

Just Warfare Theory Revised

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Notes for Phil 162

I. ARNESON ON THE ETHICS OF KILLING IN WAR.

Traditional just war doctrine sharply distinguishes the justice of a war (*jus ad bellum*) and justice in warfare (*jus in bello*). A just war can be waged unjustly; an unjust war can be waged justly. The main requirement of justice in warfare is that one respect noncombatant immunity. One must not deliberately aim fire at noncombatants (though inflicting unintended but foreseen harm on noncombatants may be acceptable provided the good one attains is proportional to the unintended bad effect). Alternatively stated, one must not seek to harm the innocent as one's goal or the means to one's goal. The innocent for this purpose are those who are not participating in waging war. Captured and disabled combatants acquire rights not to be harmed and to be kept safe until the cessation of the war. A soldier is presumed to be either morally permitted to fight against enemy combatants whether or not her cause is just or at least to be blameless for fighting within the limits of the just warfare constraints. Several years ago Michael Walzer and Paul Ramsey provided restatements of the traditional doctrine for our time.

Common-sense rhetoric tends to regard respect for noncombatant immunity as a litmus test for moral rectitude. "Terrorism strikes at the defenseless, not at the combatant forces of a social unit, and is thus by nature a crime against humanity." A U.S. government official circa 2003: "We face a hate-filled, remorseless enemy that takes many forms, hides in many places, and doesn't distinguish between innocent civilians and military combatants."

To my mind the traditional doctrine unravels under scrutiny. (Note: I consider only the deontology of just war and warfare and do not consider how a consequentialist moral theory might deal with these issues.)

Walzer. Walzer's view is roughly that the soldier in modern times, whether fighting for a just cause or not, does not freely choose to fight. One is conscripted, or volunteers under strong social pressure of patriotism or felt moral obligation. Call this the compulsion consideration. Also, the soldier fighting in modern wars is standardly told the war his country is embarking on is just. Even if this is not so, the individual soldier is not in a position to assess his government's case for war. Call this the nonculpable ignorance or mistake consideration. Taken together, compulsion and nonculpable ignorance/mistake always combine to bring it about that the soldier who fights for an unjust cause either does not act wrongly or if he is acting wrongly, is not blameworthy for acting wrongly. My objection: These considerations of compulsion and ignorance/mistake vary by degree, and do not always rise to the level that excuses. They apply sometimes, not always.

Self-defense. Consider the analogy of defense of one's country against aggression and defense of her life by an individual. Under what conditions is it morally acceptable to kill someone when necessary to save one's own life? Suggestion: fault forfeits first. In a situation in which there is a wrongful threat to an innocent person's life, and only killing another person can avert that threat, it is morally better that among those who might die, a person who is significantly and culpably at fault with respect to this situation should be the one who dies. Examples:

Accommodation. Smith flees evil aggressor, can survive if bystander perched in niche makes way for him. If bystander fails to be accommodating in this way, Smith can escape aggressor only by jumping to bystander's perch and causing him to fall to his death. Bystander appreciates that the situation is as just described, and declines to be accommodating. Bystander is seriously culpable and forfeits here his right not to be harmed.

Guilty Past. Smith is confronted by an innocent aggressor, who is about to kill him. Smith can survive either by killing innocent aggressor or swerving his car onto the shoulder, where a guilty

bystander is located. The bystander is guilty by past action that culpably brought about Smith's present predicament. To save his life Smith ought to swerve and kill the guilty bystander.

Guilty bystander trying to inflict harm. Same as previous example, except that the bystander is guilty in virtue of willing wrongfully the death of innocent Smith and doing whatever he can to cause harm to Smith (his actions are impotent and pose no threat to Smith). Again, the morally preferred outcome is that Smith saves his life by swerving his car onto the shoulder where guilty bystander happens to be.

Guilty bystander disposed to inflict harm. Same as previous example, except that the bystander is not trying impotently to kill Smith but is firmly disposed to harm or kill him if he could. If Smith can save his life only by swerving and killing guilty bystander or instead attacking innocent aggressor, the morally preferred scenario is that Smith does the former.

Guilty bystander exulting in anticipated evil. In this version of the example, Smith is menaced by an innocent aggressor, as before, and he could save his life either by attacking this innocent aggressor or swerving his car onto the shoulder. If he does the latter he kills a bystander, who is culpably gloating at the anticipated horrible death of innocent Smith. If guilty bystander here is sufficiently culpable, again the morally preferred scenario is that Smith saves his life by killing guilty bystander not innocent aggressor.

Objection: One is only morally permitted to kill in self-defense an individual who has causally contributed or is causally contributing to the threat of injury to oneself that killing will avert. More broadly, one is only morally permitted to kill someone to prevent injustice if that person has causally contributed or is causally contributing to the injustice or threat of injustice. A person does not lose her moral right not to be attacked merely in virtue of her bad thoughts or impotent bad intentions. Response: Consider further cases. If two hunters simultaneously form the intention wrongfully to kill a nearby person, and one happens to be shooting a realistically designed toy gun he takes to be real, I submit that even though the deluded shooter poses no threat, if the threatened victim can save her life by killing either shooter, either is equally an eligible target of self-defensive violence. Analogous tort cases also suggest dropping any causing-or-threatening-harm condition on forfeiture of the right not to suffer expropriation of one's property.

The application of fault forfeits first to warfare is straightforward. The soldier fighting a just war ought to aim his fire at a seriously culpable noncombatant rather than at a morally innocent enemy combatant if killing either one would equally advance the just war cause.

Noncombatants as wrongful trespassers. There are other ways in which noncombatants could be culpable in ways that should forfeit their immunity from deliberate attack during warfare. They might be unjust trespassers, for example.

The moral rights of captured soldiers. The norm that enemy combatants who surrender or are disabled are prisoners of war, who must be kept safe throughout the war, depends on the thought that the soldier is morally responsible for fighting fairly not for the justice or injustice of the cause she is fighting to advance. But in war, a just cause is not merely a legitimate reason for fighting, but an all-things-considered balance of reasons in favor of fighting. Often none of the parties engaged in war have a just cause, and at most one side has a just cause. If one lacks just cause, one does not have a moral right to aim fire at enemy combatants, and one does not have a moral right to advance one's unjust cause. A soldier fighting for an unjust cause has no moral right of self-defense against enemy combatants any more than a person committing a felony with force of arms has the moral right to defend herself by shooting at the police who are shooting at her. One might claim that even if an unjust warrior acts wrongly merely by fighting, she is always substantially blameless because she is either coerced to fight or nonculpably ignorant of the injustice of her cause or both. But these excuses apply sometimes, and to varying degrees. Combatants fighting for an unjust cause may well be culpable for fighting. To

the extent this is so, their moral immunity from harm if they are captured or disabled is lessened, and perhaps disappears altogether. Objection: the prison guard analogy.

Guerrilla combat. In guerrilla combat, irregular combatants conduct raids and then hide amidst the civilian population. Guerrillas of this sort make it difficult for their adversaries to wage war against them while respecting noncombatant immunity. The moral puzzles and problems of guerrilla combat for traditional just warfare theory start from this point. But this initial starting point is misdescribed by traditional theory. The first question is, do the guerrillas or their opponents have just cause to fight or not. The rights and duties of guerrillas, counterinsurgency forces arrayed against them, and noncombatants caught between these military forces vary enormously depending on which side, if any, is fighting a just war. Analogous points apply to the morality of sieges, blockades, and reprisals, which should be analyzed very differently from what traditional just warfare theory proposes.

Morally innocent unjust combatants; morally guilty just combatants. The question arises, does lack of moral culpability entitle one to immunity from harm? If so, we can imagine an unjust war fought by morally innocent combatants (perhaps epistemically deprived by living under a dictatorial regime), and am I then saying one is not morally permitted to attack these troops? My answer is that culpability is an important factor in determining whom one may permissibly attack but it does not rule the roost. If the moral stakes are sufficiently high, and if attacking morally innocent combatants is the only way to prevent the victory of an unjust cause, such attacks may be permissible. Other things being equal, one should prefer attacking the morally culpable rather than the innocent if attacking either would equally advance the just cause. In the odd case in which the combatants fighting for the just cause are morally culpable (their motives are evil or reprehensibly reckless or the like) and one could advance the just cause equally by attacking innocent enemy combatants or culpable just warriors, one ought to attack one's comrades in the just war effort.

Should rights reflect what we can know? Objection: You can't base the ethics of war on a determination as to which side (if any) has a just cause, because belligerent nations always claim moral legitimacy. Moreover, the determinations of moral culpability and innocence on which you propose to base the determination of whom one morally is permitted to attack are impossible to make in practice in conditions of warfare. Response: We should first get clear at the level of moral principle about what we are permitted, required, and forbidden to do in the course of waging war. Here it is appropriate to set epistemic worries to the side. Moreover, I deny that information about culpability and its absence is never available in conditions of war. We are not conducting criminal trials and imposing criminal punishment, and the standards appropriate for that context do not apply. We are wondering who are morally favored and disfavored targets when we are engaged in fighting a just war.

Absolute and moderate construction of the revised right of immunity from deliberate attack. Walzer on supreme emergency. I propose revisions in the norms for drawing lines between morally appropriate and inappropriate targets of lethal attack during wartime. I don't deny there are lines to be drawn, that delimit a class of people in given circumstances who ought not to be deliberately attacked. These people have a right not to be attacked. The next question is, is such a right absolute, to be respected whatever the consequences, or moderate, to be respected up to some threshold of considerations that together override it. Michael Walzer wrestles with this issue in his *Just and Unjust Wars*. He proposes that the right of noncombatant immunity holds without exception and should never be violated up to the point of supreme emergency—moral catastrophe that reasonably seems to be avertable only by attacking civilians. Allied terror bombing of German residential neighborhoods during World War II is his prime example of supreme emergency. Response to Walzer: the moral entitlement to override noncombatant immunity (or whatever revised doctrine of permissible targets one ultimately

accepts) cannot be cabined narrowly as Walzer seeks to do. In Walzer's discussion the operative norm appears to be that if the ratio of evil-that-one-perpetrates-by-violating-noncombatant-immunity to the evil-that-one-averts-by-this-means is sufficiently favorable, then violating people's rights not to be attacked can be justified. But if it is acceptable to kill 100,000 German bystander civilians to prevent the murder of one million innocent people, then why isn't it equally morally permissible to attack and kill a single innocent civilian bystander to prevent the murder of ten people? Supreme emergency doctrines thought through generate permissions to kill in "nonsupreme emergencies."

II. MCMAHAN ON THE ETHICS OF KILLING IN WAR

McMahan challenges three foundational tenets of just war and warfare theory as Walzer interprets it: "(1) that the principles of *jus in bello* are independent of those of *jus ad bellum*, (2) that unjust combatants can abide by the principles of *jus in bello* and do not act wrongly unless they fail to do so, and (3) that combatants are permissible targets of attack while noncombatants are not."

On (1): If you do not have a just cause for using violence, you cannot satisfy the proportionality requirement in the double-effect condition for morally justified violence. Proportionality requires that the good effect you aim at is proportionate to the bad unintended effect you also bring about. But if you aren't fighting for a good cause, killing enemy soldiers is not bringing about anything good. So proportionality can never be satisfied if one is fighting for an unjust cause.

The situation is analogous to that of a bank robber whom police try to apprehend. They get into a gun battle. We think the bank robber has no right to shoot at the police in this situation. He lacks a self-defense right to shoot. The police, shooting at him, when necessary to prevent him from carrying out a serious crime, do not violate any of his rights, and he has no right to shoot back. His recourse is to retreat or surrender. Same goes for the unjust warrior (the soldier fighting for an unjust cause), says McMahan.

On the contrary, Walzer thinks that soldiers, regardless of the justice of the cause they fight for, pose risk of grave harm to enemy combatants, and so are legitimately liable to self-defensive violence directed at them by those they threaten.

Against this, McMahan says there is an initial phase of an aggressive war in which one cannot claim the attackers are defending themselves. More important, the bank robber comparison challenges Walzer's claim. Walzer himself discusses the bank robber comparison, but thinks it does not defeat his claims. He thinks that compulsion and excusable ignorance, alone or together, always render it the case that what unjust warriors (those fighting for an unjust cause) do is not wrong. McMahan claims Walzer exaggerates the degree to which these considerations hold, and anyway, they are at most excuses, not justifications. At most they go to the issue of blameworthiness, not to the issue, are unjust warriors doing what is morally wrong by fighting on the unjust side. Taken as excuses, they should be regarded as sometimes excusing to some variable degree, not as always fully excusing.

Another Walzer argument: War is a rule-governed activity. We could not sensibly make the moral distinctions we do make in assessing soldiers' conduct, if all of their acts were wrongful killings. How could one regard, for example, General Rommel, Hitler's general, as an honorable man? Our praise of him for not shooting captured soldiers and for not slaughtering noncombatants makes no sense if any killings he perpetrates are murders.

Response by McMahan: What Walzer claims follows just does not follow. We can consistently assert both that a soldier fighting for an unjust cause has no moral right to shoot at enemy combatants and still praise him for refraining from shooting noncombatants or for exercising moral restraint in other ways. We can make similar discriminations of the conduct of bank robbers. Not all wrongs, even serious wrongs, are equally wrong, or wrong in the same way.

Another argument, perhaps hinted at by Walzer: The soldier has joined a public agency. Such agencies can function effectively only if people mostly follow the command hierarchy. One has a reason to follow the command hierarchy, a reason that might outweigh the reason one has to violate the rules of the enterprise or the lawful command of a superior officer. Analogy: Suppose one is a prison guard, whose job is to guard prisoners and keep them confined, if need be by deadly force. He faces a situation in which an individual the guard happens to know is innocent, and wrongly convicted, is trying to escape. In the situation the guard's responsibility is to shoot the escaping prisoner, even if he knows he is not guilty of the crime for which he is being confined. Even if it is morally wrong to shoot the prisoner, arguably the guard does not commit murder by shooting. "We know enough if we know we are the king's men," the prison guards might say—and even more so if the country is a democracy and the guards can say "we know enough if we know we are authorized to do what we do by the command hierarchy of a decent democratic society."

Response: Sometimes one's social role can affect what it is morally right and wrong to do. But there are limits. One cannot justify acting in ways that seriously wrongfully violate the rights of other persons just on the ground that the effective functioning of the enterprise is boosted if one does this. The prison guard should not shoot an escaping convicted convict who has been unjustly tried and convicted and has no duty to submit to punishment. In fact, Walzer accepts this line of thought regarding jus in bello rules. One cannot appeal to the fact that one received an order to justify one's violation of, for example, rights of noncombatants. Same goes for rights of people who are not legitimately subject to attack because they have done no wrong.

Back to (1) and (2). McMahan says it is not quite right to say that if one is not fighting for a just cause, one cannot ever perpetrate acts of war against the enemy combatants that satisfy the proportionality conditions for fighting justly according to jus in bello requirements. One possibility is that in the course of fighting a just war, enemy combatants are engaged in a local unjust action (they are about to slaughter some innocent people without justification, for example). In this case one might have a moral right and even a moral duty to shoot at those enemy soldiers if that is necessary to block their local unjust action. Another possible case is that both sides in war have unjust causes, but on one side, a soldier is nonculpably entirely ignorant of the fact that the cause he is fighting for is unjust, so he is fully excused for fighting. If enemy soldiers who themselves are pursuing an unjust cause attack him, he arguably has a self-defense right to shoot back at them. (Compare this scenario to a bank robbery in which two independent groups are trying to rob the same bank and end up fighting each other. Throw in the assumption that I nonculpably believe that my team is acting rightly, not trying to rob the bank but just trying to stop the other team from robbing it. Do I have a self-defense right to shoot at the rival robbery team members who are shooting at me? I am inclined to think I am not blameworthy, but still acting wrongly, but I'm not sure.)

Walzer says these sorts of cases just discussed are as it were the exception that proves the rule. In the "combating local injustice" case, arguably we have a small military conflict within the larger one, and in the small-scale conflict, the soldiers trying to stop the enemy soldiers from slaughtering a bunch of innocent people actually have a just case for fighting. It remains the case that one cannot determine whether jus in bello allows one to fight independently of jus ad bellum considerations. The justice or injustice of the cause for which one is fighting is always a relevant factor, one that partly or wholly determines whether one has a right to fight and whom.

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 To reiterate, the moral equality of soldiers doctrine holds that soldiers, whether they are fighting for a just cause or an unjust cause, do not act wrongly when they aim their fire at enemy combatants and observe jus in bello requirements. A soldier fighting in war does not have a moral right not to be attacked by enemy combatants—regardless of the justice or injustice of her cause. Another argument for the moral equality of soldiers doctrine: There is a longstanding convention that when one joins an army and engages in war as a combatant, one gives up one’s normal moral right not to be attacked. One gives up this right with respect to enemy combatants fighting a war against one’s country. It is not necessarily the case that soldiers, joining an army, should agree to such a convention. But as a matter of fact, they do. Moreover, as a matter of fact, this convention is a good thing. That soldiers take themselves to be entitled to attack enemy soldiers but not to attack noncombatants on the enemy side makes war generally less horrible for noncombatants than it would otherwise be. Although it is hard to gauge this, perhaps the convention reduces the moral costs that wars overall impose. So not only do soldiers in fact waive their rights not to be killed by enemy soldiers when they sign up to be soldiers, the convention is a good one and they have good reason to waive their rights in accordance with this normal, conventional practice.

This argument is not to my knowledge raised by Walzer. Nor is it discussed by McMahan. I got it from Tom Hurka; I’m not sure if he now endorses it.

Objection: Consider a duel. In a duel, each of the persons involved waives his or her right not to be attacked by the other (under fair fight conditions). Many would still object that the killing that takes place in duels is wrong, unjustified. Now suppose soldiers all waive their right not to be attacked by enemy soldiers, in case of war, when they join the military. One might say: So what? It is still wrong to kill without a good reason, and wrong to the person one kills without justification. If one is fighting for an unjust cause, one lacks a good justification for fighting. So, one ought not to fight. I therefore believe the voluntary consent idea here does not go far toward establishing the moral equality of soldiers. To the extent the idea has any plausibility, what seems rather to be going on is just an appeal to consequences—it may be that regarding enemy soldiers as not doing wrong when they fight for an unjust cause helps dampen enmity and hatred and eases the task of gaining mutual reconciliation when war ends. This seems pretty iffy, however.

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McMahan, p. 713: “The requirement of just cause applies not just to the resort to war, or to the war as a whole, but also to individual acts of war. It seems, moreover, that the requirements of just cause, and indeed all the other jus ad bellum requirements as well, must be continuously applied to the continuation of war as circumstances evolve throughout the course of a war.” So in this way jus in bello cannot be satisfied independently of jus ad bellum, contrary to the recent tradition.

Discrimination. (This is the claim 3 issue.) McMahan says that the traditional just war theory account of the requirement of discrimination needs reformulation. The idea is that combatants in war should discriminate among potential targets and only aim fire at permissible ones. But the line should not be drawn between combatants and noncombatants. Rather, says McMahan, the correct line is between those who bear “moral responsibility for an unjust threat or, more generally, for a grievance that provides a just cause for war.” A noncombatant might satisfy this condition and be liable to permissible attack. A combatant might not satisfy the condition.

To see the idea of moral responsibility at work here, consider McMahan’s example of the Implacable Pursuer. This is a person who is posing a wrongful lethal threat, but is not morally responsible for posing this threat. (The person is drugged and has a device implanted in her brain

that controls her bodily movements.) If one is a morally responsible agent (one has rational agency capacity at a sufficient level), and one acts in such a way as to pose a wrongful threat, one bears moral responsibility for the threat, according to McMahan, even if one is blameless (maybe one is coerced, or is acting on the basis of nonculpable mistake or ignorance).

McMahan also notes that one might be morally responsible for bringing about the situation in which a wrongful lethal threat is posed against someone, even if one is not now threatening or menacing anyone. Suppose I tell a lie to Smith ("Jones is engaged in an attempt to murder your husband and hence is a wrongful aggressor who ought to be shot"). This is false, but Smith reasonably believes it, and attacks Jones. Suppose Jones can save his life by killing me, even though it is now Smith, not I, who is posing a lethal threat to Jones. We may suppose there is nothing I can do now to stop Smith's lethal attack. But if Jones kills me, Smith will become confused, and cease attacking. In this case I am morally responsible for a wrongful serious threat, and liable to be killed if that is necessary to prevent the threat I have initiated from ripening into serious harm.

The laws of war. McMahan asserts that he is discussing the moral theory that determines under what circumstances one may permissibly deliberately kill or harm another person. Who in principle is liable to being the target of permissible lethal attack? That is roughly his question. He says the answer to this and related theoretical questions does not automatically settle the question, what the laws of war (the laws and rules written into international treaties or the United Nations charter statements or declarations of human rights). McMahan, page 730: "It is important to understand that the account I have developed of the deep morality of war is not an account of the laws of war. The formulation of the laws of war is a wholly different task, one that I have not attempted and that has to be carried out with a view to the consequences of the adoption and enforcement of laws or conventions." In much the same way, an account of the moral theory of self-defense and justified killing in peacetime contexts does not automatically tell us what the criminal laws of homicide ideally ought to be like. The morality of justified killing should significantly shape the criminal law, we think, but the criminal law is inevitably coarse-grained and cannot and should not perfectly register every nuance in the theory of morally justified killing. If we tried to make the criminal law of homicide too perfectly fine-grained, the results would be morally worse than if we accepted that the law, to be administrable, must be somewhat simple. So some morally justified killings should perhaps be illegal and some morally unjustified killings should perhaps not be illegal. Same goes for the laws of war, according to McMahan.