

Excessive Force in War: A "Golden Rule" Test

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The use of excessive force in war is an all-too-familiar phenomenon that resists an obvious philosophical solution. A principle that prohibits disproportionate use of force is commonly recognized. Yet I argue that an adequate proportionality principle is more difficult to formulate than may appear. There are too many morally relevant considerations to be weighed — especially harms to combatants versus noncombatants, depending on which side they are on — and we have no clear idea how to weigh them. These difficulties are avoided through the dominant understanding of proportionality codified in international law and military practice, which rules out only attacks that intentionally target civilians or that involve negligence in targeting or conduct. We should find it harder to deny that use of force can be excessive despite conforming to these narrow constraints. Specifically, we can clearly identify as excessive the use of force in pursuit of unjust goals. This will still leave a range of hard cases in which there is a just cause for war. For these cases, I propose a "golden rule" test of the sincerity of deliberation about whether a use of force would be excessive. Relying on narrow constraints that would govern use of force in war can be morally worse than not having them. The golden rule test can help to

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direct us toward broader, reasonable moral considerations regarding excessive force.

I. THE LIMITS OF THE PROBLEM

War involves the pursuit of national or humanitarian goals through fighting that typically injures or kills large numbers of people. Use of force might seem unavoidably excessive in war, since achieving the goals is the priority and the fighting usually will harm innocent persons, among others. On the other hand, use of force might not seem excessive if the fighting is necessary to achieve the goals, despite the harm to innocent persons.

A natural response is to formulate constraints on conduct in war that acknowledge the realities of fighting and seek to limit the destructiveness. For example, international law and common philosophical treatments of just war recognize a principle that prohibits the disproportionate use of force.¹ Yet an adequate proportionality principle is more difficult to formulate than may appear. What are the relevant considerations to be weighed: harm to combatants, noncombatants, the natural environment, civilian infrastructure, cultural artifacts? How much weight is each consideration to be allocated relative to the others? Does the justice or injustice of the cause on each side matter? A comprehensive approach to these questions seems so elusive and contested that a proportionality principle might provide little practical guidance in war.

Some moral rationales for limiting the use of force have self-consciously avoided the language of proportionality. Article 51 (5)(b) of the 1977 Geneva Protocol I rules out attacks "which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated."² As one commentator has observed, this "use of the term 'excessive,' rather than 'proportional,' in relation to civilian casualties was in response to strong objections by several states that

1 See, e.g., Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, *opened for signature* Dec. 12, 1977, art. 35, 1125 UNTS 3, 21, 16 I.L.M. 1391, 1408 [hereinafter Protocol I], *reprinted in* Documents on the Laws of War 419, 442 (Adam Roberts & Richard Guelff eds., 3rd ed. 2000) [hereinafter Documents]; See also Michael Walzer, *Just and Unjust Wars* 129-30 (3rd ed. 1977).

2 Protocol I, *supra* note 1, art. 51(5)(b), 1125 UNTS at 26, 16 I.L.M. at 1413, *reprinted in* Documents, *supra* note 1, at 449.

the concept of proportionality was contrary to humanitarian principles and international law."³ The standard proportionality principle would balance the expected good consequences with the expected bad consequences of a war. This may too readily imply the permissibility of undertaking actions that cause (though not intentionally) casualties to innocent persons when the good consequences overall exceed the bad.

What is being sought is an excessive force principle that is more basic, in moral terms, than a proportionality principle. The rule stated in Article 51, however, seems ambiguous on this front. It makes a relational claim — loss of civilian life could still be weighed against the military advantage anticipated — that permits the very judgments of proportionality that use of the term "excessive" was intended to avoid. In contrast, I propose that some cases of excessive force can be identified on grounds that do not involve a relational claim that balances harms against gains.

My view should be distinguished from two schools of thought that are thoroughly skeptical about the philosophical depth of the problem of excessive force in war. On one side are pacifists, who doubt that just wars can be fought.⁴ For pacifists, the injuring and killing that goes on in war is bound to be excessive, since the victims almost always include many morally innocent persons, whether combatants or noncombatants. This is a morally uncomplicated reason why war may be perceived as impermissible. On the other side are political realists, who doubt that war ultimately can be constrained by moral principles, though warring parties may agree for mutual benefit (namely, to limit their losses) to observe certain rules of conduct in war.⁵ For realists, there is no objective or even reasonable moral point of view according to which actions that might significantly contribute to victory can be judged as excessive, since war is fundamentally an exercise in pursuit of national interest and falls outside the scope of morality.

While I reject pacifist and realist approaches to thinking about war, space does not allow me to elaborate here. I will assume that there can be just causes for war and just conduct in war — in other words, that war can be morally permissible and that its conduct does not fall outside the scope of morality. This is a defining feature of just war theory. My approach,

3 Judith Gail Gardam, *Proportionality and Force in International Law*, 87 Am. J. Int'l L. 406 (1993).

4 See, e.g., Cheyney C. Ryan, *Self-Defense, Pacifism, and the Possibility of Killing*, 93 Ethics 508 (1983); Jenny Teichman, *Pacifism and the Just War* (1986).

5 For a classic view of political realism about war, see Karl von Clausewitz, *On War* (Michael Howard & Peter Paret eds. & trans., Knopf 1993) (1832).

however, is different in important respects from common versions of the theory.⁶

The common view in just war theory holds that ordinary noncombatants are innocent and combatants are *non-innocent*. These descriptions simply attach to the roles of noncombatants and combatants in war, without implying any moral judgment of their conduct. This is because the common view maintains that the relevant notion of "innocence" in war is material innocence, that is, not doing or threatening harm.⁷ Since ordinary noncombatants do not immediately harm anyone, they are supposed to be off-limits to attack — a claim that is marked by designating them innocent. Yet the claim that currently harmless persons should not be attacked does not need to appeal to their innocence; they might be noncombatants or apprehended war criminals. In fact, such an appeal distorts our familiar understanding of innocence by emptying it of any moral content, which in turn distorts the moral dimensions of just war theory.

In my revisionist account of just war theory, moral innocence plays a central role in assessing permissible conduct in war.⁸ Persons are innocent in the relevant sense if they bear no moral responsibility for wrongdoing through war; they are otherwise non-innocent to some degree. Material non-innocence alone does not determine who can legitimately be attacked in war. Generally, combatants remain moral agents. They may be morally innocent or partially non-innocent. Just combatants are morally innocent in that they fight for a just cause or against an unjust cause, using just means. Most unjust combatants will be partially non-innocent in that they bear partial moral responsibility for fighting for an unjust cause. Legal obligation, a sense of patriotic duty, or physical coercion to serve, along with ignorance or delusion about the cause for which their side is fighting, can help to explain why soldiers choose to fight. Such considerations mitigate but do not necessarily negate moral responsibility. Unjust combatants have no moral right to attack just combatants, even in self-defense; they have insufficient moral grounds for fighting in the first place. Persons, including combatants, do not lose their moral immunity to attack merely by virtue of being a threat to agents of unjust aggression.

6 See, e.g., Walzer, *supra* note 1; Paul Ramsey, *The Just War: Force and Political Responsibility* (1983).

7 See, e.g., Thomas Nagel, *War and Massacre*, in *International Ethics* 53, 69-70 (Charles R. Beitz et al. eds., 1985); Walzer, *supra* note 1, at 146.

8 I defend this account at length in Lionel K. McPherson, *Innocence and Responsibility in War*, 34 *Can. J. Phil.* 485 (2004); See also Jeff McMahan, *Innocence, Self-Defense and Killing in War*, 2 *J. Pol. Phil.* 193 (1994).

By contrast, as we have seen, the common view in just war theory focuses on material non-innocence. Combatants as a class are supposed to be equally non-innocent, whether they serve a just or an unjust cause. This alleged battlefield equality gives them an "equal right to kill."⁹ But they are to observe the rules of war. The rules that comprise "the war convention," as Michael Walzer characterizes it, derive roughly from the following principles: (1) combatants are legitimate targets in war, and noncombatants never are; (2) disproportionate use of force is prohibited; and (3) the use of violence that violates human rights (e.g., rape) is prohibited.¹⁰ In sum, the common view recognizes a sharp distinction between *jus ad bellum*, or justice of war, and *jus in bello*, or justice in war. Ordinary combatants bear moral responsibility for their conduct only at the level of justice in war, not at the level of justice of war.

I have argued elsewhere that this "two-level" account of the moral responsibility of combatants is morally implausible.¹¹ The common view holds that soldiers cannot be expected to evaluate whether the cause on their side is just: given the epistemological and moral uncertainties surrounding the justice of a war, soldiers should defer to the legitimate authority of their governments. Moral responsibility for the justice of a war, then, is said to rest properly with political leaders. Soldiers are expected only to act in accordance with the rules of war. This means that the common view recognizes that soldiers retain some responsibility to make decisions and are not mere pawns who must always follow orders: when orders given by superior officers would violate the rules of war, soldiers have a legal/moral obligation to disobey them.¹² The problem with this two-level account is that the situation of soldiers with respect to knowledge and authority may not be much better regarding justice in war than justice of war. Orders by superior officers are strongly presumed by subordinate soldiers to be lawful, even or especially when there is a *prima facie* reason to believe that the orders may not be lawful. How the rules of war should apply in practice is often not obvious from a battlefield perspective.

If soldiers can bear moral responsibility for their conduct in war, despite the challenging conditions under which they fight, there seems no morally consistent basis for denying that they also can bear moral responsibility for serving an unjust cause. This does not mean they are morally blameworthy

9 Walzer, *supra* note 1, at 41.

10 See, e.g., *id.* at 127-37; See also Brian Orend, Michael Walzer on War and Violence 110-11 (2000).

11 See McPherson, *supra* note 8.

12 See, e.g., Walzer, *supra* note 1, at 39.

whenever they fail to recognize that the cause on their side is unjust. Since the common view claims that soldiers are never morally responsible for fighting, it is enough to support my revisionist account that reasonable persons could recognize in advance when some wars are unjust (e.g., wars of expansionist aggression). Such wars represent the strongest case for finding unjust combatants morally non-innocent and blameworthy for fighting for an unjust cause.

The main arguments in this paper, though, do not rely heavily on my broader, revisionist approach to just war theory. At least three reasons clearly sustain judgments that use of force through war would be excessive, apart from considerations of proportionality. Only the first reason rests on a revisionist account of just war theory; the other two are in line with the common view. These reasons together show why we might take the philosophical problem of assessing proportionality to be limited.

First, resort to war may be simply impermissible. A just cause for war is a goal, or a set of goals, that makes it permissible to resort to war if other conditions are satisfied.¹³ When a state or a non-state group has no just cause for war, there can be no moral justification for fighting for the unjust side. At most, unjust combatants will have an excuse for inflicting casualties on just combatants and innocent civilians. Use of force on the basis of an unjust cause for war, therefore, necessarily will be excessive.

Second, use of force through war may be unnecessary to achieve a morally legitimate goal. Less destructive means than war may be available. An example of this possibility is the U.S. and British-led 2003 Iraq War, which had the professed goal of eliminating Saddam Hussein's alleged weapons of mass destruction. Sanctions, diplomacy and weapons inspections apparently were instrumental in neutralizing the threat. When such non-military means could be employed without serious and likely risk of consequences worse than war, the harms done in war are gratuitous. In short, use of force through an unnecessary war is excessive. The just war principle of last resort, which requires that reasonable alternatives be exhausted in pursuit of a just cause before war is permissible, is by definition violated in cases of unnecessary war.¹⁴

Third, use of force may well be necessary to achieve proximate legitimate goals yet not efficacious in helping to achieve ultimate just goals. Use of force

13 See Jeff McMahan & Robert McKim, *The Just War and the Gulf War*, 23 *Can. J. Phil.* 502 (1993).

14 For criticism and a helpful revision of the traditional last resort principle, see *id.* at 523-24.

then becomes gratuitous. Take the Israeli tactic of bomb and missile strikes on suspected Palestinian militants in the Occupied Territories, and the militant Palestinian tactic of raiding Israeli settlements in the Occupied Territories. Let's assume that Israel intends to reduce the number of Palestinian attacks inside Israel, and that the Palestinians intend to reduce the presence of Israeli settlements and settlers. Neither a reduction of casualties nor a decent settlement of the Israeli-Palestinian conflict has been brought any closer to realization by either side's tactics. Use of force through war or particular acts in war is excessive when, despite the proximate credentials of using force, the harms cannot be justified with respect to a decent resolution.¹⁵

The second and third reasons for judging that use of force would be excessive, considerations of proportionality aside, should be compelling to anyone who accepts a version of just war theory.¹⁶ I recognize that the first reason, which depends on a revisionist account of just war theory, is controversial. Yet the three reasons share a common feature: each operates at the level of justice of war (the third also operates at the level of justice in war). Their operation at this level moves us away from the standard perspective of viewing excessive force exclusively in terms of actions undertaken when a war is already being fought. Instead, the three reasons point to constraints that seem more basic morally than considerations of proportionality. These three reasons together support my claim that the problem of excessive force in war is more limited than we might have thought.

There remains a range of possible cases of use of force in war that cannot be ruled out on grounds of any of the reasons I have discussed. Such cases arise when the force used may appear to be excessive by some humanitarian or human rights standard — e.g., many innocent civilians would die — despite the fact that there is a just cause for war and the means employed might succeed in achieving the ultimate, morally legitimate goals

15 Within the present moral framework, I take the legitimate purpose of fighting to be defense of a state or a people against unjust aggression or defense of basic human rights; *see, e.g.*, John Rawls, *The Law of Peoples* 91-92 (1999). This is in contrast, without prejudice from my perspective, to a protest or an expressive function of violence, such as the attempt to manifest or to recover respect or identity as a group or a person; *see, e.g.*, Frantz Fanon, *The Wretched of the Earth* (Constance Farrington trans., 1963).

16 These two types of reasons are sometimes seen in criminal law as part of the doctrine of proportionality. Namely, in determining whether an act is proportionate, we must examine whether less destructive means are available (whether the act in question infringes on rights as minimally as possible), and whether the act is efficacious in helping to achieve the desired goal (whether the means adopted are rationally connected to the objective). *See, e.g.*, *R. v. Oakes*, [1986] 1 S.C.R. 103, 139 (Can.).

being sought. Here relational judgments balancing harms and benefits seem unavoidable.

Consider high-altitude bombing of military targets that are located in areas densely populated with civilians. Although the morally salient factors are fairly evident, they raise unwieldy issues regarding excessive force. Could an attack different in means or targets be less harmful and still no less efficacious in securing a just victory? Under one interpretation of this question, the answer would require comparing the sum of harms caused to all persons involved with the sum of harms caused through alternative courses of action. Under other interpretations, all harms are not equal. Harms to civilians, for example, might be thought worse than harms to combatants; or harms to combatants on the side of the just cause might be thought worse than harms on the opposing side, even to civilians. While deliberate harm to civilians is often considered worse than unintentional harm, unintentional harm to innocent civilians is also bad. What number, then, of unintentional or "collateral" civilian casualties might render the attack impermissible? To answer this question, an assessment of the stakes in terms of justice would seem to be necessary.

International law appears to call for judgments of proportionality that are supposed to help us sort through such issues. I have suggested that asking what counts as disproportionate will not get us far. Yet recall Article 51 (5)(b) of the 1977 Geneva Protocol I, which prohibits attacks that can be expected to cause civilian casualties "excessive in relation to the concrete and direct military advantage anticipated."¹⁷ A striking feature of this rule is that it has been understood to sanction judgments of proportionality that are not difficult to make. The rule's guidelines are nearly implied by the very recognition of moral constraints in war. According to Judith Gail Gardam,

[Article 51] clearly requires that proportionality be assessed from various perspectives before an attack is launched. First, proportionality is a factor in the selection of the target. If civilian losses are inevitable, because of either the intermingling of civilian and military targets or the dual character of the target itself, these must be balanced against the military advantage. Second, the means and methods of attack must be assessed. Some weapons are more likely to involve indiscriminate damage than others.¹⁸

17 Protocol I, *supra* note 1, art. 51(5)(b), 1125 UNTS at 26, 16 I.L.M. at 1413, *reprinted in Documents, supra* note 1, at 449.

18 Gardam, *supra* note 3, at 407.

The catch is that Article 51 allows leeway for attacks that cause unintentional civilian casualties, which shifts the burden of proof about what is excessive onto advocates of greater caution. Indeed, the difficulty of specifying when a particular attack would be disproportionate favors military license, for the military will be inclined to protect its interests and has the power to do so. There is no determinate, less permissive interpretation of the proportionality framework on hand in cases that do not already seem obvious. Gardam concludes,

In the final analysis, it appears that the interpretation by the United States and its allies of their legal obligations concerning the prevention of collateral casualties and the concept of proportionality comprehends prohibiting only two types of attacks: first, those that intentionally target civilians; and second, those that involve negligent behavior in ascertaining the nature of a target or the conduct of the attack itself...¹⁹

This conclusion is indirectly substantiated by Major General James M. Dubik of the U.S. Army. He claims that "commanders are morally responsible not to waste lives of their soldiers because they are charged to protect soldiers' right to life."²⁰ Put this way, the claim is undeniable: no person's life should be wasted. Dubik goes on to argue that "Commanders are expected to balance, simultaneously, their responsibility to ensure due care is afforded to civilians with their responsibility to ensure due risk is required of their soldiers."²¹ Given the special duty that he believes commanders have to protect the lives of their soldiers, a narrow understanding of proportionality comes as no surprise.

So the Article 51 rule in effect recognizes absolute, though quite limited, constraints on conduct in war. This exists in tension with the moral concern that would seem to underlie proportionality restrictions, namely, a desire to minimize harms, especially among civilians. Use of force presumably can be excessive in war despite satisfying constraints that would prohibit intentional targeting of civilians or negligent behavior. The sheer number of casualties among innocent persons, whether unintended or not, should influence our moral assessment of whether conduct in war involves use of excessive force, and should do so in a forward-looking way that could proscribe certain courses of action.

Perhaps we could expect that the military's appeal to a proportionality

¹⁹ *Id.* at 410.

²⁰ James M. Dubik, *Human Rights, Command Responsibility, and Walzer's Just War Theory*, 11 *Phil. Pub. Aff.* 354, 368 (1982).

²¹ *Id.*

principle would be biased. The complex and adversarial nature of violent conflict seems to bring with it a substantial element of subjectivity that is likely to cloud judgments about what counts as excessive force. Nevertheless, it is possible to keep this subjectivity roughly in check. Even if adherents to common just war theory or to prevailing practice do not accept how I have set the limits of the problem, the merits of my approach to deliberating about a permissible balance of harms versus gains in the use of force can be considered on independent grounds.

II. THE GOLDEN RULE TEST

I propose a "golden rule" test for thinking about excessive force. The test would have us ask the following question: Could we legitimately be subjected, under similar circumstances, to a use of force comparable in its effects to the use of force that we are prepared to employ against other people? Of course, ordinary civilians typically are not in a position to make or affect specific decisions about use of force once a war is being fought. Since these decisions belong to political and military leaders, the test actually would be for them. In the spirit of democratic deliberation and the shared responsibility accompanying it, however, I will proceed as if decisions about use of force in war belonged to the citizens as a whole.

This golden rule test requires both explanation and defense. The point of the test is not to determine whether a use of force would in fact be legitimate. "Objective" judgments would depend on considerations that govern justice of war and justice in war, and I have expressed skepticism about whether any proportionality principle would enable us to make objective judgments. Rather, the point is to make perspicuous the sincerity of deliberation, in hard cases, about whether a use of force would be excessive. Eliminating inconsistency or hypocrisy in deliberation could lead us to be more careful about how we use force and, thus, possibly help to minimize harms.

To be clear, I am not denying that there can be reasonable moral judgments about what would constitute excessive or disproportionate force in war. I am denying that there is an adequate general principle for making these judgments in hard cases — that is, with regard to the number or kinds of casualties, the broader costs of using force and the appropriateness of targets, when there is a just cause. Evaluating whether a use of force is excessive will involve judgment about its moral permissibility in light of the surrounding circumstances and its effects. The golden rule test is meant as a guide for helping in this process. The test will not necessarily direct us toward the moral truth. Yet, assuming that we have a decent sense of

how others should treat us — for instance, we would insist that the Geneva Conventions apply to our prisoners of war — the test would suggest credible constraints on how we think about treating others.

The golden rule does not get much respect in normative ethics. Kantians, for example, want a principle on the basis of which we could make objective moral judgments. So they are anxious to distinguish the categorical imperative from the golden rule. The most prominent formulation of Kant's categorical imperative is the formula of universal law: "Act only according to that maxim whereby you can at the same time will that it should become a universal law."²² Contrast this with the biblical formulation of the golden rule: Do unto others as you would have them do unto you. The essential difference for the Kantian is that the golden rule could set standards of conduct that are radically subjective.

Let's say I am disposed to take a serious, if fairly unlikely, risk in pursuit of a moderate benefit. Further, suppose I would subject others to such a risk; and I would accept, as a condition of my pursuit, them subjecting me to such a risk for their benefit. This application of the golden rule does meet a familiar standard of fairness: I am prepared to treat others as I am prepared to have them treat me. But the nature of the treatment seems objectionable, since imposing a serious, even if fairly unlikely, risk for the sake of a moderate benefit might be unreasonable. That I am a risk taker does not set a reasonable standard for my treatment of other people, who reasonably may not accept such a risk. To put this in Kantian terms, I could not rationally will the maxim, "Accept a serious, yet fairly unlikely, risk for the sake of a moderate benefit" as a universal law, since other people could rationally find the maxim unreasonable. The Kantian universalization test is not radically subjective about the content of morality.

The difficulty in using a universalization test is that trying to determine what counts as excessive force in war resists credible moral generalization in hard cases. There are too many factors regarding the comparative value of persons, things and goals, and we have no clear idea how to weigh them. Further, our information about the circumstances and estimates of the effects of an attack might be mistaken. Finally, there is the influence of hostile or callous feelings toward the enemy side. Perhaps the best we can do is to approach the issue of excessive force in war with sincerity in deliberation — by trying to make sure that we would not impose burdens on others that we ourselves would not accept if others would impose similar burdens on

22 Immanuel Kant, *Grounding for the Metaphysics of Morals* 30 (James W. Ellington trans., Hackett 3rd ed. 1993) (1785).

us. This can have substantial ramifications for the stability and consistency of our forward-looking judgments about excessive force. My focus is on formulating an approach for guiding conduct in war, not on morally or legally assessing this conduct after the fact.²³ I therefore set questions of culpability and excuse aside.

The golden rule urges us to take the victims' perspective. If we adopt the potential victims' perspective of use of force through war, we can expect to be more careful in our judgments both about when it is legitimate to use force at all and about how much force it is legitimate to use under the circumstances. The idea is not that the victims' perspective is somehow morally privileged. While no one wants to be a victim, this obviously does not mean that use of force would always be impermissible. We might equally say that before victims object to a use of force, they should imagine whether they would consider it morally permissible if they were on our (force-using) end. But the idea of taking the victims' perspective is simply intended to compel us explicitly to examine our possible actions at some distance from our goals. If we ignore this perspective, the potential for abuse in our use of force is surely greater. We are likely to overestimate the benefits and necessity of using force and to underestimate the costs to persons who would be the victims. An example is the U.S. military's conduct under permissive "rules of engagement" in Iraq, which has resulted in thousands of civilian deaths that have been met largely with indifference by the American public and mainstream media.²⁴ I assume that Americans would never tolerate such conduct if they seriously contemplated being among its victims.

More fundamentally, my emphasis on sincerity through the golden rule might seem empty, since in hard cases of use of force we are assuming deliberation in good faith. Yet I take sincerity in deliberation to be a normative and not merely a psychological constraint that can steer us away from principles that are particularly liable to dubious application. Article 51(5)(b) of the 1977 Geneva Protocol I, we have seen, has been interpreted to rule out only attacks that intentionally target civilians or that involve negligence in targeting or conduct. We should find it harder than this to deny

23 For an account of the legal doctrine of self-defense, see Joshua Dressler, *Understanding Criminal Law* 221-22 (3rd ed. 2001).

24 See, e.g., Iraq Body Count, *A Dossier of Civilian Casualties in Iraq 2003-2005*, available at <http://www.iraqbodycount.net> (last visited July 28, 2005). As of this date, the Iraq Body Count reports that U.S.-led forces killed 37% of approximately 25,000 civilian victims, compared to 9% killed by anti-occupation forces/insurgents and 36% killed through post-invasion criminal violence. The U.S. has stated that "We don't do body counts" of Iraqi civilians.

what seems true: use of force can be excessive despite conforming to these narrow constraints. The dominant, narrow understanding of proportionality is disturbing precisely because it would enable use of excessive force, for example, by giving no essential consideration to collateral casualties. The golden rule test may not be able to tell us whether a use of force would be morally permissible. But it prompts us to question whether we have brought the full range of relevant moral considerations to bear on deliberation about our conduct in war, even if they cannot be captured by some general principle.

There are more serious drawbacks to a golden rule test that must be addressed. Our practical capacity for informed and impartial deliberation about counterfactual situations that are far from our own experience may be limited. This problem will be exacerbated if we are on the side of greater military power, if we are socially or economically privileged, or if we have weak connections to communities or individuals that tend to be associated with targeted behavior (e.g., terrorism). The sincerity of our deliberation is threatened to the extent that we are or feel less vulnerable to being subjected to use of excessive force.

It might be tempting to employ a formal mechanism — similar to Rawls' "veil of ignorance"²⁵ — for dealing with this problem. In developing a reasonable, workable principle that would specify what counts as use of excessive force, the parties would be deprived of knowledge that could bias their choice of a principle. This knowledge would include, at the level of states, the relative military strength of their peoples and, at the level of individuals, their economic and social status.

A mechanism like the veil of ignorance, however, is not much of a solution here. The problem is not about choosing a principle to govern the use of force. Rather, the problem involves the sincerity of deliberation about use of force, namely, in the absence of a general principle that can yield judgments in hard cases. In fact, Rawls' veil of ignorance presupposes our ability to deliberate without regard to our own circumstances. The parties in "the original position" for choosing principles of justice recognize their susceptibility to bias and thus commit themselves to choosing under a mechanism that would exclude the influence of considerations that might bias their choice. The challenge in the case of excessive force is that the judgments must be made under the particular circumstances of war, a scenario where the potential for bias is greater given the immediacy and

25 See, e.g., John Rawls, *A Theory of Justice* 16-17, 118-19 (rev. ed. 1999); See also Rawls, *supra* note 15, at 30-33.

urgency of the stakes and the breakdown of any common aim to seek mutually acceptable, peaceful terms of cooperation. The kind of impartiality envisaged by a veil of ignorance will be especially difficult to come by during war, which is virtually an exercise in partiality.

When conditions of considerable advantage are at work for us in war, we may be much more willing to imagine that we are behind a veil of ignorance, and we would agree to be subjected to a use of force that otherwise may seem excessive. For instance, the authorities might believe that, by torturing you, they could learn information that would prevent the deaths of innocent people. Your attitude toward this case — your claimed willingness to be subjected to such treatment — may be more a reflection of your confidence that you would never be subjected to such treatment than a reflection of your moral commitments, e.g., an obligation to accept personal sacrifice for the sake of the greater social good. Our tendency when we are in a position of considerable advantage will be to identify with the possible benefits to ourselves and others for whom we have special concern and to dissociate from the costs to persons likely to bear the burdens of use of force. Realistic and principled engagement with a counterfactual scenario may be hard to realize.

Even if we believe in some instances that we can make a reasonable judgment of the proportionate harms in relation to anticipated military gains, our job is not done. We must factor in the probability of success, which seems crucial to judgments about whether a use of force would be excessive. In addition, this estimation of probability interacts with the magnitude of the legitimate gains anticipated: presumably, if relatively less is at stake, the probability of success must be greater; if relatively more is at stake, the probability of success need not be as great.

We can see again, though, susceptibility to bias when we place ourselves on the side of those using the force in question. For example, after defending strict observance of the rules of war, Walzer recognizes an exception for "supreme emergency." He argues that in comparing a "determinate crime" in war, such as the deliberate killing of innocent civilians, against "immeasurable evil," and in the apparent absence of some other alternative to avoiding the evil, we "must wager" that the crime is necessary for success.²⁶ "Utilitarian calculation can force us to violate the rules of war," Walzer claims, "only when we are face-to-face not merely with defeat but with a defeat that is likely to bring disaster to a political community."²⁷

²⁶ Walzer, *supra* note 1, at 259-60.

²⁷ *Id.* at 268.

According to this view, when the stakes are high enough for one side, the rules of war may be violated. These rules include a proportionality principle. If, under circumstances of supreme emergency, we "must" violate this principle, this implies that any probability of success would be sufficient to permit causing an indeterminate amount of harm to innocent persons on the other side. While Walzer does not give a theoretical account of what counts as disaster to a political community, a supreme emergency exception for violating the rules of war seems particularly liable to abuse by the side identifying with the possible benefits. That states seem more inclined to violate the rules through idiosyncratic interpretations of them under the circumstances (e.g., by regarding persons who break curfew under military occupation as combatants and hence legitimate targets of attack), rather than through a claim of supreme emergency, is small comfort. Since war is often seen by both sides as being necessary to avoid disaster for their respective political communities, proportionality and other limits on the conduct of war will come under great pressure when their violation is deemed necessary for success.

Susceptibility to bias is of course not a distinctive problem for how we approach use of excessive force in war. This is a broader problem for moral deliberation when the interests of other persons bear directly on our conduct and are in conflict with our perceived interests. An important task of morality is to put pressure on us to justify our tendency toward self- and group-interest. The sincerity test I have proposed makes this point in connection with antagonistic situations in which a great deal is at stake.

The bottom line is that were we to try to moderate our subjective judgments by taking the golden rule seriously with respect to use of force in war, we would be more inclined to support rather strict prohibitions of certain kinds of conduct. We would be less willing to chance long odds or even relatively good odds that the use of force against us would be efficacious in the pursuit of a just cause. We also would be less willing to accept claims of supreme emergency that would permit imposing on us indeterminate harms in the interest of preventing disaster to another political community. Some decent sense of proportionality combined with a golden rule test of sincerity in deliberation seems to offer the best approach for minimizing unnecessary or gratuitous harms in war. Relying on narrow, general principles that would govern the use of force in war can be morally worse than not having such principles. The golden rule test can help to direct us toward reasonable moral considerations regarding excessive force that we should find hard to ignore.

