

## ***Jus in Bello* through the Lens of Individual Moral Responsibility: McMahan on Killing in War**

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A review of Jeff McMahan, *Killing in War* (Oxford University Press, 2009) 250 pp, Hbk ISBN: 9780199548668.

In this densely argued and superbly written volume, Jeff McMahan provides a comprehensive defence of the claim that moral liability to attack in war follows from responsibility for the threat of harm posed by a war fought without a just cause (or one that is disproportionate). McMahan's thesis conflicts with numerous principles central to the currently dominant, though increasingly contested, understanding of just war theory, including the doctrine of the moral equality of combatants and the separation of *jus ad bellum* and *jus in bello*. This review begins with a short exposition of the challenges that McMahan's view poses to these two principles. The brief chapter-by-chapter summary that follows illustrates the comprehensive nature of McMahan's discussion, and makes clear why those concerned with the morality of killing in war must engage with it. Indeed, I believe that *Killing in War* ought to replace Michael Walzer's venerable *Just and Unjust Wars* as the text around which practitioners and theorists alike construct debates over the ethics of waging war. Indeed, *Killing in War* will likely be of interest to a wider audience, namely all those concerned with the ethics of killing in general, since, as McMahan writes, 'one of the presuppositions of this book is that the justifications for killing people in war are of the same forms as the justifications for the killing of persons in other contexts' (156).

On the dominant understanding of just war theory, the moral standing of combatants is symmetrical or equal, with all possessed of the same right to kill, and liability to being killed by, enemy combatants. In contrast, on McMahan's view only those combatants with a justification for going to war—ie that have a just cause and for whom war is a proportionate response to the unjust threat they face—have a moral right to kill enemy combatants, while only those who wage an unjust war are liable to being killed for doing so. Thus, in a war where one party fights justly, combatants have an asymmetrical or

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unequal moral standing; those who are justified in going to war do nothing to lose their right not to be killed, while those who are not justified in going to war do nothing (and have nothing done to them) that entitles them to kill.

McMahan's position on the moral permissibility of killing in war also undermines the alleged separability of *jus ad bellum* and *jus in bello*, and in particular the view that combatants can (and ought to) conform to the principles of discrimination and *in bello* proportionality even if they wage an unjust war. The first of these two principles requires combatants to target only those that are liable to attack in war. But if McMahan is right when he maintains that just combatants—those who are justified in waging war—do nothing to make themselves liable to attack, then it follows that unjust combatants—those who are not justified in waging war—cannot attack the combatants that oppose them while also conforming to the principle of discrimination. The second of these two principles, *in bello* proportionality, is typically understood to require that the morally good consequences of an act of war outweigh its morally bad ones.<sup>1</sup> McMahan argues that unjust combatants will rarely be able to meet this condition. Acts of war undertaken by unjust combatants can have morally good consequences, such as reducing the collateral harm that just combatants inflict on the unjust combatants' innocent civilian compatriots. Nevertheless, McMahan contends that these good consequences are unlikely to render an unjust combatant's actions proportionate, since among the bad consequences of such actions will be the intentional infliction of harm on those (including just combatants) not liable to it. The disvalue inherent in the intentional infliction of harm on those not liable to it is far weightier than the prevention of unintended harm to those with the same moral status, and so an unjust combatant's action will fail to be proportionate except for the rare case in which the number of innocents protected from unintended harm by an unjust combatant's action far exceeds the number of innocents he intentionally harms.

The foregoing arguments are both introduced in the first chapter of McMahan's book. In the second chapter, he offers a critical survey of the many different attempts moral theorists have made to justify the doctrine of the moral equality of combatants. These include arguments from mutual consent by individual combatants; arguments that point to combatants' shared status as coerced agents; the view that in the absence of obedience to authority various institutions essential to the realisation of justice, especially military forces, are unlikely to function well if at all; and an argument that disobedience to democratically enacted law, including a decision to go to war, treats one's fellow citizens unfairly. In each case, McMahan offers numerous devastating criticisms, a few familiar but many not.

<sup>1</sup> As I discuss below, McMahan argues that a separate notion of proportionality familiar from discussions of self-defence in non-war contexts also has some application to the just conduct of war. This notion of proportionality describes the fit between the unjust threat of harm an agent faces and the level of force he is morally permitted to use against the agent responsible for that threat.

Less convincing, I think, is his rejection of an argument recently advanced by David Estlund that attempts to justify a duty on the part of combatants' waging war on behalf of a democratic state to defer to its judgement regarding the justice of a war.<sup>2</sup> McMahan appears to understand Estlund's defence of the state's authority to be a purely epistemic one, namely that a properly functioning democratic state is more likely to get it right when it comes to assessing the justice of a particular war than is any individual combatant. He then argues that democratic institutions are not designed solely, or even primarily, with the aim of achieving maximum epistemic reliability regarding the justifiability of a contemplated war (or anything else, for that matter). Yet Estlund's defence of a democratic state's authority and its citizens' correlative duty to defer to its judgement does not depend on its epistemic virtues alone. Rather, Estlund argues that treating others morally in circumstances of reasonable disagreement over what exactly morally just treatment requires necessitates deference by all parties to a decision-procedure for resolving moral disputes that can be defended to all qualified, or reasonable, points of view. Among the procedures that meet this condition, Estlund defends a democratic process over a fair lottery on the grounds that the former is somewhat more likely to track the truth than is the latter. The crucial point here is that the epistemic shortcomings of a democratic decision procedure need not undermine its claim to authority; on the contrary, they are essential to it and, according to Estlund, give it a claim to authority that an epistemically superior but non-democratic decision procedure lacks.<sup>3</sup> Thus, the justification for deference to democratic authority is not simply instrumental; if it were, McMahan's criticism of democracy's value as a means to assess correctly the justice of a war would be conclusive. Justification for deference to democratic authority is also non-instrumental in that it treats people only in ways justifiable to all qualified points of view (or within public reason). Of course, McMahan might counter that even if citizens of a democratic state have a duty to obey the law, in cases where the state wages an unjust war that duty is defeated by the duty not to intentionally harm innocent people. Yet this response seems to miss the point of (at least partly) non-instrumental defences of democratic authority such as Estlund's (or Thomas Christiano's, or my own), namely that people may reasonably disagree over whether a given war is just and that in such circumstances morality requires deference to the conclusion reached via a democratic decision procedure.<sup>4</sup> That conclusion may be wrong, obviously, in which case the citizens of a democratic state may be collectively liable to punishment as well as the payment of

<sup>2</sup> David Estlund, 'On Following Orders in an Unjust War' (2007) 15 *Journal of Political Philosophy* 213.

<sup>3</sup> 'The authority of democratic decisions ... [is not] based on their having a high degree of reliability. Rather, it is based on their having *some* epistemic value, and their being (at least nearly) the best epistemic instrument available so far as can be determined within public reason': David Estlund, *Democratic Authority* (Princeton University Press, 2008) 157.

<sup>4</sup> Thomas Christiano, *The Constitution of Equality: Democratic Authority and its Limits* (Oxford University Press, 2008); David Lefkowitz, 'A Contractualist Defense of Democratic Authority' [2004] *Ratio Juris* 346.

reparations. Still, an argument along these lines may justify a liberty-right on the part of combatants waging war on behalf of a (sufficiently) democratic (and liberal) state. Though this might not suffice to establish the moral equality of combatants—perhaps the just combatants would have a claim against third party interference in their fighting that the combatants of a democratic state waging an unjust war lacked—it would, in McMahan's words, 'support a view that is much closer to the common sense view than that which claims that all unjust combatants act impermissibly when they fight for their side's goals in an unjust war' (68).

McMahan devotes the bulk of the third chapter of *Killing in War* to a sophisticated assessment of unjust combatants' claims to excuse for the wrong they do in waging an unjust war. As examples of waging war under duress, McMahan considers not only cases of conscription but also situations in which starvation is the likely alternative to fighting for a party waging an unjust war, or in which fear of embarrassment or social stigma generates enormous pressure to participate in a war. Duress rarely provides a full excuse for waging an unjust war, McMahan maintains, since the harm most combatants face should they refuse to fight is typically much less than the harm they will unjustifiably inflict on enemy combatants and civilians should they contribute to the waging of an unjust war. Besides simply submitting to the punishment inflicted on those who refuse to fight, coerced combatants also have the option of surrender or of not firing at enemy combatants (or trying not to hit them). Though the latter may sound fanciful, in support of it being a genuine option for many combatants McMahan points to the well-known report produced by SLA Marshall which claims that only 15–20 per cent of combatants involved in a given engagement ever fire their weapons.

Turning to the epistemic limitations under which many combatants labour, McMahan offers a compelling depiction of them as largely ignorant and subject to forms of manipulation specifically designed to place narrow blinders on their capacity for critical assessment. Yet, for two reasons he resists drawing the conclusion that these epistemic limitations largely excuse most unjust combatants' immoral conduct. First, he contends that combatants typically act under conditions of moral and factual uncertainty and that in such circumstances they have good reason to err on the side of not fighting in what turns out to be a just war rather than on the side of fighting in what turns out to be an unjust war. For example, statistically speaking, the odds that a given war will turn out to be unjust are far higher than that it will turn out to be just, since in many conflicts no party enjoys a moral right to wage war. Knowing this, the moral course of action for a combatant uncertain about the justice of the war he is ordered to fight is to refuse to do so. Of course, many combatants do not know this, and more importantly, many of them do not believe that they labour under the sort of epistemic uncertainty McMahan describes. Crucially, McMahan finds them culpable for this. He writes that there is little evidence that combatants make any serious effort to ascertain the justice of the wars they are commanded to fight. Moreover, the all too common plea made by unjust

combatants—that they could not be expected to know their war was unjust—wears thin when it has been offered by so many who fought in previous unjust wars. Given the example of those earlier unjust combatants, current soldiers, sailors and airmen ought to be especially vigilant when it comes to the justice of the wars they wage. Yet they are not.

McMahan appears inclined to view unjust combatants as, at best, partially excused for their failure to make any serious inquiry into the justice of their war (153). In contrast, my inclination is to excuse them for this shortcoming on the basis of many of the same factors McMahan himself adumbrates when first characterising the epistemic limitations under which most combatants labour. Perhaps most importantly, among those putative moral claims regarding the just conduct of war that combatants are most likely to have been taught is that they are responsible only for adherence to the principles of *jus in bello*, a responsibility they can discharge regardless of whether the war they wage is just. Even many of those that challenge the justice of the war that soldiers wage refrain from charging them with having acted immorally, and it is not implausible to think that that is because they too accept the separation of *jus ad bellum* and *jus in bello*. Moreover, combatants can sensibly interpret the law of war as supporting this view of their moral responsibility; after all, with the exception of the highest ranks, combatants are never tried for having waged an unjust war. Add to this limited experience and skill in challenging authority (at least among many of those that join the military) ‘tendencies to patriotism and loyalty [that] further dispose them to trust what their government tells them’ (120) and ‘further reassurance ... provided by the observation that others are doing exactly as they are’ (121), and it seems unreasonable to blame combatants for their failure to critically reflect on the justice of the wars they are ordered to fight. Were *Killing in War* to become the contemporary treatment of the ethics of war most often studied by military personnel, this might warrant a different conclusion. At present, however, that distinction is held by *Just and Unjust Wars* (at least, in my experience, for US military personnel), and in that text Walzer staunchly defends the view that combatants are responsible only for how they wage war, and not for the justice of the war they wage.

In part, McMahan’s investigation follows naturally from his analysis of certain arguments for the moral equality of combatants, where he claims that considerations thought to justify the waging of war by unjust combatants at most provide them with an excuse for their immoral conduct. However, it also serves to lay some of the groundwork for McMahan’s discussion in chapter four concerning an agent’s use of force in defence against those who are partially or fully excused for the threat they pose to him. While such actors remain liable to defensive attack, the fact that they have an excuse for acting as they do affects what counts as a proportionate, and so morally justifiable, use of force against them. Proportionality here refers to the degree or extent of harm to which an agent is liable in virtue of his wrong action, and is distinct from the type of proportionality on which just war theorists typically focus. While McMahan’s initial treatment of this matter may strike some as an example of the worst kind of armchair

philosophy, he is careful to demonstrate its implications for the conduct of war. For example, McMahan argues that, during the first Gulf War, US and allied troops ought to have exercised greater restraint in their attacks on conscripted Iraqi forces than in their attacks on Iraqi Republican Guard troops, since the former had a greater claim to excuse for their immoral conduct than the latter.

In the fifth and final chapter, McMahan considers the moral permissibility of attacks on non-combatants or civilians. If it is responsibility for an unjust threat (and not merely posing one) that renders a person liable to defensive force, then, since particular civilians may share in responsibility for the waging of an unjust war, it follows that these civilians can be liable to defensive force exercised by those who justly resist the aggression for which those civilians are partly culpable. As the discussion in chapter four demonstrates, exactly what type of force just combatants may use against civilians depends on the degree or extent of the latter's responsibility for the unjust war. While McMahan does identify a few possible cases in which specific civilians might be legitimate military targets, these are likely to be rare. More common, perhaps, will be cases in which responsibility for an unjust war is spread widely enough across a civilian population to justify economic sanctions that target the state's population as a whole. McMahan also contends that civilian responsibility for an unjust war may sometimes render them liable to being harmed as collateral damage, even if it does not rise to the level necessary to render them legitimate targets of war.

Though McMahan's account of the ethics of killing in war departs radically in many ways from the dominant understanding of just war theory, he carefully distinguishes questions concerning the morality of war from questions concerning what constitutes the morally best law of war. In the present circumstances, McMahan argues, almost any attempt to align more closely the law of war with the morality of war, as he characterises it, will likely lead to even more immoral conduct than already occurs. For instance, suppose the law of war were modified to permit just combatants to attack deliberately civilians who bore a significant degree of responsibility for an unjust war. Since most participants in a war are likely to believe, albeit in many cases mistakenly, that they are just combatants, the upshot would almost certainly be an increase in the already horrific number of unjustified civilian deaths. If McMahan's account of killing in war is broadly correct, then one pressing task for theorists and practitioners alike involves the exploration of possibilities for creating an institutional setting in which the law of war can be made to conform more closely to the ethics of war.

The analysis McMahan offers in *Killing in War* reflects the many years of careful thought the author has given to the topic, and to the ethics of killing more generally. The result is an extremely densely argued book. Nevertheless, the writing is quite clear, and the reader will be well rewarded for taking the time to engage patiently with it.