

Phil 116, April 28, 2010
McMahan, “The Ethics of Killing in War”

Traditional Just War Theory:

Principles governing going to war: *jus ad bellum*.

Principles governing conduct in a war: *jus in bello*.

- Principle of Discrimination: Force may be used against, and only against, combatants.
- Principle of Proportionality: The bad effects of the use of force must be proportional to the good to be achieved.
- Principle of Minimal Force: The bad effects of the use of force must be the least necessary in order to achieve that good.

McMahan argues that the following three claims of the traditional theory are false:

1. Whether one satisfies *jus in bello* does not depend on whether one satisfies *jus ad bellum*.
2. *Unjust* combatants—combatants on the side that *violated* the principles of *jus ad bellum*—act permissibly, so long as they satisfy the principles of *jus in bello*.
3. The Principle of Discrimination: It is permissible to attack combatants, but not permissible to attack noncombatants

Hypothesis: The traditional theory, and these specific claims, seem to follow from the:

Simple right to self-defense: one is permitted to use (proportional) force against another if this is necessary to defend oneself (or others) against the threat that that person poses.

- Just combatants pose a threat to unjust combatants. Therefore, unjust combatants have a right to attack them. So 1 and 2.
- Combatants pose a threat, whereas noncombatants do not. So 3.

Arguments against 1:

Any argument against 2. If 2 is false, but *just* combatants *do* act permissibly so long as they follow *jus in bello*, then whether one satisfies *jus in bello* depends on whether one satisfies *jus ad bellum*.

Arguments against 2:

A. Even the simple right to self-defense would not permit unjust combatants to use force in the “initial phase,” even force that satisfied the traditional principles of *jus in bello*. “Suppose that one country’s forces initiate an unjust war by launching a surprise attack against the unmobilized forces of another country.” The unmobilized forces do not pose a threat, so the simple right to self-defense could not explain why the surprise attack is permissible.

B. The simple right to self-defense is false. *Unjust* attackers (such as a bank robber) have no right to fight back, if you defend yourself. So unjust combatants would seem to have no right to use force, even force satisfies the traditional principles of *jus in bello*.

Walzer’s reply: Bank robbers have a choice, but soldiers do not have a choice. They are subject to external pressures and epistemic limitations: coercion, manipulation, deception, deference to the moral authority of their government, uncertainty about the justice of their country’s cause,

etc.

McMahan: External pressures and epistemic limitations are at best excuses. Excuses mean that one should not be blamed or punished. But they do not show that one acts permissibly.

C. Unjust combatants can never satisfy the traditional *jus in bello* Principle of Proportionality. Why?

- (i) If one has no just cause for war, then one's acts of war never achieve any good, or just end.
- (ii) If one's acts of war never achieve any good or just end, then no bad effect of one's acts of war is ever proportional to the good that one would achieve. (*Zero* good can't outweigh *some* bad.)

Qualification: Actually, there is an exception to (i). Unjust combatants may achieve some good or just end by preventing just combatants from violating the principles of *jus in bello*. "Suppose that just combatants were to attempt to coerce the surrender of their opponents by attacking a population of innocent civilians," and the unjust combatants can prevent this only by using military force against the just combatants (and not by surrendering). It is a mistake to think that there is one single just cause or aim of war. Although unjust combatants, by definition, have an *overall* aim that is unjust, they may have some *subordinate* aim that is just.

Nevertheless:

- This tends to undermine 1. Whether there is a just cause matters not only for *jus ad bellum*, but also for *jus in bello*.
- In practice, no unjust war will be waged entirely by acts of war that pursue such subordinate just aims. So, in practice, unjust combatants cannot satisfy *jus in bello*.

Arguments against 3:

A. As we have seen, it is *almost* always impermissible for unjust(-in-the-overall-war) combatants to use force against just(-in-the-overall-war) combatants. And it is always impermissible for unjust(-in-the-present-act-of-war) combatants to use force against just(-in-the-present-act-of-war) combatants.

B. It is impermissible for just(-in-the-present-act-of-war) combatants to use force against unjust(-in-the-present-act-of-war) combatants, if the latter are *not responsible* for the unjust threat that they pose.

Why?

- First, there is no morally significant difference between a nonresponsible threat and a bystander.
- Second, this follows from the *real* justification of the right to self-defense. If *someone* has to die, then, as a matter of justice or fairness, it is permissible to see to it that it is the person, if any, who is *responsible* for creating the situation in which someone has to die.

This *suggests* that the right to self-defense is *something like a special case* of a more general principle governing the *distribution of scarce resources*. Suppose that there are

two berries for us to share, and I deliberately squash one. Then it seems fair for you to claim the other, since I am responsible for creating the situation in which someone has to go without a berry. Alternatively, if someone pushes me, causing me to squash the berry, then it does not seem fair for you to claim the other berry, since I am not responsible for creating the situation in which someone has to go without a berry. Instead, the fair thing is to draw lots.

By “responsible,” McMahan means something like: “voluntarily chose, with competent powers of agency, while either knowing, or being in a position to know, the relevant risks.”

Someone can be responsible in this sense without being *culpable*, i.e., properly subject to blame or punishment.

- First, one may be responsible for a wrong action even though one is not culpable, because of some excuse.
- Second, one may be responsible for a permissible action that poses a threat to others (such as driving a car).

However, responsibility comes in degrees. The less someone’s responsibility, the larger the good to be achieved has to be, in order for harming her to be permissible.

C. It is permissible to use force against *noncombatants*, if they *are responsible* for an unjust threat (and if the use of force is proportional and necessary to protect oneself and others from that unjust threat).

Example: “In 1954, executives of the United Fruit Company persuaded the Eisenhower administration to organize and direct a coup that overthrew the democratic government of Guatemala and installed a new regime that returned to the company some uncultivated lands that had been nationalized in an effort to aid the peasants.” If the coup could have been prevented at least as effectively, proportionally, etc. by attacking the executives, then it would have been permissible to attack them.

Worry: Doesn’t this mean that civilians are legitimate targets, if they voted for the relevant leaders, or paid taxes?

Reply:

- Even if many civilians are permissible targets in principle, their responsibility and the good achieved by harming them low. So using force against them will not be proportional.
- Even if some civilians are sufficiently responsible, it is hard to tell who they are.
- Even if one can tell who they are, it is hard to attack only them and not other civilians.

The Deep Morality of War vs. the Laws of War

So far, McMahan has been discussing the “deep morality of war.” But he grants that there may also be “laws of war”: conventions that, if generally observed, tend to limit the destructiveness of war.

- We have both prudential and moral reasons to want that everyone observe these conventions.
- Viewed in isolation, a given act of violating these conventions may be permitted by the deep morality of war (or a given act of conforming to these conventions may be impermissible).
- However, if an act of violation encourages others not to observe the conventions, or exploits their adherence to them, then this may make the act not only imprudent, but also morally wrong.

Conjecture: The traditional principles of *jus in bello* are such laws of war.

Instances of the conjecture:

Claim 3: Since killing civilians is usually impermissible, and since the temptation to kill civilians (when it is impermissible) is great, it is better in the long run to have soldiers believe it is *always* impermissible.

Claims 1 and 2: There are good reasons not to *punish* unjust combatants, any more than just combatants, for violations of the traditional principles of *jus ad bellum*. Why?

- (i) It is impossible to give fair trials for all the members of the losing army.
- (ii) There is the temptation to “victor’s justice”: vengeance in the guise of punishment.
- (iii) Combatants will have little incentive to surrender, if this means punishment.

These reasons have less force against punishing combatants for violations for traditional principles of *jus in bello*. Thus, claims 1 and 2.

Questions:

- Does this mean that the deep morality of war should be kept a secret, and that people should be led to believe that the traditional theory is correct?
- What practical effect might the deep morality of war have?