had characterised the nineteenth century.

The twentieth century also saw the re-emergence of the salience of just war theory as a lens through which to examine the ethical issues raised by the use of military force. Paul Ramsey's *The Just War: Force and Political Responsibility* (Ramsey 1968) and Michael Walzer's *Just and Unjust Wars: A Moral Argument with Historical Illustrations* (Walzer 2006, originally published in 1977), both written as philosophical reflections about the Vietnam War, argued the categories of *ius ad bellum* (the principles governing decision to wage war) and *ius in bello* (the criteria shaping what one can do in war) should be at the heart of modern statecraft.

The significance of just war theory continued through the end of the twentieth century and into the twenty-first century as the choices of statesmen, military leaders and soldiers were influenced by its principles. At the dawn of the War on Terror, Michael Walzer wrote in a famous essay entitled 'The Triumph of Just War Theory (and the Dangers of Success)' that:

the triumph of just war theory is clear enough; it is amazing how readily military spokesmen during the Kosovo and Afghanistan wars used its categories, telling a causal story that justified the war and providing accounts of the battles that emphasised the restraint with which they were being fought. (Walzer 2002: 932)

His point in penning that essay was that the *ius ad bellum* and *ius in bello* categories had succeeded in making the sphere of war a moral sphere, as opposed to one where the ends justified any violent means. This was in large part due to the restraint that the principles of just war imposed on the decision to wage war and the ways in which lethal force employed.

A Crisis in Just War Thinking

The advent of the United States-led global War on Terror, however, called Walzer's conclusion into question. Scholars have debated whether US actions satisfied the *ius ad bellum* principles, the extent to which new conditions required rethinking their meaning and whether a problematic shift in their meaning has occurred. Nicholas Rengger, for example, sees recent interpretations of just war principles, which he views as fundamentally

about the 'restraint of war', as complicit in, problematically expanding 'the scope of justification of the use of force' in the modern era (Rengger 2013: xii). This controversial renegotiation of the parameters of *ius ad bellum* and the need to recapture the essence of restraint, marks the context in which theorising about *ius ad vim* emerged.

Scholars have begun to argue that a more calibrated moral theory is needed to navigate the challenges facing statesmen, military leaders and ethicists today. The first to do so was Michael Walzer. When writing the new preface to the fourth edition of his iconic book *Just and Unjust Wars* in 2006, Walzer was deeply affected by the moral crises of the Bush era, specifically the 2003 Iraq War. Walzer noted, with a critical tone, that the despite what some scholars had argued (for example James Turner Johnson and Jean Bethke Elshtain), the

war was not a response to aggression or a humanitarian intervention. It was not (as in 1991) an actual Iraqi attack on a neighbouring state or even an imminent threat of attack; nor was the cause an actual, ongoing massacre. The cause was regime change, directly – which means that the US government was arguing for a significant expansion of the doctrine of *ius ad bellum*. (Walzer 2006: xiii)

In other words, the Bush Doctrine relaxed the constraints of *ius ad bellum* by extending the conditions under which war could be justified, which cut against the grain of just war thinking endorsed by Walzer that sought to limit instances when unleashing the dogs of war was justifiable.

That being said, Walzer was not so naive as to think that one should ignore the threat posed to peace and security in the international system by states such as Iraq. He thus went on to argue that:

the Iraqi case invites us to think about the use of force-short-of-war; the containment regime of 1991–2003 is only one possible example of this use. Despite the French argument at the UN in 2002 and 2003 that force must always come as a last resort, force-short-of-war obviously comes before war. The argument about *ius ad bellum*, therefore, needs to be extended to *ius ad vim*. We urgently need a theory of just and unjust uses of force. (Walzer 2006: xv)

Walzer's subsequent discussion of how limited force could have been used to curb the threat of Saddam Hussein's Iraq and eventually lead to regime change without having to resort to full-scale war peered into a new theoretical era. By distinguishing between measures short of war (such as imposing no-fly zones, pinpoint air/missile strikes and sanctions) and actual warfare (ground invasion, large-scale bombing campaigns), Walzer demarcated a distinction between limited force and war that invited scholars to think about how the ethical dilemmas and moral requirements differed in each context.

A key element of Walzer's argument was that the just war doctrine did not apply to all the ways force was used in the post 9/11 era. Challenging the 'standard of just war theory, which Elshtain expounded and defended' in her polemical book *Just War against Terror*, Walzer argues in an article entitled 'On fighting terrorism justly' that these standards 'do not always fit the larger war against terror as it has developed since 2002' (Walzer 2007: 480). Rather than war, he contended that much of the so-called war is police work, while some is 'the work of Special Forces who stand somewhere between the police and the army' (Walzer 2007: 481). Here Walzer makes a crucial distinction between zones of peace where the paradigm of law enforcement governs the use of force, zones of war where the principles of just war reign and what he calls the 'in-between spaces' such as Yemen and Pakistan, where states do not fully control what goes on within their borders and the moral guidelines are blurred. While war used to be easily defined as a zone of combat where lethal force was justified (to be distinguished from a zone of peace, where it was not), the struggle against terrorism has created these in-between spaces of moral uncertainty where force is used on a limited scale, but war is not declared. Citing an isolated US strike against al-Qaeda in 2002 in Yemen, Walzer asked the critical question of the twenty-first century to date: 'what standards apply to the secret war against terror?' (Walzer 2007: 481).

Here we see the clear blurring of the lines between war and not war and the emergence of a space where policing seems too restricted but war too permissive. Under the policing paradigm, the state can, as Fernando Tesón argues:

use lethal force only in very limited circumstances, mostly in self-defence or to protect persons from deadly threats. Beyond that, a suspected criminal is entitled to due process and may not be killed except in execution of a lawful sentence pronounced by a court of law after a finding of guilt. (Tesón 2012: 405)

But policing has its limits, especially in the context of fighting international terrorist groups. For Jeff McMahan, although terrorists have some elements of both criminals and combatants, they 'lack some of the defining characteristics of combatants and are considerably more dangerous than ordinary criminals' (McMahan 2012: 155). They do not wear uniforms and are not fighting a conventional conflict, but pose a significant threat to international peace and security by plotting and carrying out terrorist attacks. Moreover, they often reside within the borders of other states, or in the in-between spaces with ineffective or uncooperative law enforcement, making them difficult to apprehend. While not wanting to legitimise the violence permitted in warfare, Walzer's reflections suggest that the level of restraint described by Tesón is not feasible across the globe when dealing with the terrorist threat; some level of cross-border force – albeit not at the level of war – is warranted. Although Walzer explores some of the thorny moral questions regarding the rights of terrorists and civilians, imminence and accountability, he does not articulate what the standards should be or develop a theory of *ius ad vim*. However, his key conclusion – that such uses of limited force have 'a different feel' from war because they happen 'outside the moral and legal conventions of ordinary warfare' – pointed to a significant moral lacuna (Walzer 2007: 482).

Early Critiques

While Walzer's writings suggested the moral space a theory of *ius ad vim* could occupy, some scholars remained sceptical and openly critical. I want to point to two critiques that were influential in my own thinking about *ius ad vim*. First, David Luban, writing well before Walzer in beginning of the global War on Terror, criticised what he sees as the major flaw in bridging the difference between the law enforcement and war paradigms,

namely that it may privilege belligerency privileges and thus be prone to significant abuse. Challenging the Bush administration's decision to use lethal force outside territorially defined battlefields, Luban underscored that:

by selectively combining elements of the war model and elements of the law model, Washington is able to maximise its own ability to mobilise lethal force against terrorists while eliminating most traditional rights of a military adversary, as well as the rights of innocent bystanders caught in the crossfire. (Luban 2002: 10)

What the Bush administration essentially did was reinterpret international law such that the laws of war applied to all spaces where terrorists operated. For Luban, broadening the moral use of lethal force in such a way 'depresses human rights from their peacetime standard to the war-time standard' (Luban 2002: 14). Thus, even limited force, like drones strikes, came to be governed by the *ius ad bellum* and *ius in bello* criteria, even if they were outside the traditional battlefield. Indeed, the drone controversy – specifically the fear that the US was obfuscating the meaning of last resort, necessity, just cause and proportionality when contemplating limited strikes by drones – was where my initial interest in *ius ad vim* was born.

Second, one worries that accepting a moral space in-between law enforcement and the just war paradigm may lead to an overly permissive theory of force that can easily be abused. C. A. J. Coady identifies, in *Morality and Political Violence*, the core logic of Walzer's distinction between *ius ad bellum* and *ius ad vim*, namely, that 'there should be greater reluctance to engage in wholesale invasion than, for example, to send in a small armed unit to effect a minimal objective' (Coady 2008: 93). However, Coady thinks that a theory of *ius ad vim* would lower the threshold for last resort for using lethal force too much. By distinguishing morally between force short of war and war, he thinks states would be provided a greater array of legal and moral options to counter threats that would make non-violent options seem less attractive and increase the frequency of political violence. Coady thus concludes that 'we do not need some more permissive theory quite distinct from just war thinking', because it would erode the restraints of just war thinking, only serving to promote unnecessary and unjust uses of

force (Coady 2008: 93). This would, he predicts, reinforce power distinctions in the international realm, thus sowing the seeds for increased asymmetrical conflict as strong states engage in more frequent 'correcting' operations that fall short of war but exceed what would be permitted in by the law enforcement paradigm (Coady 2008: 6–7).

Defining *ius ad vim*

Both Luban's and Coady's critiques remind us that a theory of *ius ad vim* cannot diminish the ethical burden of a state seeking to use limited force. While their strident critiques imply that actions that do not qualify as war – perhaps drone strikes – should be judged as policing acts (which would hence disqualify them because the policing paradigm is much more restrictive), this assumption is seen as problematic to some scholars. S. Brandt Ford explores Coady's critique in significant detail in his chapter '*ius ad vim* and the Just Use of Lethal Force-Short-of-War' published in the *Routledge Handbook of Ethics and War*. He argues that 'just because a conflict fails to meet the criteria of warfare does not mean it automatically fits the policing paradigm' (Ford 2013: 70). Ford observes that the policing paradigm is not capable of dealing with many of the contemporary conflicts, while 'the conventional just war approach suffers from a false dichotomy where the use of lethal force by the military is judged through the lens of either no conflict whatsoever or all out war' (Ford 2013: 71). Note that Ford, like Walzer, suggests that existing frameworks have limits that point to the need to theorise about the moral use of limited force. He concludes that, notwithstanding Coady's concerns, a theory of *ius ad vim* acknowledges the 'need for a hybrid moral framework' to govern uses of force short of war, which have become commonplace in the post 9/11 era (Ford 2013: 72).

At roughly the same time, I made the case (with my co-author Megan Braun) for *ius ad vim* in the seminal article 'From *ius ad bellum* to *ius ad vim*: Recalibrating Our Understanding of the Moral Use of Force', published in *Ethics & International Affairs* and reprinted here (Chapter 5). The thrust of our argument was that 'the *ius ad bellum* framework does not offer sufficient leverage for assessing the *ius ad vim* actions' (Brunstetter and Braun

2013: 88). This was the first systematic attempt to establish the principles of *jus ad vim*.

Our conclusions followed from two observations. First, we observed that the rise of non-state actors, coupled with advances in technology, accelerated the uses of force that do not fit neatly within the traditional category of war. This situation has arisen, in part, because of the emergence of what Eric Heinze calls the 'regime of non-state responsibility' – a view of sovereignty and international law where weak states are not responsible for what goes on within their uncontrolled borders. The result, Heinze argues, has been 'the expansion of the right of self-defence under international law', in a 'limited and targeted fashion', against non-state actors within another state (Heinze 2011: 1080).

Second, we identified a disconnect between the scholarly literature and actual uses of force by states. The number of books and articles that employ traditionalist just war principles to describe every use of force, from drone strikes to the US-led Iraq invasion, abound. By pointing out that there was a tendency to not distinguish between the levels of force being applied, we claimed to have identified a major shortcoming of the ethical scholarship on military affairs, which reinforced the need to think more deeply about the ethics of limited force and the specific moral dilemmas such uses of force raise.

A prominent example of such a disconnect is the US use of drones in targeted killing campaigns beyond official combat zones. As mentioned above, the use and abuse of drones was the catalyst that led me to think about the need for an ethics of limited force. In a previous article 'The Implications of Drones on the Just War Tradition', published in *Ethics & International Affairs*, I noted (along with my co-author Megan Braun) that the recent scholarship on the ethics of drones by military personnel, robotics experts and philosophers has tended to assume that semiautonomous drones are just like any other guided missile weapons platform and therefore do not change the categories of *jus ad bellum* or *jus in bello*. The same could be said for policy officials, who obfuscate the deliberation process by using a moral framework that does not differentiate between limited force and war, but rather assumes all uses of force imply the same moral challenges. We rejected this assumption and went on to explore

how drones alter the meaning of traditional just war principles. Our conclusions – that drones lower the threshold of last resort for using force because too much faith is put into their purported accuracy and too little is understood about the long-term effects of a sustained drone campaign – led us to conclude that ethicists, statesmen and military planners need to update their 'moral thinking in ways that take into account the technological advantages (and disadvantages) of drones' (Brunstetter and Braun 2011: 355). This is what led us to write our 2013 article 'From *Jus ad bellum* to *Jus ad vim*'.

I think it is important to note that this article was published in a special centennial edition of *Ethics & International Affairs* on just war. As the journal editors noted regarding the special issue:

As we approach our second century, the Carnegie Council will remain the home for energetic, rigorous, and creative thinking on the ethics of war. In these pages, we rededicate ourselves to the proposition that the 'just war' tradition is an inheritance that requires and rewards constant engagement. (Ethics & International Affairs 2013)

It is in this spirit that we pursued the development of a moral framework of limited force, or *jus ad vim*. Indeed, in the spirit of creative and critical thinking on the ethics of war, I have used the *jus ad vim* framework to critically reflect on US drone policy (Brunstetter 2013b; Emery and Brunstetter 2016), to think about the French domestic response to the Islamic State in Syria (ISIS) threat (Brunstetter 2018a) and limits of victory in modern conflict (Brunstetter 2018b).

Do we really need a new theory? In defence of *jus ad vim*

Every attempt to innovate and reinterpret the ethics of war has been met with resistance and criticism. Indeed, the tradition 'showcases a myriad of different theories and notable disagreements across various eras. These are the very substance of the tradition, its marrow' (Brunstetter and O'Driscoll 2017: 2). It is no different with

the emergence of *ius ad vim*, which began as a critique of traditionalist just war thinking and a response to new international conditions and has now become the subject of critique. I will refrain from rehashing the initial principles of *ius ad vim* and assume the reader has read the article 'From *Jus ad bellum* to *Jus ad vim*' (see Chapter 5 in this volume). Rather, I will delineate three extant critiques of *ius ad vim* and advance responses that attempt to defend the theoretical and practical importance of thinking about the ethics of limited force.

Are Existing Theories Good Enough?

One of the main reasons I saw the need to think about *ius ad vim* was because, from my view, existing frameworks were not equipped to satisfactorily work through the dilemmas related to the use of limited force. This perception has come under criticism from multiple angles, but the thrust of the criticism is the same: we do not need a new paradigm because existing frameworks of just war provide the necessary moral power to make ethical judgments about limited force.

In this volume, Kaplan (Chapter 11) argues that I fail to clearly demonstrate the inadequacy of either the *ius ad bellum* principles or the law enforcement paradigm for assessing limited force. Elsewhere, Avery Plaw and Carlos R. Colon argue in the case of drones that we do not need an ethics of limited force to evaluate their use. They argue not only that *ius ad vim* is 'unrealistic and unhelpful' as a framework, but that a 'rigorous application of conventional [just war theory] criteria will provide a more appropriate, flexible, and realistic framework' (Plaw and Colon 2015: 163). A parallel critique comes from the revisionist vein of just war thinking. Helen Frowe argued in a spirited exchange published in *Ethics & International Affairs* that a framework of limited force was essentially redundant: '[*Jus ad vim*, much like traditional collectivist approaches to war, places unwarranted weight on whether something counts as war' (Frowe 2016; Brunstetter 2016). From her perspective, regardless of whether one is in a state of war, a state of peace or in the in-between zone of limited force, the ethics are the same. She subscribes to the reductive individualist version of just war, a view that challenges the traditionalist legalist view, but which is itself subject to considerable scholarly rebuttal.

I find it interesting that this critique comes from both the traditionalist and revisionist strands of just war, though for different reasons. Traditionalists reject the call for something else, but surely must recognise the flaws of conventional just war thinking as well as the challenges of rigorous application of its principles. Indeed, the meaning of these principles is, as the literature shows, often the subject of spirited debate. While one could, as Enemark does, reject both *ius ad vim* and the traditionalist just war account, his conclusion that using drones in struggle against terrorist groups is a matter of perpetual risk management is deeply unsatisfactory (Enemark 2014). And revisionists, of course, reject not only *ius ad vim*, but the traditionalist view of just war as well. From my perspective, the important point to retain is that the ethics of war is a field of contestation, debate and disagreement.

The turn to a theory of *ius ad vim* follows from the view that, rather than a stagnant just war theory, it is important to realise that the moral vocabulary of just war is shifting as security conditions, technological capabilities and ethical norms evolve. As Ian Clark describes the state of the field:

It is not possible to speak of a single doctrine of just war; nor can we point to the linear development of any single idea. At best, just war appears as a tradition, a set of themes and tropes that has developed across the centuries and drawing from diverse strands of intellectual endeavour. These recurrent themes in the discussion of warfare reflect a general philosophical orientation (and hence can be loosely referred to as a continuing tradition), *but they have been subject to constant revision and adaptation.* (Clark 2015: 33; emphasis added)

My attempt to develop a framework for the use of limited force emerges from my engagement with the just war tradition and what I understand the purpose of engaging in ethical questions related to the use of force to be. First of all, I view the just war tradition as helping to elucidate the right set of questions to ask and providing guiding principles to explore potential answers (Brown 2007). My own reading of the tradition is inspired by those who view it as a conversation about the ethics of war that has occurred over the past two millennia, as a space for debate about the dilemmas

and challenges of using force that one's own society faces and as a means to develop new ideas to confront contemporary challenges (Brunstetter and O'Driscoll 2017). But this may at times require reimagining the ideas and categories we have inherited. As Chris Brown observes:

if we believe that it is desirable to reduce the role of violence in human affairs this should simply stimulate us to rework the relevant categories to try to produce a more viable account of the circumstances under which the resort to force might be justified. (Brown 2007: 67)

This is what I hope thinking about *ius ad vim* can accomplish.

I recognise that I am not reinventing the wheel as it were, coming up with a new framework out of the air. Rather, the ideas I develop have underexplored historical precedents in the just war tradition – the notion of limited force as punishment for example – and are inevitably connected to existing *ius ad bellum* and *ius in bello* principles. Thus, my contribution aims to show how existing principles might need to be reinterpreted or recalibrated in a limited force context and to identify new principles that could be useful. *Ius ad vim* fits into how Cian O'Driscoll describes the just war tradition as necessarily 'subject to the processes of negotiation and re-negotiation as its advocates seek to re-interpret and apply it to new scenarios and historical contexts' (O'Driscoll 2007: 113). The development of a theory of limited force is an exercise of this sort – part of a spirited conversation aimed at navigating the ethical challenges we face today. It is meant not to trounce just war thinking or the law enforcement paradigm; indeed both remain highly relevant in many contexts. But rather, it is part of the process of an inevitable renegotiation of its terms. If 'just war is a site of contestation constituted by a protean idiom or moral vocabulary that both structures and informs how we think about war in substantive terms', then the act of contestation may indeed change the meaning of these terms, or reveal new ones (O'Driscoll 2011: 84).

While one of the goals of theorising about *ius ad vim* is to identify the shortcomings of existing paradigms, the essence of *ius ad vim* is more constructive. By focusing on the dilemmas of using limited force, the scholar is led to think about the principles that govern the use of limited force (*ius ad vim*), what

one can do when using limited force (*ius in vi*) and justice after the use of limited force (*ius post vim*). This has, controversially, led me to reinterpret some of the *ius ad bellum* principles – notably just cause – and define a new principle: the probability of escalation.

Is *Ius ad vim* Too Permissive and Subject to Abuse?

One of the early critiques of *ius ad vim*, articulated by Coady, was it was too permissive and would enable leaders of strong states to use limited force for dubious purposes. The reality is that this happens with or without a theory of *ius ad vim*. Indeed, just war principles are subject to the same criticism, no matter how rigorously they are applied. Although others will no doubt disagree, this is what the Obama administration has done by misappropriating *ius in bello* principles to defend drone strikes (Brunstetter and Bacardi 2015). If we stick with the same categories and fail to recognise that limited force is different from war, then we are simply engaged in a battle of whose interpretation of *ius in bello* is correct. The attempt to articulate *ius ad vim* aims to provide a more precise language to think about limited force and, in doing so, seeks to constrain potential abuses of limited force.

There is, of course, a challenge in doing so given that the *ius ad vim* notion of just cause is necessarily more permissive than that of *ius ad bellum*. Kaplan, in his chapter, warns of conflating defensive force with punitive and preventive force in ways that undermine the existence of a just cause, of mischaracterised international crimes as acts of military aggression warranting limited force and of further blurring the edges between war and peace to the point that we can have little clarity. Parkin, who argues the case of contingent pacifism, worries that *ius ad vim* will make the forcible options look more attractive than non-violent options by providing a moral blanket of responsibility to legitimise state responses to perceived threats. These are valid concerns – one should always worry about turning too easily to lethal force.

That said, we have seen multiple instances in the recent past when states have used, or threatened to use, limited force as a punitive response. Both the Obama and Trump administrations' reactions to the Syrian regime's use of chemical weapons are prime examples, but so are Israel's punitive strikes against

the Syria regime, the Jordanian government's retaliation against ISIS burning alive its pilot (Cockroft 2015) and Egypt's punitive attacks against ISIS in Libya (Al Jazeera 2017). And the list goes on. We have also seen the spectre of preventive force resurge as debate about whether a preventive strike would be legitimate to prevent Iran or North Korea from obtaining transcontinental nuclear weapons capability. And finally, there is the threat from terrorist groups and the use of drones to kill suspected terrorists who pose, what I call elsewhere, a threat of lagged imminence (Emery and Brunstetter 2016: 260). All this is to say that *ius ad vim* does allow for punitive and preventive force, though it does not give a blank cheque to use limited force in any of these ways. More untangling of how its principles would be interpreted in these cases is clearly warranted, but beyond the scope of this chapter.

I am cognizant of the risk that providing moral justification for limited force could diminish the meaning of last resort. The temptation to say we waive just cause, so we can respond to injury, or the threat of it, is real. But to do so would miss the bigger point, namely that thinking about the other *ius ad vim* principles – especially the probability of escalation – should temper any impulsive temptations. In this light, just cause in *ius ad vim* is similar to just cause in *ius ad bellum* – simply having just cause does not legitimise the use of force. Rather, only after thinking through the other principles can one decide whether it is moral to act. This is why the new probability of escalation principle is so important.

Why We Need to Focus on Escalation

One of the most important contributions of my initial attempt to conceive *ius ad vim* was the new principle I called the probability of escalation. I argued that because the essential element of any *ius ad vim* act 'is that it does not lead to the outbreak of war . . . if engaging in *ius ad vim* actions has a high probability of resulting in war, then one could argue that such actions are not justifiable' (Brunstetter and Braun 2013: 99). While my critics agree that the subject of escalation is important, they reject the need for a new principle. Kaplan argues that escalation is simply contained within the *ius ad bellum* principle of proportionality. Lango, in Chapter 8, rejects the need for a new principle, but concedes that

a theory of just and unjust uses of force should include a theory of just and unjust escalations. Gillcrist and Lloyd (Chapter 12) warn that limited force is inherently prone to mission-drift, but worry that a new principles will ultimately be ineffective. Rather, the use of limited force is unlikely to produce just cause benefits outweighing the total costs of waging persistent, drawn-out conflicts.

What is clear from these critiques is that thinking about escalation is important. I disagree with the claim that the probability of escalation is simply part of the proportionality calculus, or that it is impossible to prevent mission creep. Indeed, this is where thinking about *ius post vim* – what I call elsewhere the principles of truncated moral victory – can be helpful (Brunstetter 2018b). But to speak directly to the point of escalation, the whole purpose of this principle is to focus explicitly on the risk of escalation, as opposed to having it be part of some broader principle – proportionality – that is difficult to calculate. *Ius ad bellum* proportionality is difficult to measure, with the prospect of future good difficult to identify and costs hard to predict. Indeed, the Bush administration sold the Iraq War on the belief that democracy building would outweigh the costs of the war – a false assumption, but one that shows the challenge of calculating proportionality (Brunstetter 2014: 89). Add to this the elusive nature of victory, namely that some wars are either unwinnable, last a generation, or, as in the War on Terror, are seemingly perpetual, and one sees even deeper challenges with the proportionality (and probability of success) criteria (Hom et al. 2018).

However, by focusing on the probability of escalation, one narrows the scope of the inquiry to a specific question: is limited force to deal with a specific threat possible without leading to full-scale war? I recognise that this may not be an easy question to answer, but it is one that should be asked. Of course, there are thorny issues to be explored: in relation to punitive strikes to send a message to a state violating international norms, in relation to preventive force to stop the spread of nuclear weapons, in the context of preventing genocide, or to thwart terrorist activities. Moreover, as Kaplan remarks, there are different kinds of escalation to think about: initiator escalation, on-the-ground escalation and regional escalation come to mind. But by focusing on the probability of escalation, a better understanding of the

moral dilemmas and choices associated with specific scenarios can be explored.

Thinking about escalation reveals the clear moral tensions inherent in using limited force. Limited force is not always an isolated act of violence, but rather is often a response to ongoing violence or undertaken to avoid what is perceived to be inevitable and unjustifiable aggression. The probability of escalation criterion should not be considered as providing a formula to follow – indeed, I have not provided a formula. Rather, it is a principle that leads us to ask a series of questions that bring to the fore the potential for the abuse of limited force: Could limited force be the first step in a protracted conflict? Could it engulf a region in war by bringing other states into fray? Would it lead to a – potentially acceptable – level of retaliation? These are important questions that get us thinking about whether limited force is justifiable, or whether its use will lead to a worsening of international affairs. A robust understanding of the probability of escalation, including a deep understanding of the different types of escalation enriches the moral vocabulary we use to talk about the use of force today.

Ultimately, thinking about escalation requires being able to predict outcomes of limited force. While perhaps impossible – there will no doubt be a lot of grey area and contexts in which it is unclear if escalation will occur – unpacking what escalation means can identify some of the potential pitfalls. This leads us back to the claim I made about *ius ad vim* and constraint, and speaks to the worries regarding an overly permissive view of just cause: ultimately, theorising about *ius ad vim* and the probability of escalation in particular is aimed at curtailing potential abuses of limited force. Its principles can therefore serve, and should serve, as both a framework of analysis and a language of critique.

Conclusion: *ius ad vim* as a language of critique

James Turner Johnson described the just war tradition as supplying ‘a fund of practical moral wisdom, based not in abstract speculation or theorization, but in reflection on actual problems encountered in war as these have presented themselves in different historical circumstances’ (Johnson 1984: 15). *Ius ad vim* has been developed as a project of inquiry in this spirit. The *ius ad vim*

project emerged from an international context in which statesmen employ limited force on a more recurrent basis, but arguably lack the moral precision to evaluate such decisions. Recent changes in the conception of sovereignty, the rise of non-state actors, the threat of weapons of mass destruction and the advent of drones suggest the need further develop such a theory, despite the hesitancy of some scholars.

I view the language of *ius ad vim*, like that of just war, as a language of engagement that should serve a practical purpose. The primary goal of developing a framework for the use of limited force, as I see it, lies partly in the process itself – namely the act of theorising about *ius ad vim*, *ius in vi* and *ius post vim*. This can help us think about how limited force ought to be used and also to identify how it is problematically being used under the auspices of just war principles. A secondary goal is to provide practical moral language that can inform statesmen who will wield the power to use such force, but also those who seek to criticise perceived abuses. Walzer first thought of *ius ad vim* as a critical alternative to the Iraq invasion. I have used the framework to criticise US drone practices (Braun and Brunstetter 2013) and to analyse Obama’s threat to strike Syria in 2013 (Emery and Brunstetter 2015). One could imagine countless other scenarios when one could use it as a critical tool (Zenko 2017).

While one may wish to remain wedded to the law enforcement-rationalist just war dichotomy and to reject any uses of force that fall in-between, to do so marks a disconnect between theory and practice that will lead to the kinds of abuses that both Luban and Coady warn against. Moreover, subscribing to the view that the ethics of using force is the same in every context misses something important about the realities of using lethal force in today’s world. In the spirit of the just war tradition as I understand it, exposing the flaws of existing interpretations and proposing an alternative framework is a hallmark of the continuing – and perennial necessity of re-engaging with – timeless questions about the use of force and the specific dilemmas that might arise in any given time. If we think of limited force as conceptually distinct from other types of violence, then, paralleling the categorical divides in just war thinking, we need to theorise about *ius ad vim*, *ius in vi* and *ius post vim*. By providing a reimaged and recalibrated moral vocabulary, a framework of limited force can potentially

help statesmen evaluate limited force scenarios more morally, or at the very least, provide scholars and practitioners the appropriate language to criticise abuses.

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