Comment on Michael Doyle's Tanner Lectures

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I find myself in the awkward position – awkward, that is, for a commentator – of agreeing with virtually all aspects of Michael Doyle's powerful critique of what international law and current US doctrine imply about preventive war, and with most of his constructive suggestions for a new set of laws, institutions, and policies for addressing threats to national and international security that seem both real and serious but are not imminent. Yet, although what he says is largely right, there is more to be said. There is an important moral constraint on preventive war that he largely overlooks (though it is faintly indicated in his early reference to a "responsible party" condition for justified self-defense), and that fails to appear in his list of criteria for justified preventive action. I propose to devote these brief remarks to supplying the condition that is omitted from his account but that needs to be included.

My argument is intended as a friendly refinement of Doyle's account, and I have reason to hope that he will see it as such and regard it with favor. For he is well known for having certain allegiances to a Kantian approach to international relations, and the condition that I believe is missing from his account should be of particular concern to Kantians.

Perhaps the best way to introduce the objection to preventive war on which I will focus is to note how the aim of averting future threats has been treated in the traditional theory of the just war. Although theorists of the just war have articulated various positions on the permissibility of preventive war, there is one view that is particularly well represented within the tradition. In the theory of the just war, the requirement that

there be a just cause for war is a component of the doctrine of *jus ad bellum* – that is, the set of principles governing the *resort* to war. The idea that war must have a just cause has typically been understood as a restriction on the types of goal – or the types of good – that can justify the resort to war. But the application of the requirement cannot be restricted just to the resort to war. If a war in progress *continues* in the absence of a just cause – if, for example, its just cause has been achieved but it goes on nonetheless – it ceases to be just, and usually ceases to be permissible. The requirement of just cause therefore applies not ~~just~~ only to the resort to war but also to the continuation of war. It is continuously applicable throughout the course of a war. It is, in other words, not ~~just~~ only a condition of the legitimate resort to war but a general restriction on the types of goal that can *permissibly be pursued by means of war*.

This understanding of the requirement of just cause opens up the possibility that there can be just causes for war that cannot on their own justify the resort to war, even when all the other necessary conditions of a just war are satisfied. Perhaps there are goals that may permissibly be pursued by means of war, but only in conjunction with the pursuit of some other just goal or goals that can justify the initial resort to war. This is the way that the goal of averting future threats, or preventing future wrongs, has often been conceived within the just war tradition. Various theorists have held that while it is not permissible to go to war ~~just~~ solely to avert some future threat, preventive action may nevertheless become permissible once an adversary is guilty of a wrong that independently justifies going to war. If, for example, an adversary is engaged in aggression, making it permissible to go to war in self-defense, it may *then* be permissible to use *additional* force in the course of the defensive action, or even *after* the goal of self-

defense has been achieved, in order to disarm the adversary, thereby preventing further threats from arising in the future. According to this view, military action to disarm the adversary that would not have been permissible in the absence of aggression becomes permissible once aggression has occurred.

Grotius, for example, writes that "it is permissible to forestall an act of violence which is not immediate but which is seen to be threatening from a distance; not directly – for that, as we have shown, would work injustice – but indirectly, by inflicting punishment for a crime commenced but not yet carried through."[i] By "directly" Grotius means action that has as its sole purpose and sole justification the forestalling of an uncertain future threat. He follows Augustine, Aquinas, and others in holding that punishment of wrongdoing is a just cause for war and also holds that prevention and deterrence of future wrongdoing are among the legitimate functions of punishment. This passage may therefore be interpreted as asserting that once an adversary has begun a criminal war, it can then be permissible in the course of the war to use force to eliminate more distant threats from this same adversary.

The view that I am attributing to Grotius was appealing to classical just war theorists at least in part because they tended to conceive of war as punishment for wrongdoing. If war is a form of punishment, it should not be surprising that many of the classical theorists object to war that is purely preventive, for – at least until the arrival of the Bush administration – civilized peoples have tended to reject the permissibility of preventive punishment, including preventive detention.

There are at least two good reasons why preventive punishment is objectionable. One is that the evidence for a person's being dangerous is generally insufficient to justify

harming him until he ~~actually~~ demonstrates his dangerousness by actually committing a crime. But while this consideration supports the rejection of preventive punishment *in law*, it does not show that purely preventive punishment would always, as Grotius says, "work injustice." For there are other forms of evidence that in many cases are better predictors of future criminal action than the actual commission of a single crime. Preventive action taken on the basis of such evidence might be less likely to be unnecessary, and therefore less likely to be unjust, than preventive action taken in response to a single criminal act.

The second reason why preventive punishment is objectionable reinforces the first but is deeper and less contingent. It is that it is only when a person has actually *done* something wrong that he has made himself morally *liable* to be harmed as a means of fulfilling the goals of punishment, including the prevention of future wrongdoing. Punishment is unjust in the absence of a crime. It is this consideration that I think best explains the view of preventive defense found in the writings of Grotius and other classical just war theorists. When a country has not yet acted in a way that makes it responsible for an unjust threat to another, it (or, more precisely, its individual agents) cannot be liable to defensive action. Yet if the country is already guilty of wrongful action, such as initiating an unjust war, and stopping the action or rectifying its ~~results~~ consequences constitutes a just cause for war, then it can be permissible, in the course of pursuing that just cause, to take further action to preempt the possibility of further wrongful threatening action in the future. The wrongful action that exposes the aggressor to defensive action now also makes it liable to further, preventive action as well.[ii]

Most of us, of course, do not regard war as a form of punishment. The principal – and to many people the only – just cause for war is defense against aggression. But defense is subject to the same condition that governs punishment – namely, that a person must engage in certain forms of action in order to become morally liable to harmful defensive action. A person who has done nothing to lose or compromise his right not to be attacked remains innocent in the relevant sense. To attack him would be unjust.

That a person is likely to act in a certain way in the future cannot, it seems, make him morally liable to attack now. To harm him preventively before he acts is to fail to respect his capacity for autonomy, which enables him, even if he has decided to act wrongly, to continue to deliberate and to alter his decision. Of course, people generally have the capacity to change their mind right up to the time of decisive action, but effective defensive action cannot wait till then. So potential wrongdoers cannot be allowed every possible opportunity to draw back from wrongdoing. In the law, certain forms of action that are preliminary to the commission of certain crimes – forms of action such as planning and preparation – have themselves been made criminal. They are, in other words, treated as sufficient for liability to criminal sanction. The idea is, roughly, that those who have engaged in planning and preparing for the commission of a certain crime have done enough to raise ~~the raise~~ the risk of criminal action to make themselves liable to action necessary to prevent the crime. That they have acted in these ways denies them a justified complaint if they are forcibly prevented from completing the crime.

A parallel form of justification ~~could~~ might be invoked to justify preventive war. Suppose, for example, that our intelligence services have compelling, indeed decisive, evidence that the political leaders of another country are planning and preparing for an

aggressive war against us a year from now. Suppose that diplomacy and other nonmilitary options would be unavailing and that if we wait until the attack is imminent, or even until it actually occurs, our chances of successful defense will be significantly lower and our expected casualties significantly higher. As in the case of a domestic conspiracy, the leaders of this country have engaged in culpable action that seems sufficient to make them liable to preventive measures.

Suppose, however, that so far *only* the political leaders have been involved in the planning. Military personnel, and in particular the rank-and-file soldiers, do not yet know anything about the unjust war being planned. They are at their bases, doing the things that soldiers do in peacetime: training, drilling, and so on. Unlike the political leaders, they have so far done nothing culpable, nor even anything to raise the risks we face from their country. So it seems questionable whether they have done anything to make themselves individually liable to preventive attack.

I will call this the example of the "Unmobilized Military." It may not pose a problem if we adopt a collectivist approach to war, according to which, as Rousseau says, war is something that takes place not among individual people but between states. On this kind of view, the action of the leaders makes the *state itself* liable, including its soldiers. I think, however, that this sort of collectivist view is untenable. One reason why this is so is that it makes mere membership in the state a ground of liability, even when membership is involuntary, thereby making liability to preventive defense independent of action or choice. Another is that it seems to support a doctrine of total war, since combatants and noncombatants are equally members of the state and therefore should all be liable if the state itself is liable.

Yet if we insist that individuals cannot be legitimate targets of attack in war unless they have acted in a way that makes them personally liable to attack, it becomes difficult to see how preventive war could be just in cases of this sort, when many or most of those who would have to be attacked may have joined the military for good reasons and are entirely unaware that their political leaders are plotting aggression. It seems that these unmobilized soldiers are innocent in the relevant sense.

This is a particularly clear implication of the currently orthodox theory of the just war. It is usually assumed that this theory objects to preventive war on two strong though defeasible grounds. The objections derive from two principles of *jus ad bellum*. One is the principle of last resort. Since the threat that preventive war would address is by definition not imminent, there is time to try options other than war; hence war cannot be the last resort. This is a familiar objection, but I think it is misplaced. It is a mistake to interpret the relevant requirement as requiring that war can be justified only when no other option remains to be tried. It is better to understand the requirement as a requirement of necessity. If a temporally remote threat can be averted now but not later when it becomes imminent, preventive war may satisfy a requirement of necessity.

The other *jus ad bellum* principle that is often thought to count against preventive war is proportionality. Assuming that the temporal remoteness of a threat is correlated with a lower probability of its eventuating, future threats have to be discounted for reduced probability, and this tends to make preventive war disproportionate.

But what has been little noticed, though it ought to be even more obvious, is that preventive war is decisively ruled out by the orthodox understanding of the just war theory's requirement of discrimination. In its most generic formulation, the requirement

of discrimination is ~~just~~ simply the requirement to direct intentional attacks only against legitimate targets. According to the currently dominant version of the theory of the just war, only combatants are legitimate targets. Noncombatants are not. The rationale for claiming that the distinction between combatants and noncombatants coincides with the distinction between legitimate and illegitimate targets is that only combatants pose a threat; only they may be attacked defensively. Noncombatants are mere bystanders and are therefore morally immune to attack. (In the contemporary literature, the requirement of discrimination is often referred to as the "principle of noncombatant immunity.") Only those who are engaged in the activity of war have combatant status, for only they are actively threatening. While unmobilized soldiers in peacetime may wear a uniform and even carry a gun, they are not actively threatening anyone and thus are not combatants in the sense in which that term is understood in the theory of the just war. (Whether they have combatant status under international law is a different issue.) But because unmobilized soldiers in peacetime are not combatants, in that they are not engaged in the activity of war, and because preventive war is *defined* as war against those who are not currently engaged in war, nor poised for imminent engagement in war, it follows that on the currently dominant theory of the just war, unmobilized soldiers cannot be legitimate targets of attack. According to this theory, there are no legitimate targets in preventive war. Preventive war is necessarily indiscriminate and therefore cannot be permissibly fought.

That the orthodox theory has this implication may not show that preventive war cannot be permissible. It might instead show, as I believe, that the orthodox theory is mistaken. In my view, the orthodox theory is mistaken in holding that posing a threat to

others is the criterion of liability to attack in war. Although I will not argue for this claim here, I believe that the criterion of liability to attack in war is moral responsibility for a wrong, or a threatened wrong – such as a threat of ~~unjust~~ wrongful harm – that it is permissible to prevent or rectify by means of war.

According to this criterion, the political leaders in the case of the Unmobilized Military who are planning and preparing for an ~~unjust~~ aggressive war may be morally liable to attack, for they have acted in a way that makes them responsible for a threat of ~~wrongful~~ unjust war. But suppose that it is not possible to attack them. Or suppose that there is a secret shadow government, whose members' identities are unknown, that knows about the plans for war and that will come to power if the existing leaders are killed. The members of this second-string government have been persuaded, as have the members of the general population, that we harbor aggressive designs against their country. Hence if we were to attempt to avert the threat of future attack by assassinating the existing leadership, this would appear to confirm the claims they had made to their successors. We would appear to be the aggressors and would be attacked in apparent self-defense. In these circumstances, we could not prevent an attack against us by preventive assassination only. Preventive war against the military would be necessary.

But, again, the members of the military have no knowledge ~~about~~ of the aggressive plans of the political leaders and, we may suppose, have no reason even to suspect that such plans might be formulated. It does not seem that they can be held in any way responsible for the threat their leaders pose.

Most people do not accept that moral responsibility for an unjust threat is a necessary condition of liability to defensive force. Many will say that it does not matter

that the unmobilized soldiers bear no responsibility for the threat, and that it does not even matter that they are not currently posing a threat. For them to be permissible targets it is sufficient that they are combatants – that is, that they wear the uniform and are armed, even if they are on their home base. But suppose that an American soldier goes now to a Swedish army base and kills a soldier there. The moral objection to this is not merely that the American soldier is acting without orders. This is an act of murder. The Swedish soldier is not a combatant in any morally relevant sense, and he has done nothing to lose his right not to be attacked, even by a member of a foreign military. Merely being an active-duty member of a military organization is not sufficient to make a person a legitimate target of attack.

The natural thought at this point is to suppose that in the case of the Unmobilized Military, the soldiers whose leaders are plotting unjust aggression are liable to attack because they *will* unjustly attack us unless we take action now to stop them. But this criterion of liability to attack is too permissive. Suppose we are in a protracted war of attrition with an aggressor state in which there is universal conscription. This war is certain to continue for at least several more years. It is therefore true of the boys and girls in their last years of high school that they will attack us within a few years. But that does not seem to make them liable to attack now. How, then, do they differ from the unsuspecting soldiers on their bases in the example of the Unmobilized Military?

The answer to this challenge – if there *is* a satisfactory answer – must be that the unmobilized soldiers in this example satisfy two conditions that are jointly sufficient for liability to attack. One is that they made a choice to enlist in the military, or to allow themselves to be conscripted into the military. They have thus *committed* themselves –

or have at least given others good reason to believe they have – to fight if ordered to do so. The other is that they have had the bad luck to have political leaders who are preparing to order them to fight in an unjust war, thereby converting them into agents of injustice. The first of these conditions distinguishes the unmobilized soldiers from the high school children in our other hypothetical example. And the second condition distinguishes them from unmobilized soldiers whose leaders are not plotting unjust aggression.

It may seem that this suggestion revises my earlier claim that the criterion of liability to attack is moral responsibility for a wrong, or for a threatened wrong. For the unmobilized soldiers are entirely unaware of the threat their leaders pose. But in fact what this shows is that one can be responsible for a threat of which one is unaware. Because they have committed their wills to obedience, their wills have become extensions of the wills of the political leaders; thus they share in responsibility with the leaders for the threat of attack their country poses. They are the ones who will implement the attack, and their wills are conditionally committed to it, although they are not yet aware of this.

This proposal makes the liability of these soldiers *strict*, in the sense that they have become liable entirely without wrongdoing or fault. Imagine that the soldiers in Unmobilized Military are citizens of a country with no recent history of aggression, and that they joined in the reasonable expectation that they would not be ordered to fight in an unjust, aggressive war. Imagine as well that there is a neighboring country that has recently engaged in various unjust acts of aggression. Soldiers in this neighboring country who recently joined their country's military may have had good reason to expect

that they would be commanded to fight in an unjust war. But in fact their leaders have decided not to engage in further aggression. According to the two conditions of liability I have proposed, these latter soldiers are not liable to attack, whereas the soldiers in Unmobilized Military are, despite the fact that they may have joined for admirable moral reasons. The soldiers in Unmobilized Military are simply the victims of bad moral luck. Their liability rests on their having chosen to join the military, or having chosen not to resist being inducted into it, together with their having had the bad luck of serving a government that is plotting aggression.

It is important to notice that my claim is that the unmobilized soldiers are strictly liable based on their prior choice to enter the military, knowing what military organizations do. I do not claim that they are liable to attack merely by virtue of being part of a collective, in this case the military. If membership in the military were genuinely involuntary, as membership in an ethnic or national group is, it could not be a basis of liability. Liability is not a matter of identity but of choice and action.

I suspect that many people will find this proposed solution to the problem of liability plausible. In that case one may wonder why I have belabored the problem when the solution is so simple. One reason is that the solution is neither as complete nor as satisfactory as one would like.

The solution is incomplete because some unmobilized soldiers whose government is plotting aggression may not be liable even by reference to the two-part criterion I have proposed. Of some it may not be true that they have chosen to be in the military, while of others it may not be true that they will later pose an unjust threat.

In some cases people are dragooned into the military literally, or almost literally, at gunpoint. While even this extreme form of coercion leaves room for choice, it does not seem to be the sort of choice that can be the basis of strict liability.

In other cases, even some of those who have freely chosen to join the military will not later pose a threat. Some, for example, may have made a doubly conditional commitment to fight when they joined. They may have committed their wills to fight if ordered to do so but only if they will also believe that what they are being ordered to do is morally permissible. In most cases, of course, they could not announce the second of these conditions at the time of enlistment, but some people (though obviously not many) do serve in the military with a private reservation of this sort. If a currently unmobilized soldier would refuse to fight if ordered to engage in unjust aggression, it is not true of him now that he will later pose an unjust threat, even if his government is planning an unjust war; therefore he fails to meet the second condition of the criterion of liability that I have proposed.

Note also that there is a continuous turnover of personnel in the military. There is continuous recruitment and enlistment, paralleled by a continuous process of retirement. In the example of the Unmobilized Military, in which the political leaders' plan is to initiate an unjust war in a year's time, many of the soldiers who are on active duty now will have rotated out of the military before the unjust attack would occur. It is therefore not true of them that they will engage in an unjust attack in the future. They, too, fail to meet the second condition of the suggested criterion of liability for unmobilized soldiers.

Of course, in the case of those unmobilized soldiers who are not liable to attack for one of these reasons – that they did not choose to join, that they would refuse to fight in

an unjust war, or that they will no longer be in the military when the aggression occurs – there is usually nothing publicly accessible that distinguishes them from others who are liable. For this and various other reasons, a preventive attack cannot discriminate between those unmobilized soldiers who are liable and those who are not. While it may be a reasonable presumption to make of *each* unmobilized soldier that his presence in the military is the result of choice and that he will fight when ordered to do so, one can be confident in virtually all cases that there are *some* soldiers of whom the presumption is false. One can be confident, in other words, that preventive war involves deliberately attacking and killing people of whom one knows that some are fully innocent in any relevant sense, though one cannot know which ones they are. It remains true, however, that those who are not liable to attack because they will refuse to fight in an unjust war or because no aggression will occur until after they have retired are nevertheless responsible for making it reasonable for their adversaries to believe that they will fight. Even though they are not liable to attack, it is not obvious that they would have a justified complaint against their adversaries if they were attacked.

This explains why I think that the proposed solution to the problem of liability is incomplete: it is almost inevitable that some of those who would be intentionally attacked in a preventive war would not be morally liable to attack. The reason why I think the proposed solution is less than fully satisfactory stems from the fact, noted earlier, that responsibility and therefore liability are matters of degree. Responsibility, moreover, is not a wholly causal notion. The degree of an agent's responsibility for an unjust threat is a function of subjective as well as objective factors: for example, his beliefs, motives,

intentions, and so on. This means, I believe, that unmobilized soldiers may be liable to attack to varying degrees.

Consider two variants of the case of the Unmobilized Military. In the original version, the soldiers are citizens of a country with no record of recent aggression. Let us assume, further, that their government has been democratically elected, and that there has been no reason, either now or at the time the soldiers joined the military, to suspect that this government would even consider engaging in unjust aggression. In a second version of the case, the soldiers are citizens of a country whose present government is a dictatorship that has recently been guilty of various acts of unjust aggression and shows no evidence of reform. In this version, the soldiers could reasonably expect when they joined that they would be ordered to fight in an unjust war. In both versions of the example, the political leaders are plotting unjust aggression and the soldiers have no knowledge of this. I claim that the soldiers in the second version are responsible to a greater degree for the threat their country poses than the soldiers in the first, and that their liability to attack is therefore correspondingly greater.

What this means in practical terms is that the conditions that must be met for preventive war to be justified are more stringent in the first case than in the second, other things being equal. The difference in liability manifests itself most saliently in the application of the proportionality requirement. A war that would be just barely proportionate in the second case would not be proportionate in the first. For example, a threat that would be just barely grave enough to justify a preventive attack on the unmobilized soldiers in the second version would not be sufficiently grave to justify preventively attacking the soldiers in the first version, who may have joined the military

for thoroughly admirable reasons. Or when the differences in cost and probability of success between going to war preventively and waiting until the threat became imminent would be just barely large enough to make preventive war proportionate in the second case, they would be insufficiently large to make it proportionate in the first.

These examples are, of course, highly artificial and minimally described. It is much less obvious how considerations of liability would affect the proportionality of preventive war in actual cases, in all their unruly complexity. Yet these considerations are both real and important, and must be taken into account in cases in which there is knowledge that is relevant to determining the degree to which those who would be attacked preventively are liable to such attack.

It is worth noting that in the actual cases that Doyle discusses – the sanctions against South Africa, the blockade of Cuba, and the strike against the Iraqi reactor – there were no intentional military attacks against people who could not plausibly be regarded as liable to attack. But this is true mainly because none of these was actually an instance of preventive war. Only in the case of Osirak was there an actual military attack, and that attack was intended to destroy only a facility. It was timed, as Doyle points out, to avoid human casualties to the greatest extent possible.

But genuine preventive wars generally have to include human beings among their intended targets. When that is the case, it is a condition of justification that those who are attacked should have done something to make themselves liable to attack. I therefore think that Doyle needs to include a fifth entry in his list of standards for preventive war. Fortunately, *l~~L~~iability* begins with an "l."

[i] Hugo Grotius, *De Jure Belli Ac Pacis Libris Tres*, translated by Francis W. Kelsey (Oxford: Clarendon Press, 1925), reprinted by William S. Hein & Co. (Buffalo, NY, 1995), book II, chapter I, section xvi, p. 184. The passage to which he refers in which he rejects "direct" preventive punishment is book II, chapter I, section v, pp. 173-75. Vitoria advances a view quite similar to Grotius's. For unusually perceptive commentary on the views of Grotius, Vitoria, Gentili, and Vattel on preventive war, see Gregory M. Reichberg, "Preventive War in Classical Just War Theory," *Journal of the History of International Law* (2007): 5-33.

[ii] For a contemporary defense of a view of this sort, see Jeff McMahan and Robert McKim, "The Just War and the Gulf War," *Canadian Journal of Philosophy* 23, no. 4 (1993): 501-541. I have subsequently come to have doubts about this view. For an able defense of the view against my later criticisms, see Thomas Hurka, "Liability and Just Cause," *Ethics and International Affairs* ~~(forthcoming)~~21 (2007): 199-218.