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# Just War contra Drone Warfare

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## Abstract

*In this article, I present a two-pronged argument for the immorality of contemporary, asymmetric drone warfare, based on my new interpretations of the just war principles of “proportionality” and “moral equivalence of combatants” (MEC). The justification for these new interpretations is that drone warfare continues to this day, having survived despite arguments against it that are based on traditional interpretations of just war theory (including one from Michael Walzer). On the basis of my argument, I echo Harry Van der Linden’s call for “an international treaty banning all weaponized UAV [uninhabited aerial vehicles].”*

**Keywords:** *just war theory; drones; proportionality principle; moral equivalence of combatants; Michael Walzer; Harry Van der Linden; Ronald Dworkin*

In this article, I present a two-pronged argument for the immorality of contemporary, asymmetric drone warfare, based on my new interpretations of the just war principles of “proportionality” and “moral equivalence of combatants” (MEC).<sup>1</sup> The justification for these new interpretations is that drone warfare continues to this day, having survived despite arguments against it that are based on traditional interpretations of just war theory (including one from Michael Walzer, to which I return below). On the basis of my argument, I echo Harry Van der Linden’s call

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<sup>1</sup> More specifically, I am concerned here with the two most commonly used drones in the so-called “War on Terror,” namely the General Atomics MQ-1 Predator and the General Atomics MQ-9 Reaper, the payload of which vehicles are called “Hellfire” and “Scorpion” missiles.

for “an international treaty banning all weaponized UAV [uninhabited aerial vehicles].”<sup>2</sup> My first section offers a summary of the argument. The second elaborates and clarifies it. The third and fourth sections offer



The official emblem of the Reaper drone

additional arguments in support of Premise 1 and Premise 2, on proportionality and MEC, respectively. My primary source for the articulation of these two key aspects of just war theory is Michael Walzer’s classic text, *Just and Unjust Wars*.<sup>3</sup> My penultimate section anticipates the dominant objection to this argument, namely that my interpretations of proportionality and MEC are so unorthodox that they sever any meaningful connection with the orthodox versions thereof.

To explain and defend this creativity, I draw on Ronald Dworkin’s influential conception of interpretation in general (and specifically in ethics, morality and politics) in his final opus, *Justice for Hedgehogs*.<sup>4</sup> And my concluding section offers a brief recapitulation.

Before getting into the details, though, a brief word about the secondary literature on drones, which has mushroomed in recent years. The two sides of the debate are well-established. The first, exemplified by Bradley Strawser, goes so far as to argue for a positive moral duty for states to use drones (as opposed to conventional tactics and weapons). Though Strawser briefly mentions the proportionality principle, in connection to drones’ allegedly precise killing, his emphasis is squarely on the lower risk to U.S. combatants.<sup>5</sup> The opposing side consists of attacks

<sup>2</sup> See Harry van der Linden, “Arguments against Drone Warfare with a Focus on the Immorality of Remote Control Killing and ‘Deadly Surveillance,’” *Radical Philosophy Review* 19, no. 2 (2016): 331-358; Harry van der Linden, “Drone Warfare and Just War Theory,” in *Drones and Targeted Killing: Legal, Moral, and Geopolitical Issues*, ed. Marjorie Cohn, 169-194 (Northampton, MA: Olive Branch Press, 2015).

<sup>3</sup> Michael Walzer, *Just and Unjust Wars: A Moral Argument with Historical Illustrations* (New York: Basic Books, 2015). The text is now in its fifth edition, which features a new preface on contemporary asymmetric warfare, which I will consider below.

<sup>4</sup> Ronald Dworkin, *Justice for Hedgehogs* (Cambridge, MA: Belknap Press, 2013).

<sup>5</sup> Bradley Jay Strawser, “Moral Predators: The Duty to Employ Uninhabited Aerial Vehicles,” *Journal of Military Ethics* 9, no. 4 (2010): 342-368. See, for example, Jeff McMahan, “Targeted Killing: Murder, Combat or Law Enforcement?” in *Targeted Killing: Law and Morality in an Asymmetrical World*, eds. Claire Finkelstein, Jens David Ohlin, and Andrew Altman, 135-155 (Oxford: Oxford University Press, 2012); Todd Burkhardt, “Justified Drone Strikes are Predicated on R2P Norms,” *International Journal of Applied Philosophy* 29, no. 2 (2016): 167-176; Mark Coeckelbergh, “Drones, Information Technology, and Distance: Mapping the Moral Epistemology of Remote Fighting,” *Ethics and Information Technology* 15, no. 2 (2013): 87-98.

on this position from both centrist and leftist perspectives. The centrist attacks, exemplified by Jai Galliott, argue (in the footsteps of Walzer) that drone warfare violates the proportionality principle properly understood, and conclude that drones should be more heavily regulated, cut back, eliminated, and/or made illegal through international law.<sup>6</sup> The leftist theorists insist that the deeper and more important unethical aspect of drones is that they are symptomatic of our current world order of perpetual war, violence, surveillance, and control.<sup>7</sup> I understand my argument to offer support to both approaches. To the centrists, I offer an additional argument against drones satisfying the proportionality principle (given, to repeat, the failure of existing arguments to persuade those in power to abandon drone warfare). And to the leftists, I offer a new argument that drones are wrong at a no less than ontological level.

### I. Initial formulation

1. Since drone warfare's "means" include drone combatants killing human combatants, then if its "ends" are to be proportional, those ends must include a world in which drones are of equal value to humans; but this is not the desired end.
2. If warfare between the drone and human combatants were just, then the drones would have to be equivalent in moral status to the humans; but this is not the case. Therefore,
3. Contemporary asymmetric drone warfare is unjust according to two distinct moral perspectives (deontological and utilitarian), and as such stands in violation of international law (as represented, for example, in the Preamble to the Charter of the United Nations).

### II. Elaboration and clarification

Beginning with Premise 1, though it explicitly references the principle of proportionality, it could also be understood as involving the following question: what is the ontological makeup of a political state that is engaged in warfare? That is, does a state consist exclusively of its people, and does the warring subset/aspect of the state thus consist exclusively

<sup>6</sup> Jai C. Galliott, "Closing with Completeness: The Asymmetric Drone Warfare Debate," *Journal of Military Ethics* 11, no. 4 (2012): 353-356. See, for example, Megan Braun and Daniel R. Brunstetter, "Rethinking the Criterion for Assessing CIA-Targeted Killings: Drones, Proportionality, and *Jus ad Vim*," *Journal of Military Ethics* 12, no. 4 (2013): 304-324.

<sup>7</sup> See for example, Derek Gregory, "Drone Geographies," *Radical Philosophy* 183 (2014): 7-19; Grégoire Chamayou, *A Theory of the Drone* (Paris: The New Press, 2013).

of its soldiers? Or does the warring component of a state also include other entities, some of which belong to other (nonhuman) ontological categories? These could include, for example, weapons and equipment, the civilian citizens and residents, or the multiple dimensions of the domestic and global economy that are funding a state's war effort. More particularly, are drones properly understood as entities, members of the war effort for a given nation? If not, then can drones be used as spatially independent combatants in war? By "spatially independent," I refer to the fact that a drone occupies a battlefield, without a human "pilot," but in the presence of enemy human combatants and civilians.

Putting the previous point differently, can drones be meaningfully understood as fighting for "their" state's future, if a state does not "belong" to them in the first place? My claim is that for the use of drone combatants to be just, drones would have to be a part of, and have a stake in, their state. They do not, but their crews do, including what are termed drone "pilots." But the drone pilots are half a world away, and do not risk their physical well-being. While the drones, who are there on the battlefield, are unable to experience threats to their physical well-being as risk. This leaves only the enemy human combatants and civilians who are even capable of risking their physical well-being, and of experiencing that risk as risk. And this, arguably, is the fundamental reason why we do not currently regard humans and drones as of equal value, because neither humans nor drones experience drones as centers/sources/subjects of value (though we do experience them as *objects* of value). This is also the reason why, for thinkers like Jeremy Bentham and J. S. Mill, each sentient being "counts once" in the felicific calculus, while non-sentient entities do not count at all.

It might be helpful, before turning to Premise 2, to address two likely objections. First, my argument does not center on the fact that drones are merely on the battlefield, in which case it would also seem to apply to various other objects, including houses, roads, and rivers. What makes drones relevantly different from the latter, and thus the focus of my argument, is that they are both mobile (locomotive) and possess deployable weaponry. Second, I am not suggesting that the proportionality principle treats harm to property insofar as that property is of equal value to humans (and I recognize that it treats harm to property insofar as it affects humans). Instead, from the fact that drone warfare treats the drone operators' lives as sacrosanct while killing maximally vulnerable enemy combatants and civilians, I infer that, if they were following the proportionality principle, then they would have to bite the bullet and admit that they view the enemies as equal

in value to, at most, the drones, while certainly lower in value than the drone operators.

As for Premise 2, it turns on the principle of MEC, and is thus deontological (where Premise 1 is utilitarian, via the principle of proportionality). As MEC is less well-known and more complex than proportionality, it might help to summarize MEC's orthodox meaning before elaborating on my reinterpretation of it. Essentially, MEC is understood to mean that moral fault cannot be attributed to soldiers who are fighting on (what is determined to be) an unjust side of a war. For an example of this interpretation of MEC, one should not judge U.S. soldiers to be immoral for killing Vietnamese soldiers in the Vietnam war, even though the U.S. was as a nation engaged in an unjust war.

Though this is the surface or standard meaning of MEC, I am claiming in Premise 2 that the phrase "moral equivalence of combatants" commits one who affirms that phrase to something more. And this something more is more interesting, and powerful: a state wars unjustly (*jus in bello*) when it deploys combatants who are not morally equivalent to an opposing state's human combatants. In the case of drone warfare, the moral inequality of drone and human combatants is based on an ontological inequality. Put in Kantian terms, humans are free, moral legislators possessed of reason, while drones possess none of these powers.

To clarify this claim, consider a more intuitive, non-drone example, keeping in mind that, for just war theory, if state A fields human combatants intentionally or recklessly against non-combatant humans from state B, then A is engaged in an unjust war with B. Consider a hypothetical deployment by A of professional soldiers against a force from B consisting exclusively of farmers, specifically because B has no professional soldiers. This would also constitute unjust warfare on A's part because B's lack of military resources means that it does not pose a threat to the "political independence" or "territorial integrity" of A (these two phenomena, according to Walzer, being the two central rights of "political communities").<sup>8</sup>

That is, a state with the capacity to field drones cannot be under the kind of threat, as defined in terms of its political independence or territorial integrity, from another state which can only field human combatants in response to the drones. To shift to a drone example, if a state (such as the U.S.) is willing and able to use drones to kill humans from another state (and infamously, in the U.S. case, its own citizens

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<sup>8</sup> Walzer, 53.

as well), then the resulting moral inequality of combatants (i.e., drones and humans) entails that the U.S. is engaged in an unjust war.

There are also likely objections to Premise 2. First, one might think that the argument against drones is based on the fact that they are weapons and would thus apply to all weapons on the battlefield, making the entire argument a *reductio ad absurdum* (since, that is, all wars use weapons and would all violate the proportionality principle, making just war an oxymoron). On the contrary, I wish to challenge the assumption that drones are mere weapons, on the grounds that weapons are not typically capable of moving themselves across the battlefield indefinitely, nor are weapons typically capable of being equipped with other weapons. A closer analogue than weapons would be a weaponized vehicle, such as a tank or a bomber, the obvious difference being that the latter are manned vehicles.

To name a second objection to Premise 2, it might be thought that I have simply misunderstood the MEC principle, specifically by thinking that it applies to combatants on both sides, who acquire the right to kill each other by equally giving up their right not to be killed. In the words of one early reviewer of this article, “Drones and other weapons do not have a right to life and there is no need to explain their ‘right to kill.’” Instead, my point is that a human combatant cannot be said to meaningfully give up their right to be killed by a combatant such as a drone, which – and the word “which,” as opposed to “who,” is crucial here – cannot be killed, and thus cannot equally give up the right not to be killed. Put more positively, if forced to defend drone warfare using MEC, they would have to admit that they assume that drones are ontologically equal, having something as precious to lose as do the enemy human combatants and civilians who face the drones.

To consider a final objection to Premise 2, it might be thought that I am treating drones as if they are fully autonomous, making decisions independent of their operators. On the contrary, my objection is that, though there is never a direct encounter between the autonomous agents of both sides (operators and enemy combatants and civilians), theorists nevertheless deploy MEC as if there were. Put starkly, what happens between drones/operators and combatants/civilians is arguably not even war, let alone just war. It is execution, or extermination, to which rhetoric I will return in detail below.

As for the conclusion of my argument, it draws on the phrase (from the Preamble to the U.N. Charter) forbidding violations of “conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained.”<sup>9</sup>

<sup>9</sup> United Nations, “Preamble,” in *The Charter of the United Nations and Statute of the Interna-*



The background assumption here, based on a long history of consensus of political philosophers, is that justice consists of a network of relationships, obtaining among sentient beings endowed with self-consciousness. Usually, the latter category is restricted to humans, though sometimes superhuman entities are included (such as angels, a Supreme Being, and extraterrestrial aliens, as for example in Kant). But it has never yet involved a non-sentient entity, such as a drone.

But if a drone can participate as a lethal combatant in warfare, then, contrary to the history of theories of justice, it is not clear whether justice remains the exclusive provenance of the sentient. And even if most people have the intuition that the latter point is at least somewhat clear, there is certainly not sufficient clarity to prevent the undermining of the Preamble's imperative (namely, the imperative to not undermine the conditions for the "sources of international law"). Thus, drone warfare also constitutes, along with its immorality, a violation of international law. This should be recognized in the form of a new, explicit, positive law against drone killing in international law.

### III. Supporting arguments for Premise 1

As a reminder, Premise 1 is as follows:

1. Since drone warfare's "means" include drone combatants killing human combatants, then if its "ends" are to be proportional, those ends must include a world in which drones are of equal value to humans; but this is not the desired end.

The basis of Premise 1, as I noted above, is the utilitarian principle of proportionality, first articulated by the philosopher Henry Sidgwick. Walzer paraphrases Sidgwick's original conception (quoting him in the process) as follows:

In the conduct of hostilities, it is not permissible to do "any mischief of which the conduciveness to the end [of victory] is slight in comparison with the amount of the mischief."<sup>10</sup>

Put differently, the point of proportionality for Sidgwick is that one cannot commit senseless acts of violence, where "senseless" appears

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*tional Court of Justice* (San Francisco, CA: 1945).

<sup>10</sup> *Ibid.*, 128-129.



to mean something like “does not directly and efficiently target the goal of ultimate victory.”

Given this initial interpretation of “proportionality,” contemporary asymmetric drone warfare appears, to many theorists today, not only unproblematic, but even asymptotically approaching that principle’s ideal.<sup>11</sup> That is, drone warfare’s proponents claim that drones focus violence on small, essential targets, and thus reduce the total amount of violence, as well as the ratio of senseless violence to total violence. Put more simply, drones are presented by their apologists as allegedly facilitating the quick and efficient destruction of enemy targets with minimal so-called “collateral damage” to civilians.

As Walzer points out, however, in his only reference to drones (in the “Preface to the Fifth Edition” of *Just and Unjust War*):

But successful air attacks, aimed at legitimate targets, depend heavily on information from the ground, and the collection of information is a dangerous business. Too often, attacks have been launched without sufficient knowledge about the targets or with knowledge provided by unreliable informants, who are often pursuing private vendettas.<sup>12</sup>

In other words, although the drone, when attacking, is an independent combatant that does not risk any allied human combatants, this tends to obscure the fact that the preparation for an attack that is both successful and just does risk (a) human allies collecting intelligence on the target, and thereby also (b) enemy non-combatants when that intelligence is inadequate.

Buttressing Walzer’s critique is that of Grégoire Chamayou, in his book *A Theory of the Drone*.<sup>13</sup> For Chamayou, drone proponents’ “precision” arguments implicitly rely on what he argues is a weak analogy between drones and mass bombing technology. A better analogy, Chamayou claims, is that between drones and other precision killing tactics, regardless of whether the latter are machines or not. In other words, Chamayou’s alternative analogy is based not on form (in this case, flying death machines), but instead on function (precision killing). “There is a crucial difference,” Chamayou writes, “between hitting the

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<sup>11</sup> I add “asymmetric” here because if both states were using drones, or even if both states could economically afford to deploy drones – in a drone-versus-drone theater of war – my criticism would no longer be relevant.

<sup>12</sup> Walzer, xxi.

<sup>13</sup> Chamayou.

target and hitting only the target.”<sup>14</sup> More specifically, he notes that the Predator’s Hellfire missiles have an estimated “kill radius” (or “kill zone”) of 15 meters, and a “wound radius” of 20 meters. By contrast, a grenade has a much more precise kill zone of only 3 meters, making them 500% more precise. But grenades are more dangerous for U.S. combatants, which for Chamayou is the reason why drone proponents miss this analogy.<sup>15</sup>

Returning to Walzer, as for Chamayou, this problem with drones (and other air attacks in contemporary asymmetric warfare) is symptomatic of a deeper problem with the principle of proportionality. To wit, far too much morally horrendous violence can be – and has been – justified merely by exaggerating (a) the contribution of that act of violence to victory, and (b) the necessity of victory to some transcendent goal. One example of (b) is H. G. Wells’ infamous description of WWI as “the war to end all wars,” which now rings hollow in light of the war’s staggering 17 million combatant and civilian deaths. “Any act of force,” in Walzer’s words,

that contributes in a significant way to winning the war is likely to be called permissible; any officer who asserts the “conduciveness” of the attack he is planning is likely to have his way.<sup>16</sup>

Paraphrasing Yehuda Melzer, Walzer affirms that “there is an overwhelming tendency in wartime to adjust ends to means,” instead of the other way around.<sup>17</sup> In Walzer’s concise formulation, this amounts to an “inflation of ends.”<sup>18</sup> In summary, though the principle of proportionality seems, in theory, to require reducing violence for tighter operations, in practice it has historically been used primarily to rationalize more violence by positing ever more expansive goals.

Extending Walzer’s critique, I argue that a state’s decision to enlist a nonhuman entity as a combatant against human combatants implies that the nonhuman entity possesses value equal to, or greater than the human targets. From such a state’s perspective, deploying its own human combatants represents a disproportionate risk. In other words, if an

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<sup>14</sup> Ibid., 141.

<sup>15</sup> Ibid.

<sup>16</sup> Walzer, 129.

<sup>17</sup> Ibid., 120.

<sup>18</sup> Ibid.

enemy you perceive as inherently inferior to you harms you, then a kind of cosmic imbalance has occurred. For example, during the Civil Rights Movement, the predominantly Caucasian police force of Birmingham, Alabama infamously used attack dogs (and water hoses) against predominantly Black protestors. My suggestion is that the white authorities preferred to risk the physical wellbeing of dogs – viewed as less valuable than the (white) police – before risking the physical wellbeing of the police themselves.

Perhaps the reader will object that there are other possible implications of this decision by the racist white police, such as that the authorities (a) did not want the blood of the protestors directly on the white officers' hands, or (b) believed that the dogs would induce greater fear in the protestors. The former theory is undermined by the fact that the police did also engage in direct violence against the protesters. And the latter theory is undermined by the aforementioned use of fire hoses (since water is less fear-inducing than either dogs or armed police). This leaves my original interpretation, which should perhaps be modified, as follows: in choosing to use attack dogs, the authorities were trying to reduce the ratio of human-on-human violence to total violence. Insofar as my interpretation is correct, the implication seems to be that the racist authorities viewed the dogs (as nonhuman combatants) as (c) less valuable than the white officers (as potential human combatants), and yet (d) equally as valuable as (if not more so than) the predominantly Black protesters (as human enemy combatants).

One piece of supporting evidence for the validity of (c) and (d) can be found in the history of the selective use of capital punishment in the United States. Studies have shown that, not only are Black folks who are convicted of murder more likely to be killed by the state than white folks are, but also that the best predictor of someone being given the death penalty is the race of the murder victim (with white males' killers most likely to be executed, followed by white females' killers, then nonwhite males' killers, and finally nonwhite females' killers).<sup>19</sup> As with the Civil Rights example, the collective state authorities appear to operate on the logic that it is most acceptable to use a machine (such as the electric chair, or the delivery system for the chemical "cocktail" of a lethal injection) to kill a Black man, especially when that Black man acted in a way that implies he can kill the white man as his equal. One explanation for both of these racialized examples is that white author-

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<sup>19</sup> See, for example, Death Penalty Information Center, "The Death Penalty in Black and White: Who Lives, Who Dies, Who Decides," June 4, 1998, <http://www.deathpenaltyinfo.org/death-penalty-black-and-white-who-lives-who-dies-who-decides>.

ities (and perhaps post-Emancipation U.S. American white authorities in particular) tend to relate, albeit perhaps unconsciously, (e) to pets (such as dogs) as *obedient* slaves, and (f) to nonwhite humans (such as Black folks) as *rebellious* slaves who do not deserve the freedom of equality, as evidenced by their alleged tendency to abuse that freedom (to, as the saying goes, “go bad”).

There is another historical phenomenon which would logically follow from (e) and (f). During dangerous infestations, authorities tend to begin their eradication efforts by deploying members of what their people view as “lesser” “races” or species, to combat members of another species which are designated as “pests.” This, in contrast to the hypothetical alternative of beginning eradication with a one-on-one engagement between (g) the allegedly superior race or species, and (h) the allegedly inferior race or species (such as the use of an “exterminator”). Consider, for example, the use of cats during the bubonic plague to hunt mice and rats (rather than risking the exposure of humans to what are feared to be carriers of the plague).

In support of my linkage of “pest extermination” to drone warfare, drone advocate Richard Strawser, whom I noted above argues for a moral imperative to use drones rather than any alternative, uses the same rhetoric at the same moment when he comes closest to conceding the potential immorality of drones, in the context of his discussion of a quote from German political scientist Herfried Münkler. “It must be admitted,” Strawser writes, “that there does appear something ignoble or dishonorable in such a vision of warfare as ‘pest control’ that Münkler’s quote describes.”<sup>20</sup>

Turning from literal pests to groups of human beings described as “pests,” consider the Nazi practice during the Holocaust of recruiting Jewish people to coordinate the mass murders of other Jewish people, and sometimes forcing them to kill themselves (as in the practice of forcing them to trigger the gas in the gas chambers). The Nazis viewed the Jewish people (among others) as subhuman, and explicitly described them as “pests.” This also provides further evidence against

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<sup>20</sup> Strawser, 357. The quote in question is as follows: “To be sure, I do not deny that there is something fishy about attacking the defenseless. What is fishy about it might be captured very well in this passage: ‘The pilot of a fighter-bomber or the crew of a man-of-war from which the Tomahawk rockets are launched are beyond the reach of the enemy’s weapons. War has lost all features of the classical dual situation here and has approached, to put it cynically, certain forms of pest control.’” Moreover, in what is arguably the result of this “pest control” strategy of drone warfare, the discourse around drone ethics mutates. In its evolving rhetoric, the “pests” become, in addition, “prey.” The latter term is used liberally in Chamayou’s analysis of drone warfare, including his neologism, “enemy-prey.” Chamayou, 30-36.

the two alternatives to my interpretation of the Civil Rights example, because there can be no question that the Nazi authorities were willing and able to use “white” Germans to directly assault their victims, and with ruthless efficiency. Instead, as in the Civil Rights example, the “white” authorities preferred, if possible, not to risk their fellow white lives in committing anti-nonwhite violence.

For a third example, consider the world dramatized in Scorsese’s film *Gangs of New York*, in which anti-Irish racism was at its peak in the U.S., and the predominantly Anglo-Saxon authorities aggressively recruited Irish men as police officers for predominantly Irish neighborhoods. For a third time, white violence against the (then) nonwhite Irish was widespread; but for a third time, the white authorities preferred that the violence be done by other nonwhite folks, to protect their fellow white folks from a violent response.

For a final example of this phenomenon, consider U.S. soldiers fighting against Arab folks categorized as terrorists. Since the last use of involuntary military conscription (i.e., “the draft”), most U.S. military members seeing combat have been poor people of color; and the predominately white authorities tend to view such people (due to both classism and racism) as less valuable than their whiter and wealthier countrypeople (with the latter being far less likely, statistically, to serve in person-to-person combat).

#### IV. Supporting arguments for Premise 2

Recall the second premise of my argument, as follows:

2. If warfare between the drone and human combatants were just, then the drones would have to be equivalent in moral status to the humans; but this is not the case.

To repeat, the source of Premise 2 is the just war concept of moral equivalence of combatants (MEC). In the orthodox interpretation of MEC, however, this principle does not arise in drone warfare. The main point of MEC is supposed to be that even combatants fighting for a political state, the cause of which is unjust, cannot be held morally responsible for killing enemy combatants. But no one (to the best of my knowledge) claims that a drone has the capacity to bear responsibility, for anything. For this interpretation of MEC, whereas human combatants remain innocent regardless of their nation’s participation in unjust war, drones remain innocent, as it were, ontologically (as non-sentients).

Although I concede the latter point, it is an interesting question as to whether drone pilots are morally equivalent to those whom their drones kill. One reason to think them nonequivalent is that, as Walzer argues in a more general way, such moral equivalence derives from the risk to the human combatant's life and physical wellbeing. This is particularly true in modern warfare, he adds, since it entails compulsion to serve (whether through conscript or an internalized sense of patriotic obligation).<sup>21</sup> That is, the injustice of a human combatant's cause does not undermine the fact that they are coerced into risking life and limb. From this perspective, since drone pilots do not take a comparable risk, they might be reasonably held morally accountable for those killed by the drones they operate.

In fact, Walzer goes even further, implying at one point in *Just and Unjust Wars* that the moral equivalence does not derive from

humanity, for it is not the recognition of fellow men that explains the rules for war; criminals are men too. It is precisely the recognition of men who are not criminals.<sup>22</sup>

In other words, a human combatant in war who is also a criminal should be held morally responsible for their killing. Although this claim is problematic at several levels, in light of Foucault's famous analyses of the social construction of "the criminal," it does support my contention that humanity is *at least a necessary condition* (though, for Walzer, *not a sufficient condition*) for the applicability of MEC.

Further support in Walzer for my claim regarding drones and MEC can be found in his claim that there is a degree of free will in each human combatant which is rarely eliminable. "Their will is independent," Walzer writes, of human combatants "only within a limited sphere, and for the most part that sphere is narrow. But except in extreme cases, it never completely disappears."<sup>23</sup> And within that sphere of free will, Walzer concludes, "they are responsible for what they do."<sup>24</sup> Drones, by contrast, having no free will, can never experience responsibility. "Ought implies can," according to Kant, the founder of the deontological theory that is the historical basis for MEC. If Kant and his deontological descendants are right about this, then how could human and drone combatants possibly be morally equivalent?

<sup>21</sup> Walzer, xix, 28, 30.

<sup>22</sup> Ibid., 36.

<sup>23</sup> Ibid., 40.

<sup>24</sup> Ibid.

Finally on this note, Walzer's account of the history of MEC provides further support for my reinterpretation of it. "Initially," Walzer explains, MEC

was not based upon any notion of the equality of soldiers but upon the equality of sovereign states, which claimed for themselves the same right to fight (right to make war) that individual soldiers obviously possess.<sup>25</sup>

Having made this claim, however, Walzer immediately modifies it. MEC was first invoked,

rather on behalf of [states'] leaders, who, we were told, are never willful criminals, whatever the character of the wars they begin, but statesmen serving the national interest as best they can.<sup>26</sup>

That is, the original subjects of equality were neither ordinary human combatants, nor their respective states, but their leaders.

To connect the latter point to Premise 2 of my argument, there is no equivalence at the level of states, nor at the level of leaders (to address Walzer's two versions of his claim). At the state level, one entity (the U.S.) is a kind of cyborg entity (in Donna Haraway's sense: a human/machine hybrid), while the other entity (for example, Iraq) is a conventional, robot-less human state. And at the leader level, the drone state's leaders are engaged partially in nonhuman technological killing (using remotely – "piloted" drones), while the leaders of the drone-less state do not deploy machines without human pilots, who as such risk their physical wellbeing (such as "suicide bombers"). The contrasting cases of suicide bombers and drone pilots have evoked powerful, opposing moral intuitions from many, in the U.S and globally. On the one hand, many people – including many U.S. Americans – feel a species of admiration for the bombers' courage and feel contempt for drone pilots. By extension, moreover, many feel a similar contempt for the leaders of the U.S. as a drone-cyborg state.

## V. Supporting argument for my creative interpretations

I anticipate that the most common objection to my argument will be that it might appear, at least initially, to distort the meaning (or original mean-

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<sup>25</sup> Ibid.

<sup>26</sup> Ibid., 41.



ing, or intended meaning) of both MEC and proportionality. To address that concern, I first note that my creative reinterpretation of those doctrines is part of an attempt to promote justice through international law. For this reason, I will attempt to support it by turning to Ronald Dworkin, whom *The Guardian* praised as “the most original and powerful philosopher of law in the English-speaking world,” and who argues that adequate moral and legal reasoning requires such creative interpretation.<sup>27</sup> As I will show, Dworkin’s argument for the inherent and salutary creativity of interpretation lends further support to my overall strategy here, which is to reconceive MEC and proportionality in the context of drone warfare, such that those doctrines resound in harmony with both their original interpretations and contemporary intuitions of justice. In short, to use Dworkin’s words, “Moral responsibility is never complete; we are constantly reinterpreting our concepts as we use them.”<sup>28</sup>

In support of his creative conception of interpretation as creative, Dworkin argues that moral reasoning is necessarily circular. “We are always guilty of a kind of circularity,” he writes. “There is no way I can test the accuracy of my moral convictions except by deploying further moral convictions.”<sup>29</sup> The question, Dworkin continues, is not one of “accuracy,” involving a correspondence between moral claims and moral facts, but rather of “responsibility.”<sup>30</sup> The latter, in Dworkin’s sense, is a method of rational justification which undergirds one’s moral claims, in which one interprets each moral claim in the context of indefinitely many other moral claims. As a result, Dworkin concludes, “the epistemology of a morally responsible person is interpretive.”<sup>31</sup>

The centrality of interpretation in Dworkin’s view of moral reasoning, though surprising in a respected philosopher of the analytic/Anglo-American tradition, is less surprising when one considers that his background is in law. That is, a central feature of Anglo-American legal practice is the casuistic interpretation of common law, according to which legal reasoning consists of a self-consciously circular process, in which a historical people is correct to affirm a new thing as right quite simply because they have previously affirmed (relevantly) similar things as right in their past.

Dworkin further justifies the foundational importance of interpretation, in part, by referencing developmental psychology (citing Piag-

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<sup>27</sup> Godfrey Hodgson, “Ronald Dworkin Obituary,” *The Guardian*, February 14, 2013, <https://www.theguardian.com/law/2013/feb/14/ronald-dworkin>.

<sup>28</sup> Dworkin, 119.

<sup>29</sup> *Ibid.*, 100.

<sup>30</sup> *Ibid.*

<sup>31</sup> *Ibid.*, 101.

et, Kohlberg, and Gilligan in an endnote).<sup>32</sup> “As young children,” Dworkin begins, “we deploy mainly the idea of fairness, and then we deploy other, more sophisticated and pointed moral concepts: generosity, kindness, promise keeping, courage, rights, and duties.” Later, Dworkin continues, “we add political concepts to our repertoire.”<sup>33</sup> But the latter, too, are insufficient, because we finally, he concludes, “need much more detailed moral opinions when we actually confront a variety of moral challenges.”<sup>34</sup> And here, at the end of the lifespan narrative, interpretation takes its cue, and steps into the conceptual spotlight:

We form these [more detailed moral opinions] through interpretation of our abstract concepts that is mainly unreflective. We unreflectively interpret each in the light of the others. That is, interpretation knits values together. We are morally responsible to the degree that our various concrete interpretations achieve an overall integrity so that each supports the others in a network of value that we embrace authentically.<sup>35</sup>

Thus, for example, one interprets the concept of justice in terms of the concept of kindness, and further interprets both justice and kindness in terms of generosity, and so forth. Applied to drone warfare, Dworkin would have us interpret MEC and proportionality in terms of each other, of justice, and the rest of our axiological concepts. And that, albeit before reading Dworkin for the first time, is what I have been trying to do with my overall argument here.

Having thus justified the centrality of interpretation for Dworkin in moral reasoning, the reader might object that I have yet to clarify the exact meaning of the concept of interpretation in Dworkin. To begin, he describes it as “one of the two great domains of intellectual activity, standing as a full partner in science in an embracing dualism of the understanding.”<sup>36</sup> In other words, for Dworkin, there are two legitimate accesses to genuine knowledge. Interpretation is for the human dimensions of reality, and science is for reality’s non-human dimensions.

Second, he insists that “there is no such thing as interpreting in general.”<sup>37</sup> Instead, each interpretation takes place “in some particular

<sup>32</sup> Ibid., 449, note 6.

<sup>33</sup> Ibid., 101.

<sup>34</sup> Ibid.

<sup>35</sup> Ibid.

<sup>36</sup> Ibid., 123.

<sup>37</sup> Ibid., 124.

genre.”<sup>38</sup> On the one hand, across all genres, interpretation remains for Dworkin a truth-seeking endeavor. But on the other hand, the basis of this truth is not necessarily what Dworkin calls the “psychological state theory” of interpretive truth. According to the latter, it is a psychological state of an artifact’s creator which “makes an interpretive claim true.”<sup>39</sup> To clarify, he is not claiming that the psychological state theory is never true, just that it is not always or necessarily true; and this is, in part, a question of the abovementioned genre-specific nature of interpretation.

Dworkin then supports the latter claim by reference to legal interpretation, which he describes as having no room for the psychological state theory. “It is now widely thought preposterous among sophisticated lawyers,” Dworkin observes, “that the correct interpretation of a statute depends on the mental states of the legislators who enacted it.”<sup>40</sup> He then offers an example of the latter. “Many legislators,” Dworkin claims, “do not understand the statutes they vote on.”<sup>41</sup> Applying this point to drone warfare, it appears that the original meanings of MEC and proportionality are entirely irrelevant, at least when interpreted as part of a proposed statute for international law (as I am interpreting them here).

To get clearer on how this could be the case, it might be helpful to consider Dworkin’s three-“stage” account of interpretation. Each act of interpretation, according to this account, interprets the following three distinct and semiseparate things: (1) which genre a given artifact should be understood to inhabit, (2) the purposes of any artifact qua member of said genre, and (3) the degree of success of the given artifact relative to the purposes of said genre.<sup>42</sup> To be clear, Dworkin does not claim that this account constitutes “a psychological report of how” most interpreters consciously proceed in their interpreting.<sup>43</sup> Instead, he characterizes the account as a “reconstruction” of the intuitive reasoning process behind their judgments.<sup>44</sup> In other words, Dworkin’s interpretation of interpreting is a reinterpretation of interpreters’ acts of interpretation.

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<sup>38</sup> Ibid.

<sup>39</sup> Ibid., 129.

<sup>40</sup> Ibid.

<sup>41</sup> Ibid.

<sup>42</sup> Ibid., 131.

<sup>43</sup> Ibid., 132.

<sup>44</sup> Ibid.

To move this back toward the legality of drone warfare, I note that Dworkin chooses legal interpretation as his first example of stage (2) of interpretation. He justifies this choice on the grounds that legal interpretation is particularly straightforward and well-established. “Statutory interpretation,” Dworkin writes, “aims to make the government of the pertinent community fairer, wiser, and more just.”<sup>45</sup> He then relates this example to stage (1) of interpretation, by noting that statutory interpretation “forces upon [U.S.] American lawyers, at least, further and more general questions of democratic theory.”<sup>46</sup> And these “more general questions,” he concludes, lead in turn to “still further questions” regarding “political and moral theory.”<sup>47</sup>

Arriving back at my drone examples of MEC and proportionality, the latter are present in statutory law as components of just war theory, which is foundational for much international law. As such, according to Dworkin, MEC and proportionality should be (a) interpreted (qua statutory laws) in such a way that they make international government fairer, wiser, and more just, which (b) can be expected to require rethinking contemporary notions of politics, democracy, and morality. This is precisely the undertaking of my own argument, in part by implicitly (c) redefining “democracy” as “the rule of humans alone (and not drones),” (d) rethinking political justice as the confrontation of ontological equals (living beings vs. living beings), and (e) extending and refining morality in light of drone technology.

Further support for my argument can be found in Dworkin’s division of all interpretation into three types, which he terms “collaborative,” “explanatory” and “conceptual.”<sup>48</sup> First, collaborative interpretation attempts to “work with” (which is the literal translation of the word “collaborate”) an assumed author or originator, to help realize the originator’s intended meaning. Second, explanatory interpretation “presupposes that an event has some particular significance for the audience the interpreter addresses.”<sup>49</sup> And finally, conceptual interpretation aims for a truth which is “created and recreated not by single authors but by the community whose concept it is, a community that includes the interpreter as a creator as well.”<sup>50</sup>

Dworkin initially claims that all legal interpretation is necessarily collaborative. Later, though, he concedes that at least one school of legal

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<sup>45</sup> Ibid., 133.

<sup>46</sup> Ibid.

<sup>47</sup> Ibid.

<sup>48</sup> Ibid., 134.

<sup>49</sup> Ibid., 136.

<sup>50</sup> Ibid.

interpretation is better understood as explanatory, namely critical legal studies (CLS).<sup>51</sup> Dworkin's prime example of explanatory interpretation is the business of historians, which choice of example gives Dworkin's reader a clue as to what makes CLS special. To wit, it reweaves the practice of law into its actual historical fabric, in which the law is revealed to be as dirty and complex as any other ancient human institution in that fabric. As for conceptual interpretation, Dworkin's only example is the discipline of philosophy. Although this three-part system is arguably inaccurate (in that it forces discourses into mutually exclusive categories, despite their actual overlap), if one assumes its accuracy for the sake of argument, there still remain close affinities among legal, historical and philosophical interpretation.

Still further support for my argument can be found in Dworkin's classification of the relationship that obtains among any two interpretations. These relationships, he classifies (again with what is arguably a Kantian Trinitarian compulsivity) as "independent," "complementary" or "competitive."<sup>52</sup> If interpretations X and Y are "independent," then the truth of each is irrelevant to the other. If X and Y are, instead, complementary, then the truth of each buttresses the truth of the other. And if X and Y are competitive, then each is truer to the degree that the other is falsier.

Applied to my creative reinterpretations of MEC and proportionality, I would argue that they (X) are complementary to the older, more orthodox interpretations of those two doctrines (Y). As such, one need not choose between mine and the originals. On the contrary, accepting the originals should give one greater reason to affirm mine, and vice versa. My reasoning here is similar to that behind Dworkin's argument for the complementarity of traditional legal interpretation and CLS interpretation.

Before presenting the latter argument, I will first summarize Dworkin's insightful discussion of what he calls an "interpretive school." Dworkin defines an interpretive school as a group constituted by "a shared interpretation of the point of the larger practice a group of interpreters take themselves to have joined."<sup>53</sup> For example, traditional Marxian literary critics view literary criticism as a practice which is ethically and politically obligated to facilitate proletarian revolution. The basis of these interpretive schools, in other words, is the schools' interpreters' interpretation of their responsibility qua interpreters of a particular genre. Or, in Dworkin's words, what ties these interpretive schools and differentiates them (respec-

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<sup>51</sup> Ibid., 144.

<sup>52</sup> Ibid., 139.

<sup>53</sup> Ibid., 141.

tively) is “the shared assumption of responsibility to a practice together with different assumptions about what that responsibility now demands.”<sup>54</sup>

Dworkin’s example of the latter, differentiating assumptions, is the abovementioned example of CLS, which is also ideally suited for my argument against drone warfare. “In recent years,” Dworkin relates, “in universities and particularly in law schools, a variety of self-styled ‘critical’ schools of interpretation have flourished and waned,” and the members of these schools refer to themselves as “Crits.”<sup>55</sup> Though Dworkin was infamously hostile to CLS in his earlier work, here in his later book, *Justice for Hedgehogs*, Dworkin opts for a quite charitable criticism. Provided one understands CLS as “explanatory” (rather than “collaborative”) interpretation, he begins, “There is no reason why critical legal studies” should

think itself competitive with conventional collaborative interpretation that aims to improve the law by imposing some greater degree of integrity and principle on doctrine whose causal roots may have been what the Crits claim they were.<sup>56</sup>

With the latter phrase, Dworkin is referring to his summary of the CLS view, earlier in this text. Legal doctrines, he claims of CLS, amount to “powerful groups pursuing their own interests rather than the impact of moral and political principle.”<sup>57</sup>

To connect this back to my argument, its unorthodox reinterpretations of MEC and proportionality are informed by influences on my thinking which overlap significantly with CLS (including critical race theory and feminist theory). As such, those reinterpretations would presumably receive Dworkin’s blessing, insofar as they are “complementary” with the more orthodox definitions. After all, it was those orthodox interpretations which initially inspired my unorthodox ones – and this is almost always the case.

For an example of the latter truth, consider Dworkin’s own reinterpretation, a few pages later, of his famous mentor Willard Van Orman Quine’s interpretation of “radical translation.”<sup>58</sup> Dworkin argues that

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<sup>54</sup> Ibid., 142.

<sup>55</sup> Ibid., 143.

<sup>56</sup> Ibid., 144.

<sup>57</sup> Ibid.

<sup>58</sup> Ibid., 148. For my own reinterpretation of Quine and his radical translation, which is more-over sympathetic to Dworkin’s, see Joshua M. Hall, “Logical Theatrics, or Floes on Flows: Translating Quine with the Shins,” *European Journal of Pragmatism and American Philosophy* 8, no. 2 (2017): 1-19.

Quine's concept of radical translation consists of "a kind of collaborative interpretation" between Quine's imaginary (and problematically christened) "native informant" and "jungle linguist."<sup>59</sup> Moreover, Dworkin presents his interpretation of Quine's interpretation of interpretation (i.e., "translation") as "complementary" to Dworkin's interpretation of Quine's interpretation, and thus does not require the reader to choose between Dworkin and Quine. Put in these terms, I have attempted to radically translate MEC and proportionality, but in a way that is collaborative with their original, now orthodox interpretations.

## VI. Conclusion

To recap, I have argued for the immorality of contemporary asymmetric drone warfare, on the basis of new interpretations of MEC and proportionality (according to which only human combatants can kill each other), and on that basis join Van der Linden (among others) in calling for an explicit international law outlawing drone warfare. The justifications for my conclusion are that (1) only ontologically equal combatants are morally exonerated from killing each other (*from MEC*), and (2) the most-valued beings in a society (in our case, human animals) may not be killed with moral justification by less-valued beings in a society (in our case, drones) (*from proportionality*). The need for such creative reinterpretations, I have illustrated by exploring Walzer's deepening of MEC and his radical critique of proportionality. Finally, the legitimacy of my reinterpretations is buttressed by Dworkin's conception of interpretation in general, and of legal interpretation in particular, as an inherently and admirably creative form of reasoning in pursuit of justice.

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<sup>59</sup> Dworkin, 148.



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