

Soldiering, Morality and Criminality in an Unjust War

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JAMES BIEDA, APR 22 2013

Is a Soldier Who Fights Justly a Moral Criminal for Fighting in a War That is Either Illegal or Unjust?

Is a soldier who fights justly a moral criminal for fighting in a war that is either illegal or unjust? This question is at the centre of a new debate that pits a widely held and legally embedded principle of war, that soldiers have equal rights and responsibilities regardless of whether they are on the 'side of the just' or not, against a set of unusual new arguments (Rodin and Shue, 2008). These arguments dispute the view that the rules governing the morality of going to war, *jus ad bellum*, and the rules governing what soldiers can do in war, *jus in bello*, are logically independent.

In this paper I will begin by outlining the traditional *just war* viewpoint before examining certain arguments that have been offered in support of the idea that *jus ad bellum* and *jus in bello* rules are connected in some way. I will then discuss the fundamental objections to these arguments before challenging more directly the most prominent defender of them: Jeff McMahan.

The Traditional Theory of the Just War

As with so much in contemporary just war theory the starting point is Michael Walzer's eloquent argument in *Just and Unjust Wars*. Here Walzer (2006a) outlines the traditional theory of the just war asserting that it comprises two sets of principles: *jus ad bellum* and *jus in bello*. For Walzer these two sets of principles are logically independent as it is perfectly possible for a just war to be fought unjustly and for an unjust war to be fought in strict accordance with the rules (2006a).[1]

Walzer (2006a) asserts that this separation between *jus ad bellum* and *jus in bello* has two important features. Firstly, soldiers have an equal right to kill enemy combatants (2006a). Simply by fighting soldiers lose their right to life and liberty (2006a). Consequently a soldier fighting for an unjust cause is not a moral criminal if he, by fighting justly, kills another combatant. This view, which suggests that soldiers on both sides of any conflict have the same war rights is referred to by Walzer as the moral equality of soldiers (2006a). The second feature is that non-combatants retain their title to life and liberty and must not be attacked.

Traditional just war theory, as well as the current laws of armed conflict, therefore assumes two theses:

1. The independence thesis which states that the *jus in bello* rights and obligations of a combatant in war are independent of the *jus ad bellum* justice of the war in which he or she fights.
2. The symmetry thesis which states that the content of *jus in bello* rights and obligations are the same for combatants on both sides of any conflict. (Rodin, 2008)

The connection between these two theses is close and is of crucial import to the ethics of war and its theoretical foundation (Rodin, 2008). Taken together the symmetry and independence theses imply that a soldier fighting for an unjust cause is not a moral criminal *if* he fights justly.

However, both theses are subject to theoretical criticisms. These criticisms propose that the norms of war should be

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reinterpreted in a way that is asymmetric, meaning that *jus in bello* rights and obligations are not always the same for combatants on both sides of a conflict, and dependent, suggesting that *jus in bello* rights are dependent on *jus ad bellum* justice (Rodin, 2007). These two viewpoints are also closely connected. Consequently, although many authors adopt more complex positions there is a natural juxtaposition between symmetry and independence on the one hand with asymmetry and dependence on the other (Lichtenberg, 2008).[2]

Arguments against Symmetry

The most potent criticisms of the symmetry thesis concern the role of self-defence in the justification of killing in war and the proper interpretation of *jus in bello* proportionality.

Self Defence

Just war theory states that it is justifiable for combatants to kill enemy soldiers because they pose a threat to them (Walzer, 2006a). Since both just and unjust combatants pose a threat, it follows, all combatants have an equal right to kill enemy soldiers. This also provides an explanation for the principle of non-combatant immunity. As non-combatants pose no threat they are never legitimate targets (Walzer, 2006a). However, asymmetry advocates assert that this explanation appears false by normal standards of both individual self-defence and morality:

It is not true [...] that one makes oneself liable to [...] attack simply by posing a threat to another. If that were true, those who engage in justified self-defence against a culpable attacker would then lose their right not to be attacked by him [...]. The correct criterion of liability to attack [...] is not posing a threat [...] but moral responsibility for an unjust threat (McMahan, 2008b:21-22).

The crux of this argument is the concept of liability (Kutz, 2008). Merely posing a threat to another is insufficient to establish liability to attack since the threat itself could be wholly justified. An example often produced is that of a police officer using force to prevent a bank robbery (Rodin and Shue, 2008). Asymmetry advocates assert that just warriors are morally equivalent to the police officer using justified force (Rodin, 2008). Since these just warriors are not engaging in unjustified action that could otherwise explain why they would be morally liable to attack, unjust warriors have no moral right to attack them. Consequently, an unjust warrior commits a moral wrong by killing a just combatant (McMahan, 2006).

Proportionality

Jus in bello proportionality holds that for the attainment of a military objective to be permissible its 'bad effects' must not be out of proportion with its 'good effects' (McMahan, 2008a). As with the notion of liability destabilising this concept can produce potent arguments for asymmetry:

It seems clear that obtaining [...] 'military advantage' [...] has no intrinsic moral value, but obtains what value it has instrumentally from the broader project of which it is a part. This seems to imply that the value of achieving a military objective is determined by the *ad bellum* justice of the conflict of which it is a part [...]. If the war is unjust, then achieving a military outcome advantageous to its end is a moral disvalue (Rodin, 2008:53).

Consequently, all harmful military acts committed by unjust warriors are ipso facto disproportionate and thus war crimes.

Objections to Asymmetry

The above arguments seem to create a compelling case against symmetry. However, the conclusions regarding unjust warriors seem deeply implausible (Lichtenberg, 2008). How can it be that a soldier fighting for an unjust cause is a moral criminal, even if he fights justly? Certainly we do not think of the typical coalition soldier who fought in the Iraq conflict as a criminal. As such

Soldiering, Morality and Criminality in an Unjust War

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“the apparently scholastic distinction between *jus ad bellum* and *jus in bello*, which allows soldiers on each side to engage in attacks on the other, seems to track common sense” (Lichtenberg 2008:113).

Keeping a common sense perspective brings us onto the most obvious and in this author's opinion the most potent objection to asymmetry, that it would give rise to disastrous consequences if it were to be implemented into a working regulatory regime of war (Rodin and Shue, 2008). This objection is known as the pragmatic case for symmetry. It has a number of dimensions.

Epistemic Issues

The case for the equality of combatants begins with an observation of the epistemic constraints under which soldiers fight (Lichtenberg, 2008). In the real world it is extremely difficult to decide where *jus ad bellum* justice lies and even if there was an uncontroversial account of what a just war is, the epistemic constraints are much greater for soldiers since they have less time for consideration and can be subjected to deception (Rodin and Shue, 2008). Such uncertainties would generate highly undesirable consequences. As almost all unjust combatants will believe or at least claim to believe that their war is just they will claim whatever additional rights are granted to just combatants (McMahan, 2008b). Consequently, the destructiveness of war would increase with no advantage gained by the ‘just side’ (Roberts, 2008).

Moreover, several factors undermine the possibility of determining the culpability of unjust warriors (Kutz, 2008). Firstly, *jus ad bellum* is constantly changing. This raises doubts as to whether notice can be given to soldiers about the legality of their actions. Secondly, judgements regarding whether military action can be justified are dependent on success. Success of course is often not apparent until long after the war is over and can always be disputed. Finally, unjust combatants' liability would need to be established on their role as either an accomplice or a co-conspirator. Both of these areas of law are laden with difficulties. Overall, it appears that there are simply not enough normative facts to verify the guilt of unjust combatants. Consequently, ‘there is no justifiable form that an institutionalised system of asymmetrically restricted privileges could take’ (Kutz, 2008:83).

Victor's Justice

The victorious in war often exact revenge for harms suffered during the course of the conflict (McMahan, 2008b). As such, accepting the view that unjust combatants may be liable to punishment even if they fight justly will expose huge numbers of soldiers to unjust acts of revenge disguised as punitive justice (Kutz, 2008).

Reduced Compliance Incentives

Furthermore, holding unjust combatants liable for fighting would paradoxically reduce their incentive to adhere to *jus in bello* norms (Shue, 2008). Unjust warriors might conclude that because they are already guilty of a war crime simply by fighting they may as well abandon all restraint in an attempt to win the war as soon and resolutely as possible (Rodin and Shue, 2008).

Ex Ante Agreement

The laws of war depend on warring parties agreeing to them and to be effective such agreements must be arrived at *ex ante* (Kutz, 2008). The current symmetrical laws of war have been extremely effective in this regard, obtaining agreement between diverse ranges of parties, many of whom have been hostile to one another.

This level of agreement would be unobtainable for asymmetrical rules for two reasons (Roberts, 2008). Firstly, history indicates that when the rules of war are couched in terms that appear to benefit one side other parties often disregard the law (Roberts, 2008). Secondly, when “war is raging, getting agreement among parties as to which side is the more legitimate [...] has always been close to impossible” (Roberts, 2008:248).

Law and Morality, Interwoven or Separate?

Soldiering, Morality and Criminality in an Unjust War

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The pragmatic case for symmetry is highly compelling. Indeed the argument is so compelling that it has forced the most prominent defender of asymmetry, Jeff McMahan, to cling to a somewhat dubious 'solution'. In an attempt to reconcile the case for asymmetry with the powerful pragmatic case against it McMahan (2006; 2008b) proposes that there should be a thorough separation between the laws of war and the morality of war. For McMahan (2008b) the laws of war have to be expressed in symmetrical terms whilst the morality of war, which is concerned with the fundamental rights of combatants and non-combatants, should be asymmetric.

However, there are authoritative objections to the idea that we can distinguish between the morality of war and the laws of war. One such objection is that no war convention is accepted simply because it is believed that it will be useful, it "must first be morally plausible [and] it must correspond to our sense of what is right" (Walzer 2006a:133). Moreover, Shue (2008) asserts that McMahan's proposed separation actually threatens the role of the laws of war themselves. If the morality and laws of war are separate then there are bound to be instances whereby laws and morality conflict. The problem with this is that McMahan's understanding of a morality of war often requires that the laws of war be cast aside in favour of morality. For instance, the morality of war may require an attack on non-combatants even though this violates the conventional requirement of discrimination (McMahan, 2006).

The Rules of Everyday Life and the Rules of War

Even if one accepts McMahan's dubious separation of the laws of war from the morality of war it is still possible to question the morality of war itself, for it is based on undefended assumptions of an implausibly close analogy between the rules of war and the rules of everyday life (Shue, 2008).

The crucial bridge by which McMahan attempts to connect the rules of war and the rules of everyday life is "his insistence that moral liability to attack is a necessary condition of attack during war" (Shue 2008:98). McMahan is thus attempting to inject into war a requirement for the determination of individual moral liability. Combatants should therefore stop using the criteria for a legitimate target embodied in the laws of armed conflict and switch to assessing the individual moral liability of their adversaries (Shue, 2008). However, McMahan only assumes and never proves that in war some kind of individual moral liability to attack, similar to the conception embodied in the moral rules of everyday life, can be, and then ought to be employed rather than the concept of legitimate targets that has evolved through the centuries (Shue, 2008).

McMahan's morality of war, his case for asymmetry, therefore "rests specifically upon the unsupported transference into war of a requirement of individual moral liability to attack, analogous to the requirement that holds generally in ordinary life for ordinary persons" (Shue, 2008:102). Consequently, it is not comprehensible except as the morality of everyday life incorrectly applied to the fundamentally different environment of war (Shue, 2008). As such we can conclude that McMahan's morality of war, which lacks grounding and rests on dubious analogies, remains to be proven (Shue, 2008).

Essentially proponents of asymmetry such as McMahan are chasing a morally appealing yet unachievable dream, a conception of war that does not violate rights, whereby only those morally liable to be killed are killed (Shue, 2008). However, "there is no such kind of war in which death is [...] allocated so individually and discriminately" (Shue 2008:100). As such wars cannot be fought without violating rights and the proposition that they can is, as we have seen, an intellectually incoherent and practically impossible position (Rodin and Shue, 2008).

What is needed instead is the development of the morally best laws of war to govern war (Shue, 2008). Laws would be the morally best in that they would take into account fundamental moral considerations whilst being able to function inside deadly combat (Shue, 2008). Moreover, when the laws of war are not the morally best laws for war, the actual legal provisions should be changed (Shue, 2008). However, there is no place for a residual morality of war as imagined by McMahan, which lingers in the shadows continuously competing with the morally best laws of war (Shue, 2008). In essence "where the laws of war are morally justified, there is no function to be performed by a competing 'morality of war' consisting of alternative rules. We do not need a 'morality of war' if we can get a morally justified set of laws of war" (Shue, 2008:89).

Soldiering, Morality and Criminality in an Unjust War

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Inappropriate Asymmetry?

More fundamentally, McMahan's attempt to save asymmetry by separating the morality of war and the laws of war brings in the question of whether criticism of the traditional approach is appropriate. Did the proponents of symmetry think they were describing the morality of war? I think not. What is more likely is that they were merely attempting to direct the behaviour of those who make war (Lichtenberg, 2008). It therefore appears that the asymmetry thesis is somewhat uncalled for. By way of conclusion the inappropriateness of the thesis is pulled more sharply into focus by Roberts (2008:253-254):

"At a time when *jus in bello* is under considerable pressure...a philosophical-cum-legal approach that provides some basis for relativising the application of the law on account of the alleged justice of the cause could only too easily be misused [...]. Even if this was in no way the intention of those exploring the question of moral inequality on the battlefield, this could be the unintended and unwelcome consequence."

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Soldiering, Morality and Criminality in an Unjust War

Written by James Bieda

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[1] For the sake of clarity let us say that those who fight in a just war are just combatants, whilst those who fight in a war that is unjust because it lacks a just cause are unjust combatants (McMahan, 2006).

[2] This paper shall keep in accordance with these juxtapositions. Thus, references to symmetry refer to the symmetry and independence theses, whilst references to asymmetry refer to the asymmetry and dependence theses.

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