

Conviction Versus Convention

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This collection of essays is centred around the growing concern with the question of whether the laws of war should be changed to reflect the moral status of the combatants involved, or as David Rodin and Henry Shue put it in their introduction, ‘Can a soldier be held responsible for fighting in a war that is illegal or unjust?’ (1). However, there is perhaps a more intriguing question to be found herein. This project, the result of two two-day workshops held at Oxford University’s Programme on the Changing Character of War in the Spring of 2005, has running beneath its aforementioned aim the seemingly meta-theoretical question of whether philosophical theory still has any value in the ‘real world.’ To be more precise, it could be argued that what is really at stake here is whether philosophical arguments about such pressing issues as asymmetric warfare, terrorism, and the ongoing wars in Iraq and Afghanistan can have any currency in international legal, political, and military debates that demand workable solutions that are more than abstract ideas based on unrealistic hypothetical scenarios.

Jeff McMahan’s opening chapter not only initiates this tension between theory and practice, but is itself a microcosm of it. McMahan argues that, while the laws of war must treat all combatants equally regardless of the justness or lack thereof of their side, the ‘morality of war’ cannot disregard justice and therefore cannot treat combatants equally (19). In order to bring our evaluation of combatants into congruence with our evaluation of the everyday use of violence, and thus bring our moral reflections about war into harmony with our ‘basic morality’ (27), McMahan contends that the criterion for liability to harm in war should be changed from ‘posing a threat to others’ (21) to ‘being morally responsible for an unjust threat’ (22). Hence, as McMahan states, since we do not claim that an attacker has a right to defend himself

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against a police officer we should not claim that an ‘unjust combatant’ has a right to defend himself against a ‘just combatant,’ even though this is the view of current laws concerning such *in bello* rights.

And yet, although he shows that justifications based on liability, lesser evil, and consent cannot be used to support the ‘moral equality of combatants’ (21), McMahan still concludes that ‘the only feasible option, at least at present, is to grant legal permission to both just and unjust combatants to fight and kill in war,’ thus maintaining the ‘legal equality of combatants’ (28). The reason for this conclusion is not that McMahan has decided that his initial position was wrong, but rather that, in the face of the realities of combat, the sort of move to an asymmetric evaluation of combatants that he has been thus far advocating is simply impractical. When considering the fact that, due to the epistemic constraints surrounding warfare, supposed experts, let alone combatants, cannot determine with certainty which side is ‘just’ (27); that allowing unjust combatants to be punished could ‘increase the risk of mass vengeance masquerading as retributive justice’ (30); and that it is safer to consider combatants as professionals fulfilling a legally-defined role rather than as crusaders fulfilling a moral mission (30), McMahan is forced to side with the legal tradition over and against his own philosophical perspective. This battle between theory and practice leads McMahan down some rather strange paths, such as the contention that when law and morality conflict one must *obey* merely whichever one provides either a prohibition or requirement (37), and that we have no choice but to consign ourselves to the ‘serious defect in the law’ that it will ‘penalize people for their adherence to the demands of morality’ because ‘this kind of defect seems ineliminable’ (39).

It is such collateral damage from McMahan’s battle that propels the subsequent efforts of the book, as each contributor tries to avoid the pitfalls that they see in McMahan’s attempts to bridge the gap between philosophy and prudence. David Rodin tries to offer what he sees as a more pragmatic form of asymmetry concerning just and unjust combatants with the help of John Rawls. Concerned with the implications of McMahan’s version of asymmetry that would, for example, let just combatants target non-combatants considered to be morally responsible for unjust threats, Rodin argues that McMahan was only half right (45) in that rather than such a permissive asymmetry we should instead have a restrictive asymmetry (55). Rodin claims that individuals in Rawls’s original position—which he adopts without questioning the dubious possibility that someone could ‘have full knowledge about the world, but no knowledge of how they will be situated within it’ (57), as though the former were entirely independent of the latter—would opt for the least morally and physically risky laws possible, laws that would not increase *in bello* permissions for just combatants, but would rather deny *in bello* permissions for unjust combatants (60).

Having put forth what he sees as a more plausible argument for asymmetry, Rodin, like McMahan, spends the rest of his chapter contending with practical objections and comes to an only slightly different conclusion. Thus, rather than suggest that we must maintain symmetry for practical purposes, Rodin instead makes the somewhat more optimistic claim that, although no international institution yet exists that could apply restrictive asymmetry and therefore punish

unjust combatants, there is still the possibility that unjust combatants' 'latent liability may become actualized by the potential future presence of such a body' (63). However, having chosen to be an optimist rather than a realist, Rodin is nonetheless left in the same position as McMahan was, waiting for a more perfect world that could put their ideas to good use.

With the collection opening with the two contributors who were, as Henry Shue puts it, 'pursuing a profoundly morally appealing but impossible dream' (111), the rest of the chapters focus instead upon how the stark reality of international affairs does not allow for asymmetry in warfare. For Christopher Kutz, the question surrounding asymmetry is not which specific rights should be accorded to which specific combatants, but rather, following Thomas Nagel, 'why any of the status quo-permitted acts of war is actually permissible' (72). In other words, if McMahan and Rodin are seeking the most just or least risky laws of war, why argue for asymmetric permissions or restrictions instead of simply pushing for the symmetric outlawing of warfare period? Kutz's answer is to move from what could be conceived as institutionally *possible* (74) to a more pragmatic approach to look at the reasons motivating the current laws of war and to see just how impractical either such a radical symmetry or a more moderate asymmetry would be when confronted with the way that the laws must actually operate.

What we find in Kutz's chapter, therefore, is the first attack upon the utility of philosophy itself. This attack is centred around two brute facts of warfare that show why, to use Kutz's framework, pragmatism and scepticism have been and should continue to be operative first and foremost when thinking about the laws of war. First, far outweighing any fear of *post bellum* punishment, the 'parties at war operate in a context of fear' (75) concerning the lives of their people and the continued existence of their nation. Second, in the 'fog of war', it would be impossible to achieve a sufficient level of certainty about the moral status of the individual participants to underwrite liability (82–3). Thus, now following Judith Shklar, Kutz concludes that 'international theorists should look—and have—to humanitarian law's promise in reducing fear, rather than pressing upon it headier ideals and aspirations' (85). Although Kutz ends his chapter with the recognition that a legal system concerned only with mediating doubt and fear is uninspiring (86), this is not, as some might hope, an opening left for further philosophical inspiration, but merely another sombre truth about war meant to ward us away from such idle speculation.

Beyond continuing Kutz's emphasis on realism over idealism, the next three contributors also have in common the fact that they each make use of Tim O'Brien's *The Things They Carried: A Work of Fiction* (though interestingly only Cheyney Ryan includes the subtitle) in their arguments. For Shue, O'Brien's novel serves to illustrate his main thesis in his attack on McMahan that, because war is so unique and therefore so discontinuous from everyday experience, claims based on ordinary moral thinking simply have no place there. In other words, McMahan's justification for asymmetry rests on the parallel between self-defense claims against a police officer and against a just combatant, a parallel that may look valid but is really comparing apples and oranges since 'in ordinary life, everyone—both the cops and the robbers—are civilians, and "civilians" has its meaning by contrast with

“combatants” (100). Shue, like Kutz, is essentially criticizing McMahan for not sufficiently appreciating just how far apart war and peace are and for not recognizing that, if we are still to try to make moral appeals to improve war, then ultimately the only coherent appeal would have to be for pacifism (104). However, for Shue, so long as wars continue to occur, we must seek reform from within the current legal framework and strive for the ‘morally best rules for the circumstances of war’ (110) rather than oppose the laws of war with theories based on a reality that ‘is fervently to be wished [for], but not, I fear, possible’ (102).

Judith Lichtenberg and Cheyney Ryan both use O’Brien’s novel to make a more specific case against McMahan, Rodin, and similar attempts to apply abstract theories to warfare. For them, O’Brien does not just encapsulate the divide between the homefront and the battlefield, but also that of the distance between the philosopher and the soldier. In Lichtenberg’s chapter, the importance of marking out this distance is that it is meant to force us to reflect on the effect that theories could have on soldiers and, therefore, what it would mean to institute asymmetric laws of warfare that would punish soldiers found to be on the wrong side.

Although we might question how committed Lichtenberg truly is to such empiricism when she is at the same time discussing whether it is permissible for a person to defend himself or herself ‘against a baby shot out of the cannon and hurtling towards him or her,’ her main thesis fortunately still depends more on O’Brien than on seemingly the very type of abstraction she is arguing against: ‘If we understand the ordinary soldier’s aim to be Tim O’Brien’s—“to stay alive”—then, contra McMahan, the bad effects of his action (say, killing an enemy soldier) will not necessarily be greater than its good effects (saving himself)’ (117). This thought, coupled with the ‘idea of a special “role morality” attaching to soldiers’ that requires ‘a degree of obedience inconsistent with the demands of ordinary morality’ (127), leads Lichtenberg to the provocative contention that if we were to ‘examine many unjust combatants and ask ourselves “Would we want to punish this soldier if it were feasible?” (Remember that we are not talking about war criminals.) I suspect that we would not’ (129).

In a vein similar to Dan Zupan’s later contribution, Cheyney Ryan uses O’Brien’s novel as part of a larger and much more personal effort to actually situate the reader face-to-face with the soldier to go beyond pointing out how far apart the philosopher and the soldier are, and instead to get the reader to see war through the soldier’s eyes. As Ryan’s and Zupan’s essays truly stand out from the overall debate while the other remaining chapters are more in keeping with the volume thus far, I will briefly discuss each of them below before returning to consider the soldier’s perspective.

C. A. J. Coady provides a conceptual analysis of the main issues at the heart of the asymmetry debate, such as the line between combatants and non-combatants, the relationship between *jus ad bellum* and *jus in bello*, what it means to have a just cause, and the consequences of asymmetric warfare. Continuing the trend from Kutz onward, Coady emphasizes that the apparent moral incongruities surrounding the laws of war need to be seen as a necessary ‘compromise’ (164) between our ideals and reality. Thus, echoing McMahan’s own move towards pragmatism, Coady points out that ‘where our concern is with what can be mutually respected and what

might be dangerously exploited,' we must choose 'legislating to control the horrors of war' rather than possibly 'giving too much reign to the passions of righteousness' by being 'concerned solely with moral entitlements' (165).

Anthony Coates, Gregory Reichberg, and Adam Roberts each present a historical context of both the asymmetry debate and of just war theory itself. As such, these chapters are useful for those looking to understand how just war theory came to be and how the debates currently surrounding it originally took shape. In Coates's chapter, such an overview is meant to help us to see once again the potential power of *ius ad bellum* that was first seen by Aquinas, Clausewitz, and others because of the perceived relationship between the motivation to go to war and the way war is fought. Reichberg likewise wants us to realize that what we often think of as one theory that has evolved over time is actually a development of competing paradigms that have been arguing about asymmetry since at least the Middle Ages. And, Roberts tries to get us to understand both what the laws of war are actually capable of and why the current laws of war merit the pragmatic value that they have, and thus why he, like so many of the contributors in this book, is so careful not to let philosophical arguments interfere with them.

I would now like to conclude by returning to the chapters by Ryan and Zupan to see if, even though they too continue the defense of the status quo, from out of them a defense of a philosophical challenge can yet be found against 'real world' scepticism. Ryan and Zupan could both be seen as providing a grounding found at the level of the experience of combatants for Lichtenberg's aforementioned claim that even if we were capable of punishing unjust combatants we would not want to do so. For Zupan, such experience explains why, as Reichberg points out, Francisco de Vitoria could argue that soldiers must exercise 'invincible ignorance' (202), insofar as 'being under orders, trusting in his superiors, focusing on the mission at hand are such a part of the ordinary experience of being a soldier that "knowing" his or her war to be unjust turns out to be something he or she literally cannot do' (218). Zupan goes one step further, however, and argues that this ignorance may not be invincible, but that it should be contractual, as it is part of a job that requires 'appropriate acceptance of one's station and the obligations that stem from it' (223), and, most importantly, a job that 'we demand that they do' (225).

It is this demand that figures most prominently in Ryan's investigation into the experience of combatants. This investigation is meant to 'provide another way of understanding the victim status of soldiers that renders Walzer's moral equality claim more tenable' (133) by exploring exactly how answering one's nation's call to fight (144) not only transforms the individual from a citizen into a soldier, but also from a member of one reality—*our* reality—to that of another—*their* reality. Although Shue follows Ryan on this point, as we have already seen in his critique of McMahan, for Ryan 'war-as-its-own-reality' goes deeper than merely not being able to compare police officers to combatants, as this realm is indeed 'incomprehensible to those outside' and thus this 'non-equivalence problem (of war to anything else)' (137) reveals a far greater problem of 'whether you can judge [soldiers'] acts if you do not share any of their experiences' (134).

Unfortunately, Ryan appears to see these ‘serious problems for philosophers’ (137) in much the same way as the other contributors to this book, as another reason for philosophers to leave discussions of war to those better equipped, rather than as an indication that philosophers are perhaps those best equipped to explore these issues. In describing the way that ‘war-as-its-own-reality’ is reflected in the language (132), actions (138), and reactions (140) of soldiers, in the phenomenon of ‘the bond that soldiers experience even with their enemies’ (145) and the isolation that ‘came from experiences [a soldier] could not share’ (151), Ryan is in many ways pointing to the very philosophy produced during and after World War II by those who experienced it firsthand—existential phenomenology.

The contributors in this book have successfully raised concerns about the deficiencies and potential dangers of those philosophers who—like Walzer, McMahan, and Rodin—try to analyze war through abstract concepts and hypothetical constructions. But we should not forget that there are also philosophers who—like Martin Heidegger, Jean-Paul Sartre, and Emmanuel Levinas¹—investigate the nature of experience and of violence in such a way that can help us to bridge the very gap between *our* judgment and *their* experience that Ryan depicts so powerfully.² Thus, this book can certainly be seen as an excellent resource for those who wish to see what just war theory is and in particular how many of its best thinkers address an issue like the problem of moral asymmetry. However, it also shows both why, as Ryan indicates, ‘if our reflections on war are to impact the conduct of soldiers, then (at certain moments, at least) they must speak to them *as* soldiers’ (132), and how such reflections will never reach their true potential until they appreciate that philosophy can offer as much pragmatic value as does law. Philosophers have helped, of course, to shape the military mind and will continue to do so—from teaching future soldiers to engaging in policy discussions—but, as this volume has pointed out, perhaps we need to ask whether this practice should continue. And, as Lichtenberg, Ryan, and Zupan have persuasively argued, this question needs to be pitched not only at the level of the policy-makers but also at the level of the policy-executers, for our concerns must reach beyond which laws are best to what these laws mean.

¹ In particular, I recommend Heidegger’s existential analysis of the meaning of death and how confronting it can separate the individual from the community (cf. Heidegger 1962: 274–311); Sartre’s investigation into the relationship between freedom and responsibility and in particular what that means for the soldier (cf. Sartre 1956: 707–712); Levinas’s attempt to reinvigorate the ancient view of ethics as ‘first philosophy,’ which, for someone who wrote in a gulag, interestingly begins with a reflection on war and morality (cf. Levinas 1969: 21–30). For a more recent exploration of the relationship between phenomenology and war, cf. Dodd (2009).

² McMahan, for one, forgets this when he writes in his recently published *Killing in War*, which is in many ways his response to *Just and Unjust Wars*, ‘For the first three-quarters of the twentieth century, virtually nothing of interest or significance was written on the just war, or indeed on the morality of war generally’ (McMahan 2009: 106). Although Walzer was at least willing to address Sartre and Frantz Fanon (cf. Walzer 2006: 204–206), it was unfortunately more to make a point by taking their words out of context than actually to engage with their alternative perspectives.

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