

January 2011

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Betz, Joseph (2011) "Review of "Killing in War", " *Essays in Philosophy*: Vol. 12: Iss. 1, Article 10.
Available at: <http://commons.pacificu.edu/eip/vol12/iss1/10>

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Book Review | *Killing in War*

Joseph Betz

Published online: 11 January 2011

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***Killing in War*. Jeff McMahan; Oxford: Clarendon Press, 2009; 250 & ix preface pages; \$35 cloth; 978-0-19-954866-8.**

I. Introduction

For a long-time, regular teacher of a course in the ethics of war like me, this is a very important book. Jeff McMahan has an excellent mind, great learning in the criminal law of murder, self-defense, justification and excuses, in international law, and in the moral and legal aspects of just war theory. These combine to allow him to acquaint readers like me with a new position in just war theory, one I desperately wanted to discover. This is because I had become so disaffected with the positions I have known up to now. Let me explain this point about possible positions.

II. The Spectrum of Positions on War

Up to now, I had distinguished four distinctly different positions in the ethics of war:

- 1) The first is the **total war position**, usually the result of the mindset of **moral and political realism**. *Inter arma silent leges* (In the times of war, the law is silent). This apparently was the position of General Paul Tibbets, the pilot of the plane dropping the atomic bomb on the city and civilians of Hiroshima, when he said, “there is no morality in war” (p. 129 in McMahan). This position rejects all attempts to restrain the evils of war.
- 2) **Classical just war theory** attempts to restrain the evils of war while allowing war. I too want to allow war but to restrain its evils. So I tend to accept just war theory.

The most basic way just war theory restrains the evils of war is, first, to distinguish good (defense) and bad (aggression) moral reasons for going to war, *jus ad bellum*. Then, second, to distinguish good (never attack civilians, do only proportionate harm to the enemy) and bad (attack civilians, cause any amount of unlimited harm) moral reasons for tactics in war, *jus in bello*.

The most popular current version of just war theory is found in Michael Walzer's 1977 book, *Just and Unjust Wars*. This has usually been the beginning text in my courses in the ethics of war. I have always accepted his endorsement of the key provision of *jus ad bellum*, that once a war has begun, all the combatants are moral equals, both the fighters for the just defending side and the fighters for the unjust aggressing side. And I have enthusiastically accepted Walzer's doctrine that the moral norms for war are principally found in the deontological realm of human rights, and not in the teleological realm of utilitarian calculation. But Walzer deserts human rights norms and accepts the utilitarian doctrine of "supreme emergency" when defeat threatens. This doctrine holds that the side with *jus ad bellum* justification is morally permitted, if it has been restrained by *jus in bello* norms in the course of the war for some time, but is in the end about to lose the war, to violate *jus in bello*. Walzer's prime example of this is Britain's decision to bomb German cities, intending the sufferings and deaths of German civilians, when it seemed in 1940 that Nazi Germany would defeat Britain. **Walzer's just war position**, one version of classical just war theory, is thus the second on my spectrum.

3) Dissatisfied with Walzer's allowance of the *in extremis* violation of *jus in bello* by the side possessing *jus ad bellum*, I have felt more comfortable endorsing the traditional Catholic understanding of just war theory. This is because it prohibits the intentional and direct targeting of civilians, even though it might allow foreseen but unintended harms to civilians according to the principle of the double effect. This position was stated during WW II in criticism of British, then American, bombing of German cities by John C. Ford, a Jesuit priest, in his famous dissenting essay, "The Morality of Obliteration Bombing." This traditional **Catholic just war position**, a second version of classical just war theory, is the third on my spectrum of possible positions in the ethics of war.

4) The fourth position is **pacifism**, the rejection of all and any war. This holds that contemporary war is so drastically destructive that it is morally impermissible to go to war at all, no matter how just one's *jus ad bellum* satisfying cause, or how stringent the tactical restraints of *jus in bello* observed. This is Gandhi's position. It demands that defenders against evil use only non-violent ways of resisting, though it also does demand that they resist.

Though I have tried to hold the third position, the Catholic version of just war theory rather than Walzer's second version, I have long been moving towards the acceptance of the fourth position, pacifism. This is because I find so few just wars, especially so few in American military history. It seems to me that almost any version of just war theory justifies too much. The dead in 19th century wars tended to be 90% combatants and only 10% civilians, but the 20th century has brought a nearly complete reversal, more like 90% civilians dead and only 10% combatants. This leads me to reject almost any contemporary war as morally impermissible, for the current military strategies of every nation, as far as I can tell, move more and more towards protecting soldiers at the expense of endangering civilians.

But I am not willing to fully espouse pacifism and renounce war altogether. I agree that Hitler's Nazi German armies had to be defeated, and that the only way was military defeat. Also, in wanting to accept some version of just war theory, I keep constantly in mind a much more current example of the need to defeat evil militarily. This was the moral necessity I saw in the efforts of the Sandinista military, in 1980's Nicaragua, to defeat the cruel, lawless, human rights-obliterating, American-created and directed Contras.

Unhappy that the popularly-supported Sandinistas led a revolution that overthrew the American-backed dictator, Anastasio Somoza Debayle, President Reagan created the Contras from members of Somoza's defeated National Guard. The Sandinista government, partially inspired by Latin American liberation theology, made enormous improvements to benefit the poor, in education in literacy, health care, land ownership, agricultural technology, and farming practices. In order to defeat the democratically elected, popularly supported Sandinistas, President Reagan armed, trained, positioned and directed the counterrevolutionary Contras in the hope of destroying the Sandinistas revolutionary gains. From their U.S. protected sanctuaries in Honduras, the Contras made forays into Nicaragua. They targeted the enormously-valued Sandinista successes. The Contras destroyed the new medical clinics and killed the health promoters. They destroyed the new schoolhouses and killed the university student volunteers teaching literacy there and the liberation theology catechists. They destroyed the new and prosperous Sandinista cooperative farms by conquering their armed, citizen-soldier, farmer defenders. But the Sandinistas instituted a military draft and sent soldiers out from Managua to defend the revolutionary improvements in their Northern region. The Sandinista combatants fought their defensive war bravely and well, for the Contras could never permanently hold any Nicaraguan territory. The Sandinista military protected the people and their new revolutionary institutions and helped the Sandinistas drive the Contras back across the Honduran border. Were it not for the military might of the intervening United States, it is widely believed that the Sandinistas could have crossed the Honduran border, confronted the Contras in battles at their camps, soundly defeated them, and would have won while respecting all the *jus in bello* norms for fair combat.

5) I have reached the point in my personal account to explain my pleasant excitement in discovering Jeff McMahan's *Killing in War*. I count **McMahan's just war position** as a new one, new at least to me. As I have explained, I wanted to hold the classical just war position but was enormously disappointed in Walzer's version of it, and somewhat disappointed in the older Catholic version of it. This being the case, I was driven towards accepting pacifism, but the example of stopping Hitler's armies and Reagan's Contras forced me to stop short of accepting it. I needed to discover, or to work out for myself, a more restraining and less permissive version of just war theory. This is what I am delighted to find in McMahan. Its essential feature is the denial of the position held jointly by both Walzer's and the Catholic and, indeed, the classical versions of just war theory. That position McMahan, quoting Walzer, calls "the moral equality of combatants." It is the doctrine that combatants fighting for the unjust aggressive cause are nevertheless the moral equals of the combatants fighting for the defensive just cause. Traditionally, the war is the politicians, and only the conduct of the war is the soldiers. Traditionally, the soldiers do and should obey their political authorities in going to war. If their political leaders order their armies to fight for an unjust cause, all the moral fault and legal liability is in the leaders. Nazi machine-gunner and American machine-gunner firing at one another are equally innocent of wrongdoing, are moral equals equally entitled to soldierly respect. *Jus in bello* norms are the same for both, as is their equal title to respect for following those norms.

McMahan's new position creates for me a new spectrum of possible positions on the morality of war. There are now five instead of four and I hold the new fourth position, McMahan's. Now there is for me:

1. Total war
2. Walzer's version of just war theory
3. The Catholic version of just war theory
4. McMahan's version of just war theory (which I now adopt), and
5. Pacifism.

When I use the phrase, classical just war theory, as I now proceed to recount McMahan's position, I mean by it what is common to both Walzer's position and the traditional Catholic position. What is this new position Jeff McMahan works out in *Killing in War*?

III. The Morality of Participation in an Unjust War

This is the title of McMahan's first chapter. In it, to my mind, he refutes the doctrine of "the moral equality of combatants." Walzer had used "the domestic analogy" to refute the total war position. That is, we only approve of the possible lethality of the victim or the police shooting at the attempted murderer, not the possible lethality of the attempted murderer shooting back at the police or at his designated victim. To Walzer, by analogy, this means that only the nation at war that is like the victim, the defending nation, has *jus ad bellum*, justice in going to war. The nation at war that is like the attempted murderer, the aggressor in the war, lacks *jus ad bellum*, and was wrong to go to war and to begin the war. Thus, there is no moral equality between the two nations at war, assuming that they do not both lack *jus ad bellum*. One is simply wrong, the other right. However, to both Walzer's and the Catholic position, both the **combatants** of the aggressor nation and of the defending nation are moral equals even if their **nations** are not.

Walzer uses "the domestic analogy" to discover this. McMahan wonders why Walzer prematurely arrested the use of this analogy in making only the judgment between right and wrong warring **nations**. McMahan's brilliance is in showing that the domestic analogy should be further applied to make the distinction between right and wrong warring individual **combatants** fighting for their respective nations. That is to say, just combatants do and should fight for just causes and in the defense of their *jus ad bellum* respecting nations. But although unjust combatants do fight with present legal protection, nevertheless they should refuse to fight for the immoral and unjust causes of their *jus ad bellum* violating, aggressor nations. This means that the just combatant is not the moral equal but the moral superior of the inferior unjust combatant. The just combatant may rightfully attack the unjust combatant, but the unjust combatant may not rightfully attack the just combatant. Even prior to this actual firing of weapons, the combatant recruited, conscripted, ordered, used to wage unjust war, should have been a selective conscientious objector and should have refused military service. McMahan holds that if every would-be aggressor nation finds itself with no willing unjust warriors, then it will not be able to wage unjust wars.

The way McMahan demonstrates that the domestic analogy, correctly applied, demands this outcome, is through his masterful explanations of the relevant concepts in domestic criminal law. He is amazing in his clear, careful, definitions, distinctions and divisions of the kinds of (the list is long): innocence, threats, proportion, discrimination, defense, justifications (subjective and objective), excuses (full and partial), desert, liability, responsibility, duress, punishment, deterrence, incapacitation, rights (waived, forfeited, overridden, infringed, violated), intending, allowing, causing, necessary and sufficient conditions for outcomes, objective wrongs.

For instance, classical just war theory claims that the criterion of one's liability to be attacked in war is that one poses a threat to others. But McMahan shows that this cannot be correct, for a police officer with draw pistol poses a threat to the murderer she arrests. Police officers properly doing their jobs are not liable to be attacked because they are innocent. One is innocent if one is neither morally responsible for, nor guilty of, a wrong, a violation of another's rights. The criterion of liability to be attacked in war is the same as in self-defense in domestic life. It is moral responsibility for an objectively unjustified threat of harm to an innocent person.

Murderers are liable to be attacked because they are non-innocent threats to others. Thus it is that just combatants, unlike murderers, are innocent and may not be attacked. On the other hand, unjust combatants are as objectively non-innocent as murderers, or attempting murderers, and so are liable to attack in self-defense. The justification for killing in war is the same as the justification for killing in domestic, individual self-defense. Combatants for a just cause are just combatants and, as innocent, retain their rights not to be harmed, but, like police, just combatants have the right to harm unjust combatants. Combatants for an unjust cause are unjust combatants, have forfeited the right not to be harmed, and have in no way acquired the right to harm the just combatants that their aggression has made their enemies, or rather, has made their would-be victims. No person has a right of defense against a threatened harm to which he or she has made himself or herself liable. This is as true in war as it is in civil society. Once having fired the shots to begin an unjust war, the aggressively attacking unjust combatant has no right to return the fire against him in self-defense.

And there is not only the above *jus ad bellum* reason for this, but there are *jus in bello* reasons as well. The *jus in bello* criteria are discrimination (civilians may never be attacked) and proportionality (the harms one inflicts must be proportioned to the good one achieves). The reason why civilians may never be attacked is because they are innocent. But just combatants are also innocent. Discrimination thus demands that they may never be attacked. And proportionality also demands that just combatants may never be attacked. Unjust combatants seek to further an unjust or evil cause, but proportionality can only justify some measure of evil if it is the means to a great good. But the end an unjust combatant seeks is a great evil, not a great good, so it cannot justify any of the harms an unjust combatant might inflict on a just combatant. McMahan thus shows, contrary to classical just war theory, that the *jus in bello* requirements of discrimination and proportionality are not separable from, and independent of, the *jus ad bellum* norm.

However, there is an exception to this. The just combatant defending the just cause might violate *jus in bello* by using unjust means. These would be tactics like bombing the enemy civilians of the unjust side, just like Britain and then the U.S. intentionally bombed German then Japanese civilians. In this case the German fighter planes trying to knock the American bombers over Dresden out of the sky would be justified. These

otherwise unjust German combatants become temporarily just combatants when they defended their innocent civilians against their non-innocent American attackers whose deliberate violation of discrimination made them liable to be attacked.

But here another key distinction can be important. If the American bombers intended to bomb only a genuinely military German target, like a munitions plant, then proportional, unintended but foreseen destruction of German civilian lives and property, would be justified (by the principle of the double effect). It would then be wrong for the German fighter planes to knock these American bombers out of the sky in defense of these innocent German civilians. This is because it would violate both discrimination and proportionality if they did so. That is, the German fighter planes would do some good if they saved the lives of the German civilians, but the evil that they would do in protecting the munitions factory arming unjust combatants, and making possible the triumph of the aggressive unjust cause, would be a great evil. Also, the reason the civilians are liable to be accidentally bombed is because of the unjust war their side's unjust combatants began. The unjust combatants are morally responsible for their own civilians' deaths.

Strictly speaking, apart from the above exception, only just combatants and not unjust combatants are held to the *jus in bello* norms allowing discriminating and proportionate attacks. This is because morality disallows unjust combatants from attacking at all. There are no norms for the right way to murder. However, McMahan holds, as long as the convention, though in error, assumes the moral equality of combatants, of aggressor and defender alike, that it is still important to hold aggressors morally and legally liable for violating *jus in bello* discrimination and proportionality. This threat of liability would at least deter unjust aggressors, who are always unjust threats to just defenders, from becoming, in addition, predators on innocent civilians of the justly defending nation.

IV. Arguments for the Moral Equality of Combatants

This is the title of McMahan's second chapter. In it, he reviews the arguments for the classical just war theorists' position that both the combatants for the aggressors and the defenders in a war are moral equals. Then he attempts, successfully to my mind, to refute these arguments. That he refutes them means that it is not morally permissible for combatants to bear arms to further an aggressor's unjust cause. Here are some samples of these arguments and his refutations.

1. Combatants on both sides are like fighters in a boxing match who waive the right not to be attacked. Or, close to this, wearing a uniform means one waives the right not to be attacked. McMahan's reply: Combatants for a just defensive cause, think of Polish soldiers in 1939, do not give Nazi soldiers the right or permission to attack them or

their country. In fact, the reason the Poles become combatants is to prevent the Nazi's from violating these Polish rights. Making the situation worse, as the Nazi's attack the right to life-retaining Polish soldiers, they violate Polish civilians rights to life, security and property in numerous ways.

2. The combatants on both sides are like the gladiators who fight one another in the Roman Coliseum, both having waived the right to be killed. McMahan's reply: This argument might apply only to child soldiers who are forced to fight under pain of death. In no other sorts of actual wars are the combatants captive slaves being forced to fight. Moreover, neither the children nor the gladiators are consenting to be killed. Those forcing the children or gladiators to fight do not force them to waive their rights; they simply violate their rights. Owners of property do not waive their right to it as they hand it over to a threatening armed robber. The claim that there is a forced waiver of rights is no more plausible than the claim that the victim raped at knifepoint waives her right to refuse sex.

3. The combatants for the unjust cause are the moral equals of the just defenders because they cannot know whether their cause is just or not. Only their leaders, who are more intelligent than the average citizen, in possession of secret intelligence, and have the leisure to study situations, can know. McMahan's reply: Some wars are obviously unjust to average citizens. The WW II German invasions of Poland, Belgium, France, and the Sudetenland were known as clearly unjust to the average German citizen. Americans have many now well-known examples (the Pentagon Papers, the Gulf of Tonkin Resolution, the G.W. Bush claims about Saddam's weapons of mass destruction) of their government lying to them to move them towards war. Citizens should be alert to the probability that the government moving them to go to war far from home is lying. However, a significant and continuing part of McMahan's entire argument is a call to citizens and soldiers to become more careful deliberators about their nation's *jus ad bellum* claims, and suggestions of helps to becoming more critical.

4. There is a role duty of soldiers or citizens, those already members of a just institution, like the military or a democracy, to do nothing to block its efficient functioning. Therefore, they must go to war even for an unjust cause if the institution so orders them. McMahan's reply: The duty not to kill innocent people outweighs this sort of role duty. Also, this duty is generated only within a just military institution, not an unjust one violating *jus ad bellum*. Also, unjust wars are highly damaging to a military institution. Selective conscientious objection to fighting in this particular war might stop this damage and bring the institution back to its just form. Also, granting soldiers the right to refuse to participate in an unjust war has not destroyed the Israeli military or Israeli democracy.

5. Citizens and soldiers have transferred the individual right to kill in war and domestic affairs to the state, and must obey the state when it so orders. McMahan's reply:

Individuals never possessed the right to kill others unjustly and so cannot transfer such a right to the state. Even if the state authority claims to accept all the responsibility and all the legal liability for ordering the killing, if the commander has no right to kill, then his order does not justify or permit the soldier to kill. Only a principal who has a right can delegate that right to a subordinate agent.

6. If a soldier can disobey an order to fight in an unjust war, then that soldier can disobey an order not to fight in a just war. McMahan's reply: This decision not to fight should be made by a representative institution because of the great consequences to all. A dissatisfied individual may resign and fight with another organization if her nation refuses to fight a just war. Americans thus joined the Abraham Lincoln Brigade to fight against Nazi supported Franco in the 1930's Spanish civil war. Also, fighting for an unjust cause would be doing evil, and not fighting for a just cause would be allowing evil, and it is more of a duty not to do evil than it is a duty not to allow evil.

The outcome of these six failed arguments for the moral equality of combatants is that our citizens and soldiers have, and McMahan and I hold that we moral philosophers should teach, **the duty of conscientious refusal**. The citizens who have sent soldiers to war should teach them that soldiers can possibly be made instruments of immoral policies. Soldiers are already thought to be able to recognize when they should refuse in matters of *jus in bello*, so they can be taught how to recognize when they should refuse in matters of *jus ad bellum*. It is false that *jus in bello* law is clearer than *jus ad bellum* law. Besides, disobedience in *jus ad bellum* could prevent a war from beginning and thus would be less disruptive than disobedience in *jus in bello* after the war has already begun.

We already allow the right of conscientious objection to fighting in any and all war, and allow it to prevent the conscription (primarily) of members of the traditional peace churches--Quakers, Church of the Brethren, the Mennonites. We should extend this to become a right corresponding to the duty of conscientious refusal. Those already in the military should have the right to select and refuse to participate in those wars that they judge to violate *jus ad bellum*. They would not need to assert religious membership or religious reasons for this refusal. It would not affect the possibility of a strong and just defense when another nation wrongly commits aggression against us. As the Nazi armies invaded Poland, loyal Poles flocked to army recruiters to fight to remedy the injustice. This is a very common reaction to a country's unjust invaders.

To help our citizens decide when to claim this right of conscientious refusal, McMahan repeats a key suggestion in many parts of his book. There should be an impartial world court whose primary function is to decide and pronounce judgments about *jus ad bellum*. This would not be the presently existing World Court at The Hague and it would not be the United Nations Security Council. If one or more nations had gone to war, or, better, wished to go to war, they would argue their cases for doing so before

this new court. The well-publicized decision of the court would be that one side had *jus ad bellum* and that the other side lacked it, or maybe that both sides lacked it. The court would typically say that this side fights wrongly as the aggressor and that that side fights rightly as the defender. This would be the legal and moral justification for the soldiers of the aggressor nation to conscientiously refuse to fight for their nation in the war. There would be fewer wars if this court existed, and much less aggression, because far fewer individuals would consent to be unjust combatants. However, this would also make wars of humanitarian intervention clearly justified to the entire world.

V. Excuses

McMahan's third chapter is on excuses. He asks why do most of us think that only high Nazi officials, not ordinary unjust Nazi combatants, deserved punishment. His answer is that most of us conflate the morality of war with the legality of war. The morality of war makes moral rights more important than good consequences. The legality of war makes good consequences more important than moral rights. That is, the way the law of war has developed, it tries hard to limit the horrible consequences of war, even if one warring nation is wrong about its moral right to go to war. Thus, the law of war allows unjust combatants to fight as long as they respect *jus ad bello*, and thus at least partially restricts the harms unjust combatants cause. But it limits some of these possible harms of war by giving unjust combatants a legal excuse for fighting. However, McMahan holds, if the law of war were brought closer to the morality of war, the unjust combatants could see that they were violating the just combatants' moral rights not to be attacked. Then unjust combatants would be criminally liable for attacking and would have no excuse. Yet, in the present circumstances that wrongly assume the moral equality of combatants, it is better to keep the present *jus in bello* norms neutral in applying to both just and unjust combatants. For, in present circumstances, what is legally permitted for just combatants also will be done by unjust combatants. Consequently, even if the unjust combatants were not restrained from going to war, they will be constrained in how they fight in the war.

In this matter of excuses, McMahan believes that an important reason for the widespread acceptance of the moral equality of combatants is the conflation of permission and excuse. What is permitted is what it is not wrong to do. What is excused is what was wrong to do but one is fully or partially blameless for doing it. It follows that the just combatant doing what is permitted and the unjust combatant with a complete excuse are morally equivalent in blamelessness, even though the first does right and the second wrong. Moral equivalence in blamelessness is not the same as moral equivalence in justification but is confused with it.

McMahan examines the unjust combatant in relation to the three grounds for excuse. 1. Is the unjust combatant excused by **duress**? This might be general societal pressures,

the pressure that causes the poor to seek out military careers, conscription, already being in the army before that army is wrongly deployed, meeting the expectations of one's family and peers to avoid shame. Still, democracies do not usually generate the duress of physical threats that totalitarian countries do. McMahan thinks that the duress generated by the severe punishments of already enlisted soldiers for refusing to obey orders to participate in aggressive wars is proof of the government's knowledge of the wrongness of those wars. 2. Is the unjust combatant excused by **epistemic limitation**? The unquestioning obedience which is a part of military training generates some degree of epistemic limitation. Also, one might well be ignorant of the facts concerning *jus ad bellum*, but this is vincible and culpable ignorance where there is freedom of speech, the press, and inquiry. And surely, those in the officer class suffer much less epistemic limitation than does the enlisted man or woman. However, it is true that the highest authorities like Presidents Reagan and George W. Bush have lied to our nation in order to move us to unjust war. 3. Is the unjust combatant a person of **diminished responsibility**? This might be true of teen-age soldiers but rarely true of more mature soldiers. But the entire military culture does promote the habit of unquestioning obedience.

McMahan holds that even if the unjust combatant is affected by all three sources of excuses, that combatant is not excused from committing a war crime by them. If these sources of excuses do not excuse in the usual case of *jus in bello*, they should not excuse in the usual case involving *jus ad bellum*.

McMahan has much to say to justify his skepticism about all these sources of excuse, holding that, at best, they excuse partially and not fully. A major source of his skepticism is his belief that even the average person cognizant of the history of wars could readily see that almost all wars are begun by aggressors and their unjust combatants, and that often enough the citizen's own nation was the aggressor. His reading of this history suggests this rule of thumb that one can use to avoid being an unjust combatant. If you would be fighting in a foreign country and not in your home country, and if that foreign country did not invade another country, and if the foreign country's combatants are supported by most of the natives of that country and find their own safety among them, then you are probably being asked to be an unjust combatant in a war of aggression. Think of the U.S. wars in Vietnam, Iraq, and Afghanistan in relation to this rule. In order not to be a new generation of Adolph Eichmann's, soldiers have a duty to deliberate carefully about the wars they are asked to fight. McMahan thinks that when soldiers have not carefully deliberated before and during a war, they act with troubled conscience, but later and only then claim excuses to escape blame.

McMahan concludes his treatment of excuses with this judgment. The usual combatants are unjustifiably complacent that their nations' wars are just. Their negligence in deliberating about the matter makes them culpable or, at best, only partly excused. One way to make this complacency less likely is to institute that new world

court which would make internationally recognized pronouncements on where *jus ad bellum* lies. Knowing the judgment of this court, the would-be unjust combatant's complacency would be destroyed and incentive and capability for careful deliberation would be increased.

VI. Liability and the Limits of Self-Defense

This is the title of McMahan's fourth chapter. His general claim for the entire book is that the justifications for killing people in war are the same as the justifications for killing them accepted in domestic law. So it is with the relevance of excuses. His principle here is that a person who poses a threat of objectively wrongful harm is liable to be attacked in self-defense. However, if that person has no moral responsibility for the threat because he or she is acting under irresistible duress or in invincible ignorance, then proportionality controlling self-defense enters here. Thus: 1. **A culpable threat** is fully responsible and fully liable to even the defensive harm of being killed. 2. **A partially excused threat** is partially responsible and might best be incapacitated or allowed to die and not be killed. 3. **A fully excused threat** has no moral responsibility, has incurred no liability directly, and ideally should be simply avoided. However, if this innocent person's threat cannot be avoided, there is a lesser evil justification for stopping or even killing this person provided by the principle of the double effect.

McMahan holds that these distinctions make little difference on the battlefield. Any unjust combatant is a threat to objectively wrong a just combatant and thus has some liability to be killed. Few unjust combatants would be innocent threats, and the majority would be at least partially culpable for their negligence in not accepting the responsibility to carefully deliberate about why they are fighting. Also, the just combatants that the unjust combatants are trying to kill would not be able to detect moral differences in their enemies' culpability on the battlefield. Only an omniscient observer could do this. Moreover, if the just combatants tried only to be lenient and incapacitate and not kill the attacking unjust combatants, the results might be that the just combatants are killed by the non-lenient unjust combatants, that only the unjust combatants live to fight on for the unjust cause, and that the just cause is lost.

There might be one sort of battle in which fully excused unjust combatants could be identified and possibly incapacitated rather than killed. This would be a battle against a unit of cruelly-impressed child soldiers (common in Africa) that might possibly be encircled and forced to surrender. Also, in the Persian Gulf War, the United States forces could know important moral differences in their Iraqi enemies. When the unjust combatants were a unit of ordinary conscripts rather than of the Republican Guard, U.S. commanders might have properly made the judgment that the conscripts were fully or partially excused and only the Republican Guards were fully culpable. There should

thus have been more restraint in fighting the conscripts and more opportunities to surrender offered them.

Though excuses do not much benefit unjust combatants to protect them from being killed on the battlefield, excuses would make more of a moral difference to protect unjust combatants from liability to punishment after the war has ended.

It would be a good thing to threaten unjust combatants for punishment after the war simply because they were combatants fighting for an unjust cause. This would help prevent wars because governments planning to violate *jus ad bellum* would find fewer soldiers to fight it.

However, in the present state of international law, there are good reasons for not punishing unjust combatants, even those fully culpable or only partially excused, after the war. The unjust side might win the war, and most post-war justice, as at Nuremberg, is victor's justice. So the unjust victor might claim that the just defenders were unjust combatants and punish them. And neither the government of the just nor unjust side would try its own soldiers for fighting in a war in which it had commanded them to fight.

However, these objections could be avoided if the same, new, impartial international court that ruled on *jus ad bellum* before the war, could now try unjust combatants after the war. But this change would not be enough to justify trying the unjust combatants after the war. Unjust combatants fearing their post war trials have an incentive not to surrender and even more of an incentive to violate *jus in bello* and win the war, for a victor nation would not want its soldiers tried. Also, it would be enormously expensive and wasteful of scarce post-war resources needed for reconstruction to try all unjust combatants, even if it is morally imperative to try the few worst of them. Lastly, punishment should make recidivism less likely, but the usual unjust combatant has no tendency to be a recidivist.

VII. Civilian Immunity and Civilian Liability

This is the title of McMahan fifth and final chapter. Classical just war theory, in *jus in bello*, has a permission (combatants may be attacked at any time) and a prohibition (non-combatants, that is, civilians, may never be directly attacked. McMahan has already argued for his radical modifications of the permission based on his rejection of the moral equality of combatants. Unjust combatants may be attacked at most times, but perhaps not if they are fully excused the way innocent child soldiers are. Just combatants may not be attacked most times by unjust combatants, but usually may be attacked by unjust combatants if the just combatants are violating *jus in bello* by directly attacking enemy civilians.

In this chapter, McMahan argues for a significant modification of the prohibition protecting civilians. This modification is based on his principle that all those, and only those, who pose an objectively unjust threat of wrongful harm are legitimate targets in war. Some civilians are such threats. For it is not what an individual *is*, his status, that makes him a threat, it is what an individual does. Actions and not class membership is important to McMahan here.

Which civilians become liable to attack under this principle? In parallel with his creation of the class he names unjust combatants, McMahan names those civilians he considers liable to attack unjust civilians. These civilians would be instigators and aiders and abettors of unjust war. One such group would be familiar to classical just war theorists-- workers in the munitions plants of the aggressor. But so would scientists and engineers working for unjust aggressors in their laboratories at universities, working on weapons, some terrible and new. Also, some civilians have been such important instigators of war that, but for them, there would have been no war. McMahan thinks the executives of the United Fruit Company were this in 1954 when they moved the U.S. government to use covert operatives and mercenaries to overthrow the democratic government of President Jacobo Arbenz in Guatemala.

It seems quite true that ordinary citizens in an aggressor nation do aid and abet unjust war even if in a lesser degree. They are jingoists, they vote for unjust war-makers, they pay taxes used for wars, they raise their sons and daughters to be uncritical unjust combatants, they are loyal subjects of their morally flawed rulers, they omit protesting even when they think it is morally due.

There are, of course, permissible ways that just combatants may cause limited amounts of harm to the civilians of an unjust nation that is the aggressor in war. These civilians will permissibly suffer when dual-use targets in their nation are bombed, targets like railroads or fuel depots. They will permissibly suffer when their homes are bombed, if the intention was to bomb the munitions factory next to their homes. They will suffer from shortages brought on by war. They will suffer from their enemy's use of economic sanctions, even if these are a poor weapon because they hurt the poor more than the rich. They will suffer, after defeat, from enemy occupation and forced reparations. It is in a way appropriate that some of these civilians suffer because they have some responsibility for the unjust war. In contrast, the citizens of the justly defending nation have no responsibility for the crime of war.

Given all this, McMahan still does not think it morally permissible to directly attack unjust civilians in war. This is for plural reasons. 1. Most civilians have little responsibility for the aggression. 2. To attack civilians is usually to treat non-threatening persons as if they were mere means and things. 3. To attack civilians to pressure their government to capitulate is of most uncertain effectiveness, for unjustly attacked civilians tend to be more resistant to surrender than non-attacked civilians.

This was true of both British and German civilians bombed in WW II. 4. Innocent civilians, especially children and the disabled, are so intermingled with responsible and unjust civilians that there is no proper discrimination possible in this civilian target.

For these reasons, McMahan holds that it would never be permissible in practice to destroy a whole city like Tokyo, Hiroshima, or Nagasaki. These reasons also show that Osama bin Laden's terrorist attacks on targets like the World Trade Center were wrong. A problem remains for McMahan. If what one does, rather than what one is, if actions and not membership, make one liable to attack, then some soldiers (e.g. army chaplains) would not be liable to attack and some civilians would be liable to attack (e.g. United Fruit executives). Should the present norm of international law thus remain in legal and moral force, the prohibition on directly attacking any and all civilians in war? McMahan uses the last sentence of his book to answer yes. The absolute prohibition, in present circumstances, is a legal necessity. This is because, the way things now stand, unjust combatants, imagining themselves just combatants, would use this permission to disregard the absolute immunity of civilians to do great harm to just civilians.

VIII. Reviewer's Conclusion

As I said in the introduction to this review, I am delighted to have discovered *Killing in War*. I might not have done so had I not been asked to review it, so I am thankful to David Boersema for requesting this of me. Discovering this book has allowed me to move to a new position in the ethics of war, a position towards which I was driven, but I had no suspicion that it existed. The total war and moral realism positions endorse a savagery that is repulsive to me, so I was driven into just war theory. But Michael Walzer's version of just war theory was too permissive in its doctrine of supreme emergency. This allowed some of the British terror bombing of German civilians. I was thus forced towards the traditional Catholic just war position of John Ford, S.J, who condemned obliteration bombing, but accepted the moral equality of combatants. But reading McMahan has convinced me that his much less permissive just war position is better, better for not granting the moral equality of both just and unjust combatants, better for arguing that *jus ad bellum* is much more restrictive than classical just war theory allows. In working out his position, McMahan uses two doctrines that I was pleased to find in Walzer, but McMahan uses them in a much more astute way than Walzer uses them.

First is the domestic analogy. Shooting in war is like shooting at a crime scene where the police and armed robber exchange gunfire. Transferred to war, this clearly means that the defenders have the right to shoot and the aggressors do not, and so the defenders are the moral superiors of the aggressors. The aggressors, like the armed robber, must be convinced not to shoot.

Second is the basing of both *jus ad bellum* and *jus in bello* in the doctrine of human rights which McMahan usually calls moral rights. This means that the just defender retains the human right not to be harmed while the unjust aggressor forfeits the human right not to be harmed. In contrast, Walzer and the classical position hold erroneously, to my mind, that both aggressor and defender have lost the human right not to be harmed.

McMahan's new version of just war theory makes two demands of which I heartily approve. First, the demand on soldiers not to fight as aggressors and not to join a military that usually asks its soldiers to fight as aggressors. I think the U.S. military usually asks this. Second, the demand on governments and on their citizens to be much more careful in their moral deliberations before deciding to begin a particular war or to become the kind of government that usually fights unjust wars. This deliberation, and the information needed to do it right, must be made more readily available to the people.

It is amazing to me that McMahan dedicates his book to his father who was a U.S. Marine, and that he conducted (presumably) continuing discussions with former and present military officers in the philosophy faculty at West Point. I can only imagine that these soldiers would be enraged at his doctrines because these doctrines are so, so critical of the United States and its military. The soldier that asserted a right to selectively refuse to fight in a war ordered by the President, acceded to by the Congress, would seem to be the bitterly hostile and possibly traitorous enemy of our career military personnel.

Lastly, McMahan's book has given me the stopping point in just war theory for which I searched in order to condemn the immoral war President Reagan's Contra mercenaries waged against the heroic and just Sandinista soldiers in Nicaragua in the 1980's. But this stopping point has not completely stopped my movement towards pacifism. Pacifism still has a strong moral and prudential appeal to me. What sort of scheme could make pacifists of us all by preventing all war? Yet even here McMahan has something tantalizing to offer me--a really impartial and authoritative world court that decides in good time before war which side would be the aggressor and which would be the defender, and that decides on who deserves to be punished after a war. If such a court had world recognition, there might be much less war and war-related injustice in the world.