

# License to Kill: Rethinking War's Ethical Boundaries

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*Under Review:*

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According to the orthodox just war theory defended in Michael Walzer's *Just and Unjust Wars* and embodied in the Geneva Conventions, the morality of killing in war is straightforward. Combatants have equal rights to kill enemy combatants, who pose a threat to themselves or their comrades, while they are forbidden to intentionally kill non-combatants. In Walzer's terms soldiers are "moral equals," their war cause irrelevant to their moral status. This practical and widely accepted view suggests clear cut boundaries between war and murder, permitting combat while reducing its destructiveness.

More than a few just war theorists are questioning this view. Its most prominent and systematic critic is Jeff McMahan. His *Killing in War* defends the unorthodox views that soldiers do not fight as moral equals, that soldiers who fight for an unjust cause are neither justified nor generally fully excused, and that the distinction between legitimate and illegitimate targets is not to be drawn between combatant and non-combatant. This work completely rethinks *jus in bello* through a philosophical analysis of the ethics of killing.

McMahan dismantles the view that “unjust combatants,” those who fight for the unjust side (which he defines putatively as an aggressor lacking just cause), have an equal right to kill for their war aims. The furtherance of a criminal mission cannot justify killing people. By waging an aggressive war, unjust combatants inherently violate the principle of discrimination, for “to attack the just combatants is to attack people who are innocent...people who have not forfeited their right against attack, and thus are not liable to attack” (16). A person engaged in a crime has no right to kill those trying to stop him or her, even in self-defense. The unjust combatant also violates the principle of proportionality, for progress in achieving his or her cause lacks positive value that could outweigh the harm caused. On McMahan’s revised just war theory, to fight justly *in bello* requires that one fight for a just cause *ad bellum*.

McMahan examines a host of arguments used to justify unjust combatants. He rejects the “boxing match” model, which views soldiers on each side as voluntarily acknowledging the other side’s right to attack them, and he questions whether soldiers waive their rights and whether such a waiver would justify others killing him or her without additional cause. There is also a “gladiatorial” model of war, paradoxically offered by proponents of the voluntarist model, which portrays soldiers on each side as forced to fight by their rulers. McMahan points out that neither view is plausible: most soldiers are neither free agents contractually accepting all the terms of their wars nor slaves driven to war without any agency.

McMahan also considers arguments that there is a political obligation to obey one’s government out of deference to its wisdom, support for its relatively just institutions, or fairness to other citizens. He argues persuasively that none of these justify obedience when the orders are to kill without just cause. History and mathematics suggest that one’s government is likely to be wrong about any given war. If one has any reason to doubt its justice, one should not fight. With respect to the duty to uphold institutions, supporting them when they are making a grave mistake is of dubious benefit. Echoing other defenders of conscientious objection, McMahan notes that the number of objectors is normally small, especially in wars of genuine national defense. When large numbers refuse to fight in the face of propaganda and social pressure, it is a good indication that the war ought not to be fought. Thus, conscientious objection poses little danger to democracy, and although the refusal of an individual soldier likely to be replaced by a willing compatriot may itself accomplish little, the soldier’s highest duty is to avoid becoming a murderer.

Having rejected any possible justification of killing for an unjust cause, McMahan takes on the more plausible view that unjust combatants are *excused* and thus equally blameless. He argues that the three main moral excuses—duress, ignorance and diminished capacity—do not apply to all combatants and only partially excuse most. McMahan acknowledges that duress excuses those who are forced to fight by threat of death or extreme poverty. However,



soldiers from many countries, particularly the wealthy North, fight willingly or, if they fight reluctantly, do so only to avoid loss of pay or short jail sentences. For many, such as U.S. draftees in Vietnam or Israelis sent reluctantly to the occupied territories, it is fear of social stigma that leads them to fight in a war they consider immoral. While not denying the efficaciousness of social pressure, McMahan argues that soldiers can be expected to place moral principle over community pressure. In a reversal of the common charge against those who refuse to fight, cowardice makes people fail to resist going to war.

Most unjust combatants believe themselves to fight justly, which suggests they may be excused (though not fully justified) by ignorance. The geopolitical causes of wars are complex. Moreover, the political leaders who order soldiers to war not only fail to reveal all of the information relevant to making an informed judgment, but actively cover up and deceive soldiers (along with other citizens) about the facts surrounding the wars to which they are ordered. For example, American soldiers in Vietnam and Iraq could make a good case that their willingness to fight was excused by the ignorance cultivated by criminal political leaders. Yet, McMahan does not let the troops off so easily. Many fight knowing or suspecting that they lack just cause. By now, most know that their government is not always trustworthy. Furthermore, McMahan suggests that if one finds oneself ordered to invade another country, while one's own country is not actively under attack, while there are no apparent massive human rights violations that one is attempting to prevent, then one ought to suspect that one's war lacks just cause (again, think Vietnam and Iraq). Absent conclusive evidence of just cause "the moral presumption is against fighting," for "[o]ur negative duty not to kill...is in general stronger than our positive duty to prevent people from being killed" (142).

McMahan acknowledges that there is disagreement about just cause, since the international community has yet to define the crime of "aggression" and just war theorists have failed to universally condemn even the invasion of Iraq. How can soldiers be held responsible for making decisions in which the experts are divided? McMahan replies that to reduce ignorance and its exculpatory power, the international community could "establish an impartial international court whose function would be to interpret and administer a reformed and morally better-informed body of law devoted to *jus ad bellum*" (153-4). The idealism of this—in principle unimpeachable—suggestion, reveals the likelihood of continuing widespread, if not invincible, ignorance about wars' justice, and the elusiveness of applying McMahan's theory practically. I also would suggest that while McMahan is right that no excuse applies to all unjust combatants and many bear some responsibility, he fails to consider how the various considerations he rejects independently combine to mitigate ~~most~~ of the responsibility of most soldiers. In a situation of coercion and ignorance, subjectively felt and objective obligations to one's state and comrades have historically sufficed to get most enlistees and draftees to fight. Despite its

complex analysis, McMahan's work remains unsympathetic to the situations of ordinary soldiers and potentially harmful in its condemnation of these men and women who are largely victims.

While McMahan argues forcefully for the culpability of unjust combatants, he stops short of calling for their prosecution for aggression. He argues that an attempt to assign legal responsibility would do more harm than good. The reason for this is that since most parties think themselves just, few would be deterred from fighting unjustly by the idea of criminal responsibility. Moreover, it would invite both sides to punish their prisoners of war, worsening treatment of just as well as unjust combatants. Lastly, a policy of punishing soldiers would tend to give incentive for individuals to keep fighting rather than negotiate a peaceful surrender. A key theme of the book is that the morality of war, properly based on principle, should not be conflated with the (pragmatic and consequentialist) laws of war. Yet, lacking legal application, McMahan's work risks being merely academic. He is left to argue that although unjust combatants would go unpunished, moral arguments should be used to convince them of their responsibility and secure their resistance. Given his emphasis on soldiers' responsibility, McMahan ought to consider holding soldiers liable in some circumstances. On the other hand, the acknowledged importance of decent treatment of prisoners of war and veterans militates against emphasizing potential responsibility. Currently, McMahan's rigid divide between moral and legal judgments has plausibility, but the separation is inherently unstable.

*Killing in War* is about not only the responsibility of fighters but also who is liable to be targeted. McMahan argues that being a combatant is neither sufficient nor necessary for liability to attack. Instead, "it is a necessary condition of liability to defensive attack that one be morally responsible for posing an objectively unjustified threat" (157). On this ground, if a soldier were completely excused and not at all responsible, he or she could not be ethically killed. McMahan adds that almost no combatant fighting for the unjust side lacks all responsibility for his or her threat. However, the diminished responsibility of soldiers fighting under coercion, in ignorance, or with limited agency, warrants that just combatants take more risks upon themselves to avoid harming those who are largely innocent of the unjustifiable risks they pose. In response to a challenge by Walzer to provide examples in which combatants could treat enemies differently in the midst of a war, McMahan gives two examples. First, in the Gulf War, U.S. soldiers were obligated to take more pains to avoid killing Iraqi conscripts than members of the loyalist, well-paid Republican guard. Second, when fighting child soldiers, uncommon precautions should be taken to attempt to capture or disband the coerced youth without killing them. To what extent armies will be willing and able to incorporate these suggested distinctions remains an open question. However, McMahan's case for greater context sensitivity in the use of destructive force against even enemy combatants makes sense in principle and could lead to



positive restraint in some cases.

The most worrisome aspect of McMahan's work is his argument that civilians can be liable to attack. As many have realized, citizens sometimes bear more responsibility, acting with more information and less coercion in their support of a war cause than the conscripts and disadvantaged enlistees who do the fighting. For McMahan, this rarely means that civilians should be liable to attack, mostly because killing them is not necessary to prevent (unjust) harm, as disabling attacking soldiers would be. However, he suggests that militaries could take into account citizen responsibility when assessing acceptable collateral damage to civilians, such as by favoring targets near cities loyal to an unjust ruler. McMahan goes on to argue that in rare cases if killing responsible civilians through a terror attack could be expected to secure the surrender of the unjust side, it is justified. He forcefully rejects the dropping of the atomic bombs on Japan on the grounds that the attacks were not necessary: Japan was already considering surrendering after the Soviet entry into the war and the United States failed to attempt a negotiated peace before using the bombs (130). However, counterfactually, had the bombing been the only foreseeable way of attaining a Japanese surrender, McMahan allows that "it is not implausible to suppose that in these conditions it would have been permissible to bomb Hiroshima" (229). What of the innocent children, those who could not understand or affect their nation's actions, and those who opposed their government? He replies that although such individuals should never be intentionally targeted, their deaths could be accepted as collateral damage in the course of killing the culpable, justified by the doctrine of double effect.

Hinging civilian immunity on an assessment of military necessity and foreign citizens' moral responsibility for their governments' policies is dangerously tenuous. It undermines the prohibition of anti-civilian bombing built up by the Geneva Conventions, military codes, and prevailing just war doctrine. History teaches little if not that military necessity and foreign culpability are easily exaggerated in the fog of war. McMahan adds once again that he does not mean to change the laws of war, only note its morality. Thus, he would retain the legal prohibition of targeting civilians while defending it *morally* in some cases. However, what this means here is less clear than in the case of the unjust combatant held morally but not legally accountable above. Breaches of the Geneva Conventions are rarely punished internationally. If states come to accept that the Conventions' restrictions lack moral defensibility, they will be (still more) apt to break them. McMahan does not address whether there is a moral obligation to observe international law over individual morality. If there is, then McMahan's moral principle lacks practical application. If there is no moral obligation to obey the law, then McMahan provides a dangerous license for states to target non-combatants when they judge necessary.

*Killing in War* is to date the most detailed and best defended analysis of

the morality of killing in war. Yet, the text lacks a context and consequence-sensitive analysis of what it means to apply these principles in the institutional contexts of international law and military conduct. Without this, the work's rigorous ethical analysis may paradoxically, if anything, rationalize further brutality, rather than morality in war. — • —

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