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Rethinking the 'Just War,' Part 2

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This is the second of two parts. The first part can be found [here](#).

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Before presenting a critique of traditional just war theory (which I call the "Theory," for short) I should make two points of clarification. Although the Theory is largely congruent with the international law of war, the subject of just war theory is *not law but morality*. If the inconsistencies and absurdities I will describe were confined to the law, they would be less troubling. Because the law is an artifact and does not purport to state truths about a reality that is independent of human invention, it can tolerate considerable disunity. But just war theory is usually understood as a set of principles that have been discovered rather than designed, and that provide an objective account of the morality of war. If just war theory is more than just a set of conventions, and if the objections I will advance here are correct, the traditional version of just war theory must be rejected.

Second, the term "war" is ambiguous. There is one sense in which a war is composed of all the acts of war by all the parties to a conflict. World War II was a war in this sense. But "war" can also refer to the belligerent action of only one side -- for example, the war that Britain fought against Germany, which was a part of World War II. My remarks will generally be concerned with wars in the second sense, for only such wars can be just or unjust. Thus, while Britain's war against Germany was just, World War II was neither just nor unjust.

### **Permissible Acts, Unjust War?**

I turn now to the critique of the Theory. As I noted earlier, just war theory distinguishes between the principles of *jus ad bellum* (resort to war) and those of *jus in bello* (conduct in war). According to the Theory, the latter are independent of the former, in the sense that what it is permissible for a combatant to do in war is unaffected by whether his war is just or unjust. Whatever acts are permissible for those who fight in a just war ("just combatants") are also permissible for those ("unjust combatants") who fight for aims that are unjust. Combatants on both sides have the same rights, permissions and liabilities - a view commonly known as the "moral equality of combatants." According to this view, if we accept that it is permissible for just

combatants to participate in warfare, we must also accept that the same is true of unjust combatants. Both just combatants and unjust combatants act impermissibly only if they violate the rules of *jus in bello* - that is, only if they fight in an impermissible manner.

This has one immediately paradoxical implication: namely, that if unjust combatants fight without violating the rules governing the conduct of war, all their individual acts of war are permissible; yet these individual acts together constitute a war that is unjust and therefore impermissible. But how can a series of individually permissible acts be collectively impermissible?

To resolve this paradox, the Theory has to claim that the principles of *jus ad bellum* apply only to the state, or the government that represents it. Hence only the members of the government responsible for decisions about the resort to war act impermissibly when a state fights an unjust war. Suppose, for example, that the armies of Aggressia have unjustly invaded and conquered neighboring Benignia. Aggression soldiers never once violated the principles of *jus in bello*. But to defeat the Benignian army, it was necessary for them to kill more than a million Benignian soldiers, most of whom were civilians when the invasion began and enlisted in the military only to defend their country from Aggressia. According to the Theory, the *only* people who have done anything wrong in bringing about this vast slaughter are a handful of Aggression political leaders who spent the war in their offices and never killed anyone.

This is incompatible with what we believe about killing in other contexts. Normally, the perpetrator of an act of killing is responsible for the victim's death to *at least* as high a degree as an accessory who may have paid or pressured him to do it. Yet the Theory holds that in an unjust war fought in accordance with the principles of *jus in bello*, only the accessories who have instigated the killing (the political leaders) are responsible for it and have therefore done wrong, while the perpetrators (the unjust combatants) bear no responsibility and have done no wrong. But how can unjust combatants act permissibly when, as the Theory concedes, their ends are unjust, their means include the intentional killing of people who have done no wrong, and their action also kills innocent bystanders as a side effect? They may, of course, be *excused* - that is, they may not be culpable - if they mistakenly though blamelessly believe that their war is just, or if they fight under irresistible duress. But that is quite different from acting permissibly in the objective sense, which is what the Theory claims they do.

The Theory's assurance that unjust combatants do no wrong provided they follow the rules makes it easier for governments to initiate unjust wars. The Theory cannot offer any moral reason why a person ought not to fight in an unjust war, no matter how criminal. If a young German in 1939 had consulted the Theory for guidance about whether to join the Wehrmacht, it would have told him that it was permissible to participate in Nazi aggression provided that he obeyed the principles of *jus in bello* (for example, by refraining from intentionally attacking

civilians). To the extent that the theory has shaped our ways of thinking about the morality of war, it has enabled soldiers to believe that it is permissible to kill people who are merely trying to defend themselves and others from unjust aggression, provided the victims are wearing uniforms and the killing is done under orders from appropriate authorities.

### **The Morality of Self-Defense**

Traditional theorists seek to justify their extraordinary claim - that those who fight and kill in an unjust war never do wrong provided they kill in accordance with the rules - by appealing to the familiar idea that, while it is not permissible to attack people who are *innocent*, it can be permissible to attack and kill those who are *noninnocent*. But the Theory uses these words in a special way. Innocent means "unthreatening," so that in war non-combatants are innocent while all combatants are noninnocent. Thus, in Walzer's words, the right not to be attacked "is lost by those who bear arms because they pose a danger to other people." This is true of the just and the unjust alike. "Simply by fighting," Walzer claims, they lose "their title to life even though, unlike aggressor states, they have committed no crime." According to this view, all violent action that is defensive is self-justifying, assuming it is also necessary and proportionate.

This account of defensive rights accords no significance to the distinction between wrongful aggressors and their victims, or between unjust and just combatants. Each has a right of defense against the other. Such a view has no plausibility outside the context of war. If a police officer, for example, is about to shoot a murderer on a rampage, the murderer has no right to kill the officer in self-defense, even if that is the only way to save himself. In this and other situations outside of war, the morality of defense is asymmetrical between wrongful aggressors and innocent victims (and third parties who attempt to defend them). While the victim has both a right against attack and a right of defense, the aggressor has neither. This asymmetrical understanding of the morality of defense is found even in the traditional doctrine of *jus ad bellum*, for the Theory accepts that the morality of defense among *states* is asymmetrical. It is only in the doctrine of *jus in bello*, which applies to combatants, that the morality of defense is symmetrical. The Theory thus comprises two distinct accounts of the morality of defense - an asymmetrical account for states and a symmetrical account for combatants.

### **Self-Defense by Civilians**

According to the second, symmetrical account, all combatants are liable to defensive attack simply because they pose a threat to others. Curiously, however, they are in general liable to attack only by other combatants, not by civilians. Why? Traditional theorists might claim that civilians can attack *defensively* only when they are being intentionally attacked, in which case the attacking combatants are indeed liable to defensive attack by the civilians. Yet there are actually three other ways in which attacks by civilians against combatants can be defensive:

- Civilians might attack combatants to defend themselves against being harmed as an unintended effect of the combatants' military action - that is, to prevent themselves from becoming "collateral damage."
- Civilians might attack enemy combatants in defense of combatants on their own side. Not all defense is *self*-defense.
- Civilians might attack combatants to prevent themselves from being harmed by the achievement of the adversary's war aims, for example to defend their property or liberty, just as soldiers do when they fight in defense of territory or political independence.

The issue of self-defense by civilians against combatants has received only scant attention in the just war tradition. But since it would be highly implausible to suppose that civilians have no right of self-defense against an intentional and wrongful attack by combatants, I will assume that the Theory permits this form of defense.

It is also generally assumed that it prohibits the last of these types of defense, primarily on the ground that self-defense in these circumstances is tantamount to participation in the war without identifying oneself as a combatant, and tends to undermine respect for the distinction between combatants and noncombatants. (The second and third types have been so little discussed in the tradition that I will not consider them here.) Yet if the Theory recognizes that civilians have a right to defend themselves against soldiers who will otherwise intentionally physically harm them, consistency demands that it also recognize that they are permitted to defend themselves against soldiers who will otherwise expose them to the harms involved in defeat, such as rule by an alien regime that may steal their land and other possessions, dismantle their political institutions, and imprison or kill them if they later resist. In part because these latter harms can be long-lasting, they can be more serious than those that civilians might suffer from an intentional physical attack, provided the attack is not lethal. How could the civilians have a right of defense against a lesser harm but not against a greater harm inflicted by the same people?

Although the Theory permits civilians to defend themselves against intentional attack by combatants, it also reduces their moral status if they do so. For if civilians attempt to defend themselves, they then pose a threat and hence satisfy the Theory's criterion of liability to attack. Thus, by engaging in self-defense, they cease to be innocent and become legitimate targets. It does not matter that the only reason they pose a threat is that the unjust attack to which they have been subjected has forced them to try to defend themselves. If that exempted them from liability for posing a threat, it would also exempt just combatants who fight in defense only because they and their innocent compatriots have been unjustifiably attacked.

Defenders of the Theory will doubtless recoil from the conclusion that by intentionally attacking

civilians, combatants can create conditions in which they may then permissibly kill those same civilians in self-defense. But that is what their view implies.

### **Implications of the Claim That All Combatants Are Liable to Attack**

The foregoing criticisms involve an element of speculation because the Theory has never had a fully explicit and determinate view about the permissibility of defense by civilians against combatants. But it has never been vague about the claim that all combatants are liable to attack by other combatants at any time during a state of war (assuming that soldiers who are wounded, have surrendered, or are attempting to surrender have ceased to pose a threat and are thus no longer combatants). It is worth noting two implications of this claim, one repugnant, the other doubtfully coherent.

Suppose that unjust combatants are engaged in a continuing atrocity, such as a massacre of civilians. Just combatants arrive and attack them as a means of stopping the slaughter. According to the Theory, even though the unjust combatants are acting impermissibly in killing the civilians, they nevertheless act permissibly if they kill those who are trying to rescue the civilians. It is hard to believe that morality could permit *that*.

A further and perhaps even more damaging objection is that the Theory's claim that all combatants are liable because they pose a threat to others seems incompatible with its further claim that combatants do no wrong when they initiate a war with a surprise attack on the unmobilized forces of another state. If the aggressing combatants act permissibly, that must be because those they attack are legitimate targets - that is, because they are liable to attack. Yet at the time they are attacked they pose no threat.

A defender of the Theory might respond that all combatants pose a threat in a state of war and that a state of war exists when the first act of war occurs. To test the plausibility of this claim, consider the position of an American sailor at Pearl Harbor immediately prior to the Japanese surprise attack. He has done nothing to lose his right not to be attacked by the Japanese. There is no state of war between the United States and Japan, so this sailor poses no threat to any Japanese. He is of course likely to try to defend himself if he is attacked, but that does not mean that he poses a threat to anyone now. If it did, that would mean that most people pose a threat to others most of the time, since most people would defend themselves if attacked. So the sailor seems not to pose a threat and thus to retain his right against attack. Yet when the Japanese crews conduct their surprise attack, they act permissibly according to the Theory, even though their attack violates the principles of *jus ad bellum*. For those principles apply only to their government, not to the crews.

But how can it be that the crews act permissibly if they attack this American sailor, along with many others like him, who pose no threat to them? The answer I suggested on behalf of the

Theory is that the Japanese attack itself creates a state of war in which the morality of *jus in bello* comes into effect. A surprise attack that initiates a war thus activates the morality by which it is governed. Prior to the attack, there was no state of war so the American sailor had a right not to be attacked. But when the attack occurs, a state of war exists and he has lost his right not to be attacked by enemy combatants. How did he lose it? The only answer the Theory can give is: *by being attacked*.

But this cannot be right, for two obvious reasons.

First, as I noted, it is incompatible with the Theory's criterion of liability, for the sailor posed no threat at the time when he was attacked. Second, it assumes that unjust combatants who initiate a war through a surprise attack deprive their victims of their right not to be attacked merely by attacking them. Yet a right not to be attacked that disappears when its bearer is attacked is no right at all.

### **Is War Governed by a Different Morality?**

I remarked earlier that symmetrical accounts of the morality of defense have no plausibility outside the context of war. Defenders of the Theory seem to recognize this, for they often claim that war is so different from conditions of ordinary life that it must be governed by principles different from those that operate in other contexts. Traditional just war theorists are thus in partial agreement with political realists, who also claim that ordinary moral principles do not apply in war. The difference is that realists make the radical claim that *no* alternative moral principles fill the space vacated by ordinary morality, so that war is outside the scope of morality altogether, while traditional just war theorists make only the more modest claim that when war begins, the familiar asymmetrical account of defensive rights ceases to apply to combatants and is replaced by the symmetrical account found in the doctrine of *jus in bello*.

The idea that conditions of war summon a different set of moral principles into effect is common but highly implausible. If it were true, the concept of war would be of the utmost practical significance. For whether a particular conflict is a war would determine which set of moral principles apply to the acts of those involved in it. A particular act of killing might be wholly permissible if the conflict in which it occurs is a war, yet be an instance of murder if the conflict falls short of war. The difference between wars and conflicts that are not wars would therefore have to be sufficiently significant to explain how the same act could be permissible in the one context but murder in the other.

By what criteria, then, are wars distinguished from other conflicts? [A recent op-ed piece](#) in The New York Times by Joshua Goldstein and Steven Pinker noted that "a common definition [of war] picks out armed conflicts that cause at least 1,000 battle deaths a year." This criterion is, however, merely a matter of scale. Combining it with the idea that different, symmetrical moral

principles come into effect in a state of war yields absurd conclusions. The combined claims imply, for example, that all killings committed in a conflict that continues over many years are permissible in those years in which more than 1000 participants are killed but not during those years when fewer than 1000 are killed. Or suppose that in one year of such a conflict, only the aggressors manage to do any killing. Their first 1000 killings are all murders but any killings they do after that are permissible acts of war.

As a matter of law, a war exists whenever one state uses armed force against another, regardless of the scale or duration of the conflict. When this happens, something of considerable legal significance does occur: the law of armed conflict begins to govern belligerent relations between the states. But this is a wholly conventional phenomenon and there is no reason to suppose that what is sufficient to activate a certain body of law automatically activates a different set of moral principles as well.

The truth is that there is no univocal concept of war. There are various different criteria for distinguishing between wars and other forms of armed conflict that are invoked in different contexts and for different reasons. What is notable here is that traditional just war theorists have not advanced any criterion of their own that would make it plausible to suppose that the commencement of war suspends the moral principles that govern other forms of violent conflict and brings quite different principles into effect instead.

### **The Revisionist Alternative**

There are many incoherencies and inconsistencies in the traditional theory of the just war of which those noted in this article are merely a sampling. But the implausibility of the traditional theory should not lead us to conclude that no plausible account of the just war can be given. Revisionist theorists have been working not just to expose the problems with the Theory but also to develop an alternative. The revisionist approach treats war as morally continuous with other forms of violent conflict and therefore rejects the idea that a different morality comes into effect in conditions of war. It asserts that the principles of *jus ad bellum* apply not only to governments but also to individual soldiers, who in general ought not to fight in wars that are unjust. It denies that *jus in bello* can be independent of *jus ad bellum* and therefore concludes that in general it is not possible to fight in a way that is objectively permissible in an unjust war.

As these claims imply, the revisionist account of *jus in bello* is based on an asymmetrical understanding of the morality of defense. While just combatants are usually justified in attacking unjust combatants, unjust combatants are seldom justified in attacking just combatants. The main exception is when just combatants are acting impermissibly, for example by pursuing their just goals by impermissible means. But the fact that most acts of war by unjust combatants are objectively impermissible does not entail that unjust combatants are blameworthy or deserving of punishment. Revisionists recognize that combatants act under

duress and in conditions of factual and moral uncertainty. These mitigating conditions usually diminish their responsibility for the wrongs they do, sometimes making their action wholly excusable (though not objectively justified). Many revisionists, myself included, argue that in current conditions, it would be both unfair and counterproductive to subject soldiers to legal punishment for mere participation in an unjust war.

These revisionists therefore accept that it is necessary, at least at present, for the *law* of war to retain a code of *jus in bello* that is symmetrical between just and unjust combatants. They accept, in other words, that the law of war as it applies to combatants must at present diverge not only from morality but also from domestic criminal law, which assigns asymmetrical defensive rights to wrongful aggressors and their potential victims. The principal reasons for this are the absence of a publicly accessible and morally and legally authoritative means of distinguishing between just and unjust wars, and the absence of an impartial, supranational mechanism for enforcing an asymmetrical code. What revisionists hope is that their work can be a source of guidance in establishing new international institutions that will eventually make it possible to reform the law of armed conflict in ways that will bring it into closer congruence with the morality of war.

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