

clearly and trenchantly why this version of the Equality Doctrine deserves to be dismantled.¹³

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Licensed to Kill

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Jeff McMahan's *Killing in War* is, among many other things, a brief against the traditional just war doctrine of the moral equality of combatants – i.e. the doctrine that all combatants 'have the same moral status, hence the same moral rights, immunities, and liabilities', including 'an equal right to kill', irrespective of whether the war they fight is just or unjust (4, 38).¹ This book is a powerfully argued, nuanced, comprehensive, relentless and impassioned brief against this doctrine. It wages total war against it, eclipsing all past skirmishes. Yet, at the same time that he rejects the moral equality of combatants, McMahan affirms the 'legal equality of combatants', according to

1 This doctrine also extends to the claim that 'a person does not act wrongly by fighting in an unjust war, provided that he obeys the principles governing the conduct of war' (105). (All such parenthetical references are to the pages of *Killing in War*.)

which ‘legal rights, liabilities, and immunities of combatants are unaffected by’ the justice or injustice of the war they fight (105). Not only does McMahan affirm that the legal equality of combatants holds as a matter of fact. He also affirms that such legal equality is morally justified at present (109). In this article, I shall expose and explore tensions that arise as the result of this uneasy combination of McMahan’s affirmation of the legal equality of combatants and his thoroughgoing rejection of their moral equality.

Regarding the legal status of combatants, as constituted by the treaties, conventions, protocols and other international laws that currently prevail, McMahan writes:

The legal rights, liabilities, and immunities of combatants are unaffected by the *ad bellum* status of the war in which they fight [i.e., by whether or not the war itself is just or unjust]. They are not legally liable for anything they do in war provided that they obey the laws governing the conduct of war. Those laws, which are stated in neutral terms and thus recognize no distinction between just and unjust combatants, are equally satisfiable by all who fight. Unjust combatants are at no disadvantage in their ability to conform their behavior to the requirements of the law of *jus in bello*. (105)²

Among other things, these laws hold that all combatants have liberal licence to intentionally target and kill enemy combatants, yet they are forbidden from intentionally targeting and killing civilians. They also hold that those who are engaged in combat must wear a uniform rather than disguise themselves as civilians and that those combatants who have surrendered must not be harmed or killed but may be temporarily detained as prisoners of war.

Within the span of two paragraphs, McMahan eloquently and powerfully defends the view that such equality of combatants in law is, at present, morally justified, and that the particular legal permissions and prohibitions just enumerated are also justified:

The law of war denies the permission to act in these ways [just enumerated] to just combatants, and at present it is right to do so. As I noted, in current conditions whatever is legally permitted to the just will be done by the unjust. And it is more important to try to restrain unjust combatants from acting in these ways than it is to grant just combatants legal permission to do such things in the rare conditions in which it

2 Here and elsewhere, McMahan adopts the shorthand of referring to those who fight on the side with a just cause as ‘just combatants’ and those who fight on the side that lacks a just cause as ‘unjust combatants’ (5). I shall follow this shorthand, while noting that readers should guard against being misled by this terminology into thinking that ‘just combatants’ necessarily act justly and that ‘unjust combatants’ necessarily act unjustly.

would be morally permissible for them to do so. A neutral law that permitted all combatants to attack civilians in certain specified conditions, or to harm or kill prisoners, or to disguise themselves as civilians, would be exploited by the unjust and inevitably abused by the just, leading to greater violence, and in particular to more and worse violations of the rights of the innocent, than a law that prohibits these forms of action to all.

At present, in other words, when all who fight claim to be just combatants, and most also sincerely believe what they claim, and when their belief cannot be authoritatively controverted, we must deny them all permission to act in certain ways that on occasion might be morally permitted to actual just combatants, or even morally required of them. We must do this because it would be intolerable to offer unjust combatants any legal rationale or protection for acting in these ways. The law must of course permit just combatants to kill enemy combatants. Just wars cannot be fought in any other way. And it would be wholly inefficacious to forbid unjust combatants to do the same; therefore the law must at present permit all combatants to kill their enemy counterparts. But just combatants can generally fight effectively without intentionally killing civilians, and it would be intolerable to offer unjust combatants any legal pretext for intentionally killing civilians on the just side; therefore the law must at present include an exceptionless prohibition of deliberate attacks on civilians. (109)

These two paragraphs supply a rule consequentialist moral justification for the legal equality of combatants in the form in which it is spelled out in existing international law. In other words, these laws are morally justified through an appeal to the consequences of their adoption, as compared with their rejection, given the way in which human beings would be likely to behave in either case.

By providing a moral justification for the extension to just and unjust combatants alike of the same legal rights to kill and liability to be killed and punished, one might wonder whether McMahan has thereby also equalized the moral status of just and unjust combatants. McMahan would deny that he has. In 3.1.1, entitled 'The Conflation of Morality and Law', he maintains that a 'ubiquitous tendency to conflate the morality of war with the law of war' underlies the mistaken belief that the legal equality of combatants implies their moral equality (105). If, of course, the laws of war lack moral justification, then one could not infer any moral rights, permissions, liabilities or immunities from the presence of legal analogues of these rights, permissions, liabilities or immunities. McMahan would, however, maintain that there is a distinction between morality and legality even if the laws in question are authoritative because morally justified. For one thing, he notes

that there are morally impermissible acts that should be permitted by the criminal law because they are ‘insufficiently serious to merit criminal punishment’ (105). The laws of war in question will not, however, diverge from the morality of war for this reason, given the seriousness of the acts in question. The legal permission of a soldier to kill enemy combatants, for example, is surely not to be explained by the fact that such an act of killing is insufficiently serious to merit criminal punishment. Rather, such permission stands in need of a different sort of justification. As I have already mentioned, McMahan himself supplies a consequentialist justification in the two paragraphs quoted above: the laws of *jus in bello* are principally designed to ‘limit and contain the violence and destruction’ of wars in order to prevent harm, especially that which is inflicted upon the innocent by unjust combatants (107). Yet McMahan also maintains that it is on account of its exclusive focus on the prevention of such harm that the law of war ‘diverges so radically from the morality of war, which requires both respect for rights and attention to consequences’ (107).

McMahan reminds his reader of one sort of moral right which, in his view, the law of war fails to recognize:

I argued in Chapter 1 that people neither waive nor forfeit their right not to be wrongfully attacked simply by defending themselves and other innocent people against a wrongful attack. This is true in war just as it is true in other contexts. What this means is that when unjust combatants attack just combatants, they are violating the latter’s moral rights not to be wrongfully attacked and are thus acting impermissibly. Yet they are acting within their legal rights. (107)

McMahan’s argument builds on his conviction that the moral principles that hold in the arena of warfare are the same as those that are applicable in ordinary life. He notes in Chapter 1 that, according to the traditional just war doctrine, just combatants are rendered liable to attack by unjust combatants simply by virtue of the fact that the former pose a threat to the lives of the latter. McMahan’s ‘central objection’ to this ‘traditional criterion is that it has no plausibility outside the context of war’ (35). In these other contexts, according to him, ‘the morality of conflict is almost invariably asymmetric: those who are in the right may be permitted to use force and violence but those who are in the wrong are not’ (35). McMahan buttresses this claim with the following example, to which he often returns in his book: ‘If a murderer is in the process of killing a number of innocent people and the only way to stop him is to kill him, the police officer who takes aim to shoot him does not thereby make herself morally liable to defensive action, and if the murderer kills her in self-defense, he adds one more murder to the list of his offenses’ (14).

McMahan’s observations about the murderer and the police officer are beyond dispute. Yet this scenario is, crucially, one in which the murderer

is acting in a manner that is justly legally prohibited. The unjust combatant, in contrast, is acting in a manner that is legally permitted. Moreover, this legal permission is in accordance with laws of war that are morally justified in the manner that McMahan sketches in the two paragraphs from 109 that I have quoted above. I would maintain that, since the unjust combatant is licensed by the law of war to kill, and this law is itself morally authoritative and binding on all parties, he does not commit a murder or any lesser crime, but instead acts within his moral rights, when he kills a just combatant. It is, in contrast, on account of the absence of any comparable licence to kill that the murderer in McMahan's example 'adds one more murder to the list of his offenses' when he kills the police officer in self-defence.

Evidence in favour of my view can be adduced by a consideration of attitudes towards the criminal punishment of unjust combatants who nevertheless act within the confines of the rules of engagement of *jus in bello*. On McMahan's view, these individuals violate the rights to life of the just combatants they kill.³ Not only do they therefore commit a moral wrong of a very serious sort, but they are typically merely partially excused from blame for doing so.⁴ It would seem to follow that these individuals are liable, at least in principle, to criminal punishment for what they have done. McMahan appears to accept this implication (189). He maintains, however, that it would be unwise at present to punish such unjust combatants for reasons 'mostly of a pragmatic nature' (190). One reason he offers is that such punitive practices could not feasibly be restricted to those combatants who are in fact unjust. McMahan notes that 'any country that fights a war declares itself to be in the right'. Hence, those who defeat just combatants in an unjust war that they have waged are likely mistakenly to regard these combatants as unjust and to punish them accordingly. Moreover, even in cases in which the just side prevails, the prospect of the punishment of genuinely unjust combatants might counterproductively make them less likely to surrender. McMahan also maintains that the sheer number of unjust combatants who fight a typical war would be so large as to render it infeasible and a waste of resources to put them all on trial, as would be necessary to provide them with process to which they are due in order to determine who is culpable and to what degree and who is entirely innocent of blame and hence immune from liability to punishment (190–91).

I am unpersuaded by McMahan's view that unjust combatants should go unpunished for pragmatic rather than more principled reasons. For let us stipulate away these pragmatic considerations. Let us stipulate that threats of

3 Assuming that these just combatants are themselves waging their just cause justly. Throughout this article, I shall assume that just combatants fight their just cause justly.

4 In Chapter 3, McMahan surveys a number of grounds that might be offered for fully excusing unjust combatants and finds them all wanting.

punishment would not counterproductively prolong wars. Let us also assume that just combatants and non-culpable unjust combatants would never be punished and that those unjust combatants who are either culpable or partially excused by McMahan's lights would be punished to a degree that reflects their level of culpability. Recall that McMahan regards the vast majority of unjust combatants who kill or try to kill just combatants as at best only partially excused for impermissibly violating or threatening to violate the rights to lives of these just combatants (189). If we add, as a further stipulation, that punishing these combatants would serve the purpose of general deterrence, McMahan would, I think, be driven to the conclusion that the punishment of vast numbers of such combatants would be justified, so long as their punishment is mitigated by their partial excuse. I doubt, however, that most would regard such punishment as justified in these circumstances.

To take the example of the Second World War, there is, I think, a better and more principled explanation than McMahan's pragmatic one for the view that ordinary German soldiers (who did not violate *in bello* prohibitions) should not have been rounded up, tried, convicted and punished for any form of homicide at the close of that war. Rather, I think the best explanation for why they should not have been so punished is one that appeals to the fact that they acted within their morally justified legal licence to kill. One does not commit a crime, and hence one is not liable to criminal punishment, if what one did was legally permitted, and such permission was morally justified.

An alternative reason that is often offered against the trial and conviction of ordinary German soldiers as war criminals is simply that they were excused from blame for participating in an unjust war. A common excuse that is provided is that they could not have known any better because they 'were doing the done thing, what everybody else was doing, what their parents and friends, teachers and pastors, and the leaders of their country, insisted was the right thing to do' (Walzer 2006: 44).

I do not think such a plea for excuses adequately explains our attitude towards ordinary German soldiers. My reason for thinking it fails as a complete explanation is prompted by the following two astute and telling observations of McMahan's: first, that we do not excuse terrorists from culpability or liability to punishment even if the totality of the excusing conditions that apply to them are greater than those that applied to ordinary German soldiers (124–25), and, second, that we are disinclined to excuse combatants for violations of *in bello* rules regarding the conduct of warfare even when 'the conditions that most people think excuse or even justify participation in an unjust or criminal war are often present to an equal or even greater degree when combatants commit war crimes by violating the rules of war' (126).

Their legal right to fight as they did, as recognized by the laws of war which were themselves morally justified, is the missing element which should

be added to, or else entirely replace, any excuse-based explanation for why ordinary German soldiers should not have been convicted and sentenced as war criminals by virtue of their fighting for an unjust cause. In contrast to mere participation in an unjust war, a soldier who violates the *in bello* rules of engagement thereby violates justifiable legal requirements. Similarly, the terrorist contravenes just laws against the killing of the innocent. An explanation that appeals to the fact that unjust soldiers who act within the limits of *in bello* rules kill with justifiable licence provides a superior explanation of our disinclination to punish them, as compared with an explanation that appeals to excusing conditions alone.⁵

If my remarks on punishment are sound, then McMahan's affirmation of the legal equality of combatants implies a restriction of the sweep of his denial of the moral equality of combatants. In particular, it calls into question his denial of the claim that just and unjust combatants have an equal moral right to try to kill enemy combatants. It calls this into question because just and unjust combatants equally retain the following significant moral right to kill their enemy: such killing is protected by a moral immunity from liability to punishment so long as the combatant fights within the limits set by *in bello* rules of engagement. This right counts as a claim right because it correlates with a duty on the part of others not to punish individuals for exercising this right.⁶ This equal moral right follows from the fact that just and unjust combatants alike are in possession of morally justified legal licences to kill.

Does it also follow from such licences that just and unjust combatants are equally morally *liable* to be killed? In particular, does it follow from such licences that just combatants possess no moral rights not to be killed by unjust enemy combatants who conform to *ius in bello* rules of engagement? To claim that it does is far more controversial than my above claim regarding moral immunity from punishment. It is one thing to say that unjust combatants have a moral right to kill just combatants, where this right is constituted by a morally justified immunity from punishment. It is quite another thing to

5 The treatment of General Paul Tibbets, who dropped the atomic bomb on Hiroshima, as a war hero in America might be thought to count as evidence against my claim that the presence or absence of legal licence is crucial to an explanation of our attitude towards the punishment of combatants. This is because General Tibbets committed a war crime: 'The law of war prohibits – and prohibited at the time of Tibbets's action – the intentional killing of civilians for the purpose of coercing their government to surrender' (129). Those, however, who treat Tibbets as a hero would not acknowledge that he committed a war crime of the highest order. I would maintain that, on due reflection, one should conclude that the prohibitions that Tibbets violated were justified and that he should have been convicted of a war crime since he lacked sufficient excuse or justification for his action.

6 This right is less extensive than a typical claim right, which also correlates with a duty on the part of others not to prevent individuals from exercising this right. Combatants have no claims against attempts by the enemy to kill or incapacitate them in order to prevent them from killing this enemy.

say that just combatants possess no moral right not to be killed by those unjust combatants who adhere to the rules of engagement.

A morally justified legal licence to kill does not necessarily imply that no right of the victim of the exercise of this licence is infringed. Rather, such a licence can, strictly speaking, be consistent with the licensed killing's being an infringement of that victim's right not to be killed. Such consistency can be shown by pointing to other cases in which the exercise of a licence to harm gives rise to an infringement of a person's right not to be harmed in this manner. Consider, for example, the case of ordinary domestic punishment. Even under the best feasible, and justifiable, system of punishment, some people will inevitably be imprisoned for crimes they did not commit. Even though they did not commit these crimes, their convictions might be legitimate because the case was made, beyond a reasonable doubt and in accordance with just procedures in a court of law, that they had committed the crimes in question. We would nevertheless insist that there is an unmistakably clear sense in which this punishment of someone for a crime he did not commit is an injustice to him.⁷ This fact of injustice is acknowledged when it is later discovered that the punished person did not commit the crime in question. Even if there was no misconduct on the part of the state in trying and punishing this person, he is released from prison upon this discovery, his record is wiped clean, and in some cases he is awarded compensation. The awarding of compensation is an acknowledgement that the prisoner has been wronged. It is a mark of the fact that the prisoner had a moral right that stood in the way of his punishment, and this right was infringed, albeit legitimately.

The injury or killing of a just combatant, however, is not thought to give rise to any legitimate claim of compensation, even in principle, when that combatant is injured or killed by someone who has observed legally enshrined *jus in bello* rules of engagement. The fact that just combatants are not thought to have legitimate claims for compensation along the lines of the innocent prisoner provides evidence that, in their case, unlike the prisoner's, it is thought that no right stands in the way of their being injured or killed.

There are also the following respects in which the morally justified laws of war might appear to imply that no moral right of just combatants is infringed when unjust combatants injure or kill them in accordance with *jus in bello* rules of engagement. It follows from the legal equality of combatants that the same relatively undemanding standard of proportionality applies to the killing of just combatants as is applied to the killing of unjust combatants. The laws of war do not apply, to the killing of just combatants, the more demanding standard of proportionality that applies to the killing of innocent civilians, who retain moral rights not to be killed which are infringed when this standard of proportionality is met. Moreover, the rights against being

7 See Christiano 2008: 22 and Christiano and Braynen 2008: 402.

killed that innocent civilians possess provide much greater immunity from deliberate killing than they do from unintentional killing. It is only in extreme circumstances where it is necessary to avert moral catastrophe, if at all, that an innocent civilian's right not to be deliberately killed could justifiably be infringed. The deliberate targeting of just combatants is, in contrast, permitted by the justified laws of war in a far more extensive range of circumstances. This lenient standard is evidence that just combatants lack a moral right not to be killed when their deliberate targeting is in accordance with the rules of engagement of *jus in bello*, rather than that they possess such a moral right which is justifiably infringed.

Is there a good reply to this attempt to show that the morally justified legal equality of combatants implies their moral equality? One promising line of resistance, which is of a piece with McMahan's approach, involves an appeal to G.A. Cohen's (2008) distinction between rules of regulations and normative principles and his view that such rules might be justified as nothing more than an optimal accommodation of the unjust beliefs and behaviour of individuals. Even if the laws of war are morally justified in the manner McMahan proposes, these laws might be regarded as nothing more than consequentialist rules of regulation which optimally accommodate the wilful ignorance on the part of combatants of the injustice of the wars they wage. McMahan could fruitfully draw on Cohen's writings in order to bolster his own view that such practical expedients are powerless to strip just combatants of their moral rights not to be killed and thereby reduce them to the moral equals of unjust combatants – i.e. his view, to paraphrase Kant (1997: AK 4:394), that usefulness or fruitfulness can neither add anything to our moral status nor take anything away from it.

McMahan could offer the following further considerations on behalf of his rejection of the moral equality of combatants. He could point out that, even if the licence to kill under discussion yields an equal moral right to kill and an equal moral liability to be killed on the part of just and unjust combatants, there remain the questions of whether it is morally permissible for an unjust combatant to avail himself of this licence and whether he would be blameless in doing so. It is one thing to argue that the justified legal right of both just and unjust combatants to kill gives rise to the moral right and liability of both parties to kill and be killed. It is another thing to argue that an individual soldier never does wrong in exercising the moral right under discussion, or that he is never worthy of blame for so doing.⁸ Take the hypothetical case of a German conscript who had come to realize that his side was waging an unjust war. That soldier would still have retained a moral right to kill at least in the sense that such killing would have been protected by a moral immunity from punishment so long as he fought within the limits set by *in bello* rules of engagement. It would nevertheless have been reasonable for him to conclude

8 On the right to do wrong, see Waldron 1981 and Enoch 2002.

that it would be wrong of him to continue to support this unjust cause and that he therefore ought to desert, or to sabotage his side from within, or at least to attempt to minimize the harm he inflicts on enemy combatants.⁹

Given that this soldier would have done wrong by lending his support to an unjust cause, it is hard to deny that his fellow German soldiers also did wrong. For their fighting promoted an unjust cause to no less an extent than his would have. Many of them failed to recognize that their cause was unjust. But at best such failure grounded an excuse for supporting, rather than a moral permission to support, an unjust cause. Moreover, if McMahan is right, most such soldiers had at best a partial excuse for failing to recognize the injustice of their cause. It follows that McMahan's justification of the legal equality of combatants does not defeat his claim that unjust combatants differ from just combatants insofar as both the moral permissibility of, and their blameworthiness for, waging war are concerned. Therefore, McMahan's rejection of the moral equality of combatants is vindicated in significant part even if not as a whole.¹⁰

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9 In Section 3.3.2, McMahan recommends such acts of resistance.

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