

Neither Present, Nor Enough: Why Consent Does Not Establish a Moral Equality Among Combatants.

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In this paper, I will argue that Jeff McMahan is correct in his argument, provided in his *Killing in War*, that the idea of a ‘mutual consent’ to take on harm between combatants cannot be used to establish a moral equality among just and unjust combatants in war. Rather, I assert, the orthodoxy’s argument that just combatants do consent hinges on an incorrect understanding of what consent is, effectively confusing response under manipulation with free consent. Moreover, consent, even if it were present, would not be enough to secure a moral equality of combatants.

To facilitate my argument that McMahan is correct, I will begin by briefly outlining the two relevant ways of understanding consent that the orthodoxy proposes: the ‘Boxing Match Model of War’ and the ‘Gladiatorial Model of War’. I will then proceed to explain why McMahan finds both analogies for consent in war to be problematically disanalogous and lacking. Following this explanation, I will discuss some potential counterarguments to my argument that just combatants do not consent to being attacked in war, and that beyond this, consent is insufficient in establishing a moral equality among just and unjust combatants. To make my

argument, I will begin by explaining the term ‘consent’, and what it means for a person to give consent. To facilitate this discussion, I will draw on a common area of consent-discourse: sexual consent. I will then turn to McMahan’s concern that just combatants are ‘compelled’ to fight (McMahan 53), using this to illustrate the incompatibility of the conditions that just combatants fight under, and the concept of ‘consent’. I will then proceed to explain the significance of the cause for which one fights, highlighting how even if a just combatant could be understood as ‘consenting’ to being attacked, a moral equality still would not exist between just and unjust combatants.

The orthodoxy proposes two conceptions of consent in war; the first is that war is like a boxing match (McMahan 52). This line of argument holds that, in boxing, both boxers necessarily waive their rights not to be hit when they take on the role of ‘boxer’ and thus, their identity as a ‘boxer’ means that they have consented to being harmed. According to the orthodoxy, war works in a similar way: it “is part of the profession of arms to consent to be attacked by one’s adversaries” (McMahan 52). The second proposal for consent in war is the ‘Gladiatorial Model’. In gladiatorial combat, both combatants were forced to fight by a third party, under the threat of death to both if they refused (McMahan 58). The gladiators had a “shared servitude” and, with the knowledge that they had to fight if they were to have any hope of

surviving, both gladiators can be understood as giving “ex ante consent” (meaning consent ‘from before the event’, or consenting ‘from the outset’) to be attacked (McMahan 58). The orthodoxy draws parallels between this form of combat and war, suggesting that both sides of a war are “compelled” to fight by those that design a war and, thus, both can be understood as fighting out of an equal sort of necessity or coercion (McMahan 58). In the following section of this paper, I will explain why neither of these proposed models of war satisfies McMahan.

In response to the ‘Boxing Match Model’, McMahan first makes the distinction between consenting to be attacked, and agreeing to accept the risk of being attacked – a distinction that, he asserts, the model fails to recognize (McMahan 52). Where consent by just combatants to take on harm is to justify, and make permissible attacks by unjust combatants (such as is the case for boxers), agreeing to take on a risk is nothing more than a recognition of potential wrongs that may be perpetrated against them. Just combatants, McMahan argues, neither agree to be killed, nor waive their right not to be killed, when they enter into combat (McMahan 52). They acknowledge that there is a risk that they will be wronged by unjust combatants, but this acknowledgement does not in turn make the wrong any less wrong. Furthermore, McMahan notes that unjust combatants “compel” just combatants to fight, a manipulation that is not reciprocated by the just

combatants (McMahan 53). In simple terms, this means that unjust combatants, who necessarily impose a wrongful threat of harm to the just side, force the hand of just combatants to fight, for if there is no defense of the just cause, the unjust side wins (McMahan 53). So, to imply that there is any real element of choice in fighting for a just cause seems misguided.

McMahan also takes issue with the ‘Gladiatorial Model of War’, as this model is “relevantly” dissimilar to modern war (McMahan 59). While gladiators ‘consented’ to fight because to refuse would end in certain death to both combatants, McMahan argues that combatants are rarely threatened with death as punishment for refusing to fight in modern war (McMahan 59). With milder forms of punishment being the norm, it does not seem to hold that one is justified in killing (or attempting to kill) another person to avoid the non-lethal repercussions for abstaining from fighting. Moreover, he argues, even if execution were used as an individual form of punishment, it could not realistically be used against an entire army, so the claim that going to war results in fewer deaths than refusing to fight seems untrue of modern war (McMahan 59).

McMahan has one additional criticism of both the ‘Boxing Model’, and the ‘Gladiatorial Model’ understandings of consent in war: that consent could only ever be considered a necessary, not a

sufficient condition in establishing a moral equality among combatants (McMahan 57). While it seems that the just combatant must consent to being attacked in order for the unjust combatant to be permitted to attack, it also seems clear that this is in no way enough. The different justness-valences of the two sides do not cease to be important, even if just combatants consent to take on a liability of harm. That unjust attacks promote an unjust cause, and that just attacks defend a just cause, matters. With or without consent, it seems, there is still a moral inequality between just and unjust combatants.

Having now outlined the orthodoxy's two proposed models for understanding consent in war, and explained McMahan's response to these models, I will now briefly turn to some potential counterarguments to my stance. As I will proceed to argue, McMahan is correct when he denies that appeals to consent can establish a moral equality among combatants. I will attempt to show how the 'consent' that the just combatant is suggested as giving under the two models does not actually constitute consent, using sexual consent as a useful analogy to guide my discussion. I will then evaluate the role that consent plays in combatant moral equality considerations. One possible objection to my argument is that my sexual consent analogy is not actually useful in criticizing the orthodoxy's argument. I hope to show, however, that this example from the domestic sphere is helpful in framing what

consent is widely accepted to mean, and that this definition of consent carries over into the sphere of war. A second possible counterargument is that if coercion is understood as being incompatible with consent, then unjust combatants fight under an equal lack of consent, as they may be manipulated into fighting by their own side. This objection, however, fails to recognize that just combatants may also be coerced to fight by their own side (e.g. by their government), and additionally by unjust combatants (in a way that is not reciprocated). So, while it is a fair comment that many unjust combatants may not give their ‘consent’ to take on liability to attack, it does not seem true that they are equally coerced, as the unjust combatants themselves directly coerce just combatants to fight.

My first major contention is with the orthodoxy’s proposal that the just combatant ‘consents’ to being attacked. To consent is a specific kind of action; consenting is not swimming, it is not eating a sandwich, and likewise, it is not the mere recognition that something is happening or will happen to oneself. Rather, to consent is to accept and actively agree to something that is happening or will happen to oneself. It is not clear, then, that ‘consent’ is the right sort of concept to draw upon when discussing just combatants’ participation in war. The following scenario will be used to highlight this misuse of ‘consent’ in the orthodoxy:

Anna is at a party. She goes upstairs to use the washroom and, when she is alone, she is cornered by Charles. Charles tries to initiate sex with Anna and, when Anna tries to make him stop, he tells her that if she does not have sex with him, he will physically hurt her friend Carmen, who is also at the party. Out of fear for Carmen's safety, Anna does not stop Charles from having sex with her.

The relevant question following this scenario is: did Anna consent to having sex with Charles? I argue (and I hope this is unopposed) that she clearly did not, as the freedom for Anna to choose not to have sex with Charles was severely diminished by Charles' threats against her friend, Carmen. Rather, it seems evident that Anna's participation in sex with Charles was a response to manipulation and coercion, and did not reflect an active agreement to sex, but rather a strong disagreement to his harming Carmen. If an unjust combatant necessarily poses a wrongful threat of harm, as is implied by their 'unjustness', then it seems as though they take on the role of Charles in this analogy. Like Charles, their goal is unjust. Just combatants, however, do not actively agree to take on liability to harm, rather, they take on the role of Anna. Just as Anna is coerced by Charles into having sex with him in order to defend Carmen from potential harm, so is the just combatant coerced into fighting by the unjust combatant, in order to defend the just non-combatants and the just cause. If it is

as clear as I find it to be that Anna does not ‘consent’ to having sex with Charles, then it appears equally wrong to assert that just combatants ‘consent’ to being attacked when they fight a defensive war. The models that the orthodoxy proposes, then, appear to misuse the term ‘consent’ and/or misunderstand what it means ‘to consent’.

My second point of disagreement with the orthodoxy’s appeal to consent in establishing a moral equality of combatants is that, as McMahan argues, even if just combatants could consent to take on liability to attack in war (which I have suggested is not clearly the case), there would still exist a moral inequality between unjust and just combatants. The following scenario may be used to illustrate the insufficiency of just combatant consent in creating this moral equality:

Charles tells Anna that he is going to step hard on her toes. After being told this, Anna replies by telling Charles that she is okay with him stepping hard on her toes. On this day, Anna has borrowed a pair of shoes from her friend, Carmen. She is wearing these shoes. Charles proceeds to step hard on Anna’s toes, hurting Anna’s toes, and scuffing the shoes that Anna has borrowed from Carmen.

In unpacking this analogy, it is important to consider three key elements of the scenario. The first of these considerations is

that it appears as though Charles is intent on stepping on Anna's toes, whether or not she consents. In terms of combat, this is paralleled by the offensive attack by unjust combatants. While an orthodox Just War theorist may assert that a just combatant does 'consent' to being attacked, it is worth noting that the unjust combatants' attack does not hinge on receiving that consent. In this way, it does not appear as though the sort of consent that is discussed in these arguments is of an equal sort. Secondly, in this scenario, Charles receives Anna's permission to step hard on her toes, causing her pain. This seems like an objectively bad or wrong thing to do. That Anna agrees to his morally wrong course of action does not make it any less wrong. Rather, the action itself can be understood as holding a distinct 'unjustness' to it. This is reflected in the sphere of war, where combatants fight for a certain cause. These causes, be them just or unjust (and to varying degrees), are not erased by consent of individual combatants. It seems deeply counterintuitive to argue that the key factor that determines the justness of a war from the outset – the just cause – is not an equally essential consideration when attempting to establish a moral equality among combatants. Thirdly, this scenario demonstrates the insufficiency of consent in establishing a moral equality among combatants by showing the way in which Charles' stepping on Anna's toes negatively affects Carmen. When Charles steps hard on Anna's toes, he also (albeit unknowingly) does harm to Carmen, by way of damaging her

shoes. While Anna has consented to Charles' stepping hard on her toes, Carmen has not consented to Charles doing damage to her shoes. Here, it seems Anna has consented to the damage to Carmen's property on her behalf – something that she is not actually able to do. Similarly, in war, even if a just combatant could consent to being attacked by unjust combatants, it does not seem as though just combatants are able to consent to unjust combatant attacks on behalf of the just non-combatants and just cause. Rather, it appears that the models of consent that the orthodoxy proposes as sufficient in establishing a moral equality among combatants, fail even to gain consent from all of the relevant people involved in the war.

In closing, in *Killing in War*, Jeff McMahan disagrees with the orthodox assertion that a moral equality of combatants may be understood as existing in virtue of just combatants' 'consent' to take on liability to harm. Rather, he argues that the models that the orthodoxy proposes to support this assertion are flawed analogies for modern war. In this paper, I have agreed with McMahan's conclusion that just combatant consent does not establish a moral equality among combatants. Moreover, I have argued that just combatants neither appear to 'consent' at all to being attacked by unjust combatants, nor would this consent successfully make just and unjust combatants moral equals, even if it were present. My argument draws on the field of sexual consent – an analogy that,

upon close scrutiny, is useful and relevant in determining who consents to taking on a liability to harm in war.

Work Cited

McMahan, Jeff. *Killing in War*. Oxford: Clarendon Press, 2009.
Chapter 2. Print.