

Morally Liable States: A Critique of Jeff McMahan's Theory of Moral Liability in War

Matthew Clark

Abstract

This essay attempts to reconsider current debates around just war theory. It takes as its starting point Jeff McMahan's ideas about just war: that the moral liability of individuals should be taken into account during war time. By reconsidering the special nature of war as conflict between states continuity is established between *jus ad bellum* and *jus in bello*. Moral liability is then shown to actually lie with the state itself, making those who *ex officio* constitute it liable targets for a defending nation.

Introduction

The laws of war are the conventions that govern the conduct of two or more opposing forces in the beginning and continuation of an armed conflict. Their chief philosophical source has been the work of traditional just war theory.¹ Jeff McMahan, however, has proposed that everyday morality should be central to our considerations of a just war.² This essay argues that there is a

¹ Orend, 'War'.

² McMahan, 'Just Cause for War'.

separate morality for war and that the existence of states, and their position as moral actors, actually requires one: as such the moral liability of an individual soldier ought not to be considered.

This essay will first of all flesh out McMahan's own theory for morality in war. Then look at a number of proposals that can be made for maintaining separate moralities in war and in peace. Through a development of the one of these (collectivism), we will see that we ought to maintain a distinct conception of the laws of war.

I. McMahan, Moral Liability and Warfare

McMahan holds that 'the most common and least controversial justification for initially harming another person is that the person *deserves* to be harmed, or is *liable* to be harmed, because of something he has done – usually an act of wrongdoing, or an act that has inflicted, or may otherwise inflict, a wrongful harm.'³ In coming towards you and threatening to attack you, I make myself *liable* to attack by you, which, as you acted in self-defence, you are not morally responsible for; instead I am, as the initial aggressor. In this way the '*ex ante* redistribution of inevitable harm away from those who are innocent and toward those who are responsible for a threat of wrongful harm' is a form of justice, specifically '*preventative justice*.'⁴ (McMahan makes similar points about corrective and retributive judgements.⁵) This common-sense intuition of justice, which McMahan holds to be one of our most basic moral intuitions about harm and harming, forms the basis for his theory on war.

He defines this further by distinguishing liability from 'desert'.⁶ While desert denotes harming a person for the end of harming in itself, simply because that is the end he deserves; liability requires something more than this, it requires a 'condition of instrumental efficacy' to be satisfied (i.e. it prevents

³ McMahan, 'Laws of War'.

⁴ Ibid.

⁵ Ibid. 498-9.

⁶ Ibid. 499.

someone from doing harm, or compensates someone for a wrong). It is with this strong and fairly incontrovertible moral intuition that McMahan builds up his theory of just war. McMahan feels that an adversary is morally liable is determined by the harm that they can cause.⁷ In warfare this harm is characterised by its relation to an aggressor and the reasons he has for fighting (whether he has just cause at *any time*) and proportionality. Given a just cause and keeping within the bounds of proportionality, does not make a combatant liable to harm in the waging of war. In this way someone fighting a just cause may be justified in killing a civilian, if that civilian has made herself liable to harm by unjustly engaging – even vicariously – in the pursuit of the war.

This outcome goes against our intuitions on this matter and the question can easily be put at this point, that moral liability is all well and good as a justification in everyday morality, but war is different from the everyday. It is worth here however briefly going over the arguments as to why moral liability may apply to war. McMahan attempts to do this largely by arguing against the distinction for relatively standard moral consideration in *jus ad bellum* – such as the similarly asymmetric distinction between the aggressor nation (liable) and the attacked nation acting in self-defence – and the neutrality imposed by *jus in bello*, where different standards are said to apply.⁸ It is only by destroying this distinction that McMahan can justify taking into account the moral liability of soldiers. If we can save such a distinction then we can continue to not consider the moral liability of soldiers.

We will now consider arguments against McMahan and for maintaining this distinction, to see if a separate morality for war can be justified. By removing this distinction, he hopes to show that the supposed special moral standards of war are untenable. The first types of arguments for the distinction between wartime and peacetime morality that McMahan characterises are those he labels as ‘consent’ based arguments. They hold that asymmetry between the two, is based on the fact that by being soldiers there is at least

⁷ McMahan, ‘Just Cause for War’ 21.

⁸ McMahan, ‘Laws of War’ 499.

an implicit consent to being harmed.⁹ McMahan here draws a distinction between consent and upholding a convention.¹⁰ In becoming a soldier, one does not accept oneself simply as a viable target for harming – in McMahan’s example a Polish patriot fighting the Nazis could not be said to think it was morally justified for him to be harmed – one is merely accepting a convention: that it is better that soldiers target soldiers than civilians. The Polish patriot would, McMahan argues, be just as justified in fighting if he rejected the convention; the Nazi as unjustified in killing him. For McMahan, the asymmetry of moral liability persists in wartime: the aggressor makes herself morally liable to harm, by posing harm initially. McMahan draws a pertinent distinction here between accepting the possibility of being harmed by fighting, and consenting to harm. The ‘consent’ approach to maintaining a different morality in *jus in bello* therefore fails.

The next style of argument defending the *jus ad bellum/jus in bello* distinction, is that put forward by rule-consequentialists. Rule-consequentialists argue for a different war-time morality by saying that the rules that give us the best outcomes are the ones to follow, and that in this case that is the ones codified in the laws of war. It is a good that many civilians should not die, so we do not allow soldiers to attack civilians. McMahan rejects these essentially by first of all questioning how these rules would overcome our natural intuitions about moral liability (that is, essentially declaring himself a deontologist),¹¹ but then by asking how war differs morally from other kinds of conflict, except in terms of scale. He suggests that fighting is fighting, and that it does not matter if two people are fighting or a million. It is beyond the scope of this essay to enter into the deontology/consequentialist debate, so for the sake of argument let us accept that McMahan is correct here. His latter objection is not so forceful, as we will see below.

McMahan next attacks the ‘collectivist’ response to maintaining a dis-

⁹ Ibid. 500.

¹⁰ Ibid. 500-2.

¹¹ McMahan, ‘Laws of War’ 504-5.

tinct morality in war and peace.¹² There are two collectivist approaches he characterises here, which are bound together by their treatment of states as moral agents: first, the moral principles governing states are held to be those that govern individuals, but such rights are not transmittable between states as agents, and the individual moral actors who constitute them. The moral difference here is maintained, McMahan suggests, in two different ways. Either, the responsibility lies with the leaders of the states, while the individual combatants (acting as ‘instruments of states’) are free of such responsibility. Or states can behave towards each other in ways ‘that would be impermissible if they were acting as private individuals’. The former McMahan defeats – and I agree with him here – by pointing to the difficulty of drawing a line of responsibility between the rulers and the populace. While Davis Brown has demonstrated that the informational difference between people and government is real, and that only the government can make informed decisions about wars;¹³ I agree with McMahan that to remove any responsibility for the war from the individuals involved, would be to greatly overstate the lack of information available. Indeed I cannot see how a lack of information could ever remove moral responsibility; the correct response to a lack of knowledge regarding a war would be to suspend judgement (that is to behave neutrally) towards the prospect of it, rather than absolution from blame through ignorance.

McMahan’s response to the latter problem (that it remains unestablished how humans, in constituting a society, can create differing moral rights over other constituted groups) is on the face of it persuasive, but by establishing that states can be moral agents governed by the same morality we can consider an alternative.

¹² *Ibid.* 503-4.

¹³ Brown, ‘Judging the Judges’ 138-139.

II. States as Moral Actors

We first need to establish whether or not states can be considered moral actors who would be capable of being liable. It certainly seems to be the case that we hold states to be responsible for certain actions, in much the way that we hold other moral actors responsible. When a state or its agents wrong someone we expect them to apologise or offer compensation. McMahan seems to disagree though when he says: ‘It is absurd to suppose that the sole responsibility for these [Nazi] killings lies with either an abstract collective, the German state, or with a handful of political and military leaders’;¹⁴ it is equally absurd, I would say, to think that when the Germans declared war on Poland it was in some sense the population or leaders of that country declaring war. It would furthermore be absurd to suggest that wars are melees of fighters spiralling out of control, as McMahan claims. Indeed McMahan accepts the involvement of states makes a major impact on war because it leads to ‘greater coordination’.¹⁵ This seems to be a purposeful understatement on his part. Wars differ from other kinds of conflict precisely because wars are constituted between *political communities*.¹⁶ If we accept this then the only moral agents we have are states.

The possibility of the moral agency of states presents a problem for McMahan’s theory. It is central to McMahan’s argument for the moral liabilities of soldiers that the soldiers consider the just causes themselves, and having made their decision become morally liable or otherwise depending upon its correctness. We can at least establish that at the war’s outbreak this is irrelevant – the soldiers have no role in declaration beyond that of their roles as citizens. Whether or not soldiers should fight or not is not so much a question of the morality of war as for political philosophy and their obligations to their states.¹⁷ If the states are moral agents, then they are the relevant actors in this area of war. The asymmetry of moral liability lies between the states, and so

¹⁴ McMahan, ‘Laws of War’ 504.

¹⁵ Ibid. 505

¹⁶ Orend, ‘War’.

¹⁷ A neglected question in relation to theories of war, see Baron, ‘Dying for the State’.

in *jus ad bellum* states can be treated as moral agents governed by the same morality as individuals are every day.

Perhaps here, McMahan could counter that our intuitions about states as moral agents is misguided. By ‘applying the principles that govern relations between individuals as if collectives were individuals’ is misguided, as a collective ‘does not have a single will ... a unitary good’. While I am doubtful that the good of defence cannot be considered a collective unitary good, I want here to sketch a quick defence of considering the correct apportionment of liability as a mark of the collective. If we accept that political communities are necessarily engaged in the initial instigation of a war, then when State A declares war on State B, two separate moral agents are confronting each other like you and I. In declaring war State A is the aggressor. If you accept that states can be moral actors (and I think we can), then they must be apportioned the moral liability (with appropriate considerations for just cause and proportionality). State A is now liable to harm, so State B has its right to self-defence. We have not introduced some special morality for state actors, nor erred in our apportionment of liability.

What though of *jus in bello*? To answer that we need to more clearly consider the relationship of states and their citizens. Citizens stand in a special relation to their state. A state is sovereign over its citizens and – in a standard social contract theory view – this *political* relation is one in which the citizen gives up some of their autonomy. As the state is the only possible agent for *jus ad bellum*, and as I have noted keeps the same morality as individuals, it seems coherent to maintain it as the agent during the war. If we do this though, do we not end up with a *jus in bello* which allows for any citizen of an aggressor state to be justifiably attacked? It need not be so. Citizens stand in a special relation to the state, but in turn the state stands in special relation to them. Not all citizens constitute the ‘state’ properly understood. Certain citizens are also functionaries, or constituent parts, of the state *ex officio*. The Government, Civil Service and armed forces are all state functionaries. As states are the liable moral agents of war, so are their functionaries: to attack them *in their role for the state* is to attack the state. This breaks down the

distinction between *jus ad bellum* and *jus in bello*, by maintaining intuitive morality with the state as the primary moral agent. It thus overcomes McMahan's insistence on considering individualist moral liability. In war it is only the states that matter.

Given that only states can be considered moral agents in war, and that they are governed by our intuitive ideas about moral liability both during *jus ad bellum* and *jus in bello*, we can now turn to the issue of considering the moral liability of soldiers. It is obvious that the moral liability of soldiers, following this argument, is irrelevant to the consideration of a just war and therefore to the laws of war grounded in it. Soldiers cannot be as persons morally liable in war. It is only *ex officio* as constituent functionaries of the state that they become valid targets, after considering the state's moral liability. It is also worth noting that valid targets for a defending nation are wider in this conception than in the standard laws of war, including 'civilian' politicians and public servants.

Conclusion

To conclude, moral agency in war can only sensibly be ascribed to states, due to the special role conflict between political communities plays in constituting war. While maintaining the intuitive morality based in moral liability favoured by McMahan, this account allows us to maintain a separate morality for warfare. A *jus ad bellum* founded in the asymmetry of moral liability, and a *jus in bello* based on the continued right of a state to attack an aggressor state, and to target those citizens fulfilling their role as a constitutive functionary of it. The consideration therefore of a soldier's moral liability should not be taken into account by the laws of war. Only the moral liability of the state should. A soldier fighting for a morally liable state is herself liable insofar as she is a constitutive part of that state.

References

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Matthew Clark is an MSc Philosophy of the Social Sciences student at the London School of Economics and Political Science (2014-2015). He also holds a degree in European Social and Political Studies from University College London. His interests cover social ontology, political philosophy (particularly liberalism and democratic reasoning) and religion, and he hopes to continue research in the future. You can contact him at [matthewthomasclark@hotmail.co.uk].