War Crimes and Just War

by Larry May, Cambridge University Press, 2007, 343 pp.

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I.

In his pathbreaking (but pre-Internet) book *After Virtue*, the philosopher Alasdair MacIntyre asks us to

> [i]magine that the natural sciences were to suffer the effects of a catastrophe. A series of environmental disasters [is] blamed by the general public on the scientists. Widespread riots occur, laboratories are burnt down, physicists are lynched, books and instruments are destroyed. Finally a Know-Nothing political movement takes power and successfully abolishes science teaching in schools and universities, imprisoning and executing the remaining scientists.

If there were, say, decades or centuries later to be 'a reaction against this destructive movement', seeking 'to revive science', they would, despite their best efforts, find that they had 'largely forgotten' what science was. They would perhaps possess 'fragments' of a field hitherto called science, but this revived science would in the nature of things consist of

> a knowledge of experiments detached from any knowledge of the theoretical context which gave them significance; parts of theories unrelated either to the other bits and pieces of theory which they possess or to experiment; instruments whose use has been forgotten; half-chapters from books, single pages from articles, not always fully legible because torn and charred.

Though there would, under this later iteration, be an activity called 'science', almost no one would realise 'that what they [were] doing [was] not natural science in any proper sense at all.' MacIntyre describes his fictional scenario as a 'disquieting suggestion' and argues, controversially and at some length, that it accurately represents the state of moral theory today. [1]

While it makes no reference to MacIntyre, Larry May's *War Crimes and Just War* offers a remarkably similar diagnosis of the contemporary state of just war theory and seeks at length to remedy it. The book, May tells us, 'is the second volume

of a projected multivolume set on the philosophical foundations of international criminal law' (p. 3). Describing contemporary war law, he says: 'One of the difficulties in defining war crimes is that there have been so many candidates for war crimes over the centuries that they seem not to form a coherent set' (p. 17). 'Indeed,' he continues,

> it sometimes seems as if what we have is merely a list of rules from different eras, cobbled together into increasingly lengthy [legal] instruments, where there is so little agreement about what their basis is that the list merely repeats previous lists verbatim, lest the original consensus about them be jeopardized by minor changes in wording. (p. 74)

This is because '[t]he connection between morality and legality', though crucial, 'is unfortunately, a neglected topic in natural law theory and the Just War tradition' (p. 52). Hence the need for a multivolume set, intended to clarify matters:

> [In the present book,] I reach the conclusion that it is possible to attain honor in war, but only if the traditional principles underlying the rules of war – the principles of discrimination, necessity, and proportionality – are significantly reformulated. (p. 21)

To put this conclusion in context, it is worth remembering that 'the traditional principles underlying the rules of war' were formulated centuries ago by devout Christians whose moral theorising was the working-out of a specifically theological vision. Morality, to such theorists, had its origin in divine commands and in the requirements of eternal salvation, and could not in the nature of the case be conceived in abstraction from such assumptions. The idea of prescinding from theology comes to us 'post-Christians' by way of the catastrophe of the Religious Wars, and arguably consists of wrenching God's commands from their context while trying to give them meaning outside of that context. [2] It should not surprise us that the result is somewhat akin to the 'revival of science' in MacIntyre's 'disquieting suggestion': a patchwork of rules, each wrenched from its original theological context, but embodied in international law as though its authority were self-evident.

May therefore has his work cut out for him. As a secular philosopher, he needs to bring order to the chaos of just war theory, and supply a 'foundation' for it that will do the work of supporting the theory so as to supplant the will of God.

And at face value, he seems like just the person for the job. He is the author of several acclaimed books in philosophy, a former student of Hannah Arendt's, 'a scholar of 17th century thought, a political philosopher, and a part-time practicing criminal lawyer' (p. 22). The book comes with kudos from a well-known expert in the field, who describes it as 'a powerful synthesis of the author's extensive knowledge of the history of thought about the just war, his equally comprehensive understanding of the areas of international law concerned with war and conflict, and his formidable capacity for philosophical argument.' In manuscript form, the book was awarded the prestigious Frank Chapman Sharp Prize from the American Philosophical Association, awarded to 'the best unpublished essay or monograph on the philosophy of war and peace submitted for the competition' in a given year.

I'm afraid that my assessment of the book is very different. In its favour, it can be said that *War Crimes and Just War* is written in a calm and equable tone that contrasts with the somewhat hysterical and hectoring style of writing in this field. But the reasonableness of the book's tone is very much at odds with the utter unreasonableness of its claims, as well as its nearly complete failure to deal responsively with obvious objections. In what follows, I offer an essentially neutral summary of the book's argument (section II), followed by a critique of its major claims (sections III-V).

II.

War Crimes and Just War is divided into four roughly equal parts. Part A offers a 'philosophical grounding' for the claims of the book, itself subdivided into an argument from 'collective responsibility and honour during war' (ch. 2), and an argument from '*jus gentium* [the 'law of peoples'] and minimal natural law' (ch. 3). Part B discusses 'problems in identifying war crimes', which are resolved in Part C ('Normative Principles'). Part D focuses on the prosecution of the war crimes discussed in the preceding parts.

The argument from collective responsibility and honour in chapter 2 is intended by May as a merely preliminary and relatively shallow justification for the rules of war. The idea is that there is such a motivation as soldierly honour, and by its nature, it seeks to satisfy a higher standard than mere justice (p. 34). Since the State sends soldiers to fight and die, it is 'collectively responsible' for what its soldiers bring about (p. 37) (though it seems principally responsible for the *dis*honour they bring about, not the honour). 'Because soldiers are acting on behalf of the society, or the State,

the society should take a special interest in trying to protect them from the worst effects of being a soldier, for harm to soldiers is also the collective responsibility of that society' (p. 37). The rules of war discharge this responsibility in two ways: (a) they restrain soldiers from all-out mayhem and thus protect them from moral harm, and (b) assuming compliance by both sides, they serve to restrain soldiers so as to protect them from physical harm. Thus collective responsibility gives 'us a ground of particular types of minimal forms of restraint on soldiers. When societies, or States, create increased vulnerabilities, they have a responsibility to create rules that reduce the harm likely to be caused by these increased vulnerabilities' (p. 40).

The argument from 'minimum natural law considerations' in chapter 3 is supposed to do the lion's share of the justificatory work in the book, but before getting to it, it may be worth clarifying the concept of a 'minimum natural law consideration.' The concept of 'natural law' is originally (and essentially) a theological one, denoting in mediaeval Christian parlance the 'laws' or moral principles commanded by God and obliging us to do His bidding. The notion of a 'minimum natural law' is an attempt (to put it crudely but accurately) to secularise this conception by cutting God out of the picture, substituting one's own preferred and supposedly uncontroversial moral principles in the place of His commandments, and then giving these principles the moral authority they *would have had* had they been commanded by a deity. (pp. 58-9).

May's minimum natural law argument begins with an extensive exposition of ideas from Hugo Grotius (1583-1645). The argument begins with the claim that we seek our self-interest, and proceeds by the observation that in doing so, we have to promote the interests of others as well (p. 52). This requirement to promote the interests of others entails considerations both of justice and of 'humane treatment and mercy.' Since the latter are (to May) clearly of higher moral stature than the claims of justice, they supersede them. Hence a minimal natural law account requires us chiefly to comply with the principles of humane treatment and mercy, not justice. 'The difficulty is that in war it seems especially dangerous to treat the enemy in this way' (p. 59); the enemy seems not to deserve it, and the enemy can take advantage of it to one's detriment. But, May continues, since a retreat to (the lower perspective) of justice would lead us to endless strife, and we will eventually want to reconcile with our enemies anyway (p. 59) – and since we ought not to conduct ourselves in war by bearing in mind what our enemies have done to offend us, or what is most advantageous to us (p. 61) – the 'difficulty' in question doesn't

much matter in the end. We just have to comply with the requirements of humane treatment and mercy, and that's that.

The principle of humane treatment is thus the basis of the book's prescriptions for the conduct of warfare. I quote at length May's précis of this principle:

> The principle of humane treatment is a principle that calls both for the minimising of suffering and for merciful treatment, as a way of displaying honor. At its core, humane treatment is related to the principle of humanity that involves treating another person as a fellow human, as a member of the same group, the human race, rather than in any number of other ways that take account of his or her otherness. What it means in any particular situation to treat another person as a fellow human is not always easy to see. Restraint is crucial because there are so many competing interests that people have that they will often not see themselves as primarily fellow humans, instead of as oppressors or victims, for instance.
>
> When we conform to the Grotian principle of humanity, we disregard many of the particularities and differences of our lives and give to others the benefit of the doubt, as if we were all pretty much the same. But humane treatment also calls for sensitivity to context, not so that we can disregard our common humanity, but rather so that we can identify how a fellow human should be treated in a situation of vulnerability, rather than seeing the person as stripped of any particularity or as an enemy rather than a fellow human. (pp. 67-8)

Vague as the principle of humane treatment may seem on first reading, one can't fault May for any failure to explain its practical consequences. The principle serves, in every case, to 'save' (modified versions of) the traditional principles of just war theory, and in so doing, to bolster a legal regime more radically restrictive of the use of force than the one that currently obtains in international law.

One pair of chapters discusses the familiar principle of non-combatant immunity (chs. 5, 8). Where current war law distinguishes between combatants and non-combatants, allowing deliberate attacks on the former but not on the latter, May rejects that distinction for one that distinguishes between those who are immediately dangerous and those who are not (pp. 99, 113). We can, on May's account, attack those who attack us when they do, but we cannot regard 'the

enemy' (combatants or non-combatants) as one unified entity; hence we cannot attack any given member of the enemy's forces at a moment when a given member of the enemy poses no immediate (and perceptually obvious) danger to us (pp. 106, 111, 115, 116, 177). 'Treating people humanely [during battle] will mean that their merely being in some general sense dangerous is not enough to justify killing them' (p. 114).

A second pair of chapters discusses prohibitions on types of weapon and tactics (chs. 6, 9). Again, where the current laws of war maintain absolute prohibitions on certain types of weapon (e.g., chemical and biological weapons), May takes a different tack: he tells us that the use of weapons in war is limited by tests of 'necessity' and 'proportionality' and then defines these concepts so that '[m]ilitary necessity is normally restricted to certain kinds of emergency situations…Such emergency cases will be few and far between' (p. 206): 'the term "emergency" is meant to signal that it will only rarely be true that a certain tactic can be employed…There is no exceptional category that is hereby created, but only a rare exception to any otherwise rather firm rule' (p. 207). This not only rules out the use of the normally prohibited weapons, but in many cases rules out the use of currently permitted weapons as a 'rather firm rule', except in the 'rare' cases where an 'emergency' calls for using them.

A third pair of chapters discusses the treatment of prisoners of war (chs. 7, 10). Where the Geneva Conventions rule out the torture of prisoners of war, May goes beyond this to insist that humane treatment of prisoners puts us in a 'fiduciary/ stewardship' relationship to them:

> Remember Grotius' comment that if there are too many prisoners of war to be treated humanely in a camp, then the captors have a duty to let them all go free. The fiduciary or stewardship relationship means that the captor must look to the interest of the prisoner with slightly more importance than is the captor's interests. The dependency status of the prisoner of war demands as much. (p. 153)

In dealing with prisoners of war, we are to forget the justice of our cause or the injustice of theirs. We are also to forget what they have done to us, and anything we may think or believe about them on the basis of their histories. We are to treat them as our moral equals, 'regardless of what supposedly happened on the battlefield' (p. 156) – or for that matter, what really *did* happen. Such prisoners should be treated

'just as if they were any other soldiers who were being confined while awaiting trial' (p. 156). To the claim made by a newspaper editorialist that 'no one expects U.S. troops to pat prisoners on the head', May tells us candidly: 'What I am arguing is that this is indeed what is expected' (p. 156).

The last section of the book discusses the prosecution of war crimes (chs. 11-13). Here May's view is straightforward and lawyerly. War crimes consist in the violation of the strictures just described. Soldiers are liable for war crimes under a doctrine of what May calls 'joint criminal liability', which holds defendants liable both for guilty acts as well as, in some circumstances, acts of negligence leading to great harm. But on May's view it is primarily 'military leaders' who are to be held responsible for war crimes. Though soldiers can be held liable, the duress under which they operate mitigates their crimes in ways that do not apply to military leaders. (Since May ignores the fact that 'soldier', 'leader', and 'officer' are overlapping categories, the discussion is somewhat uninformative.)

A final chapter (ch. 14) discusses terrorism, but adds nothing to the argument of the book, and reads very much like an afterthought to what precedes it. May's view, in effect, is that terrorism reduces either to domestic crime or to a form of ordinary warfare. There is thus nothing morally or legally unique about terrorism. In criminal contexts, suspected terrorists should be treated by the same norms as suspected criminals of a non-terrorist variety. In military contexts, suspected terrorists should be treated by the very same rules that would apply to non-terrorist combatants:

> In the end, I see no reason to think that terrorists are not owed what is considered the minimum for all humans, and I believe that this should be drawn in terms of both considerations of justice and humanity. Once one is convinced of this claim, then it is just a short step to believing that terrorists, like everyone else, are owed a minimum amount of compassion, mercy, and justice, at least procedural justice as epitomized in rule of law considerations. (p. 312)

Since May's conception of 'minimal' considerations actually goes far beyond existing international law or common consensus, this rather understates things. By his own admission, what he really means is that we are obliged by the strictures of his theory 'to pat terrorists on the head.'

Anyone who has followed my summary this far may be excused for wondering whether May is a sort of pacifist in disguise, and has fashioned a moral theory impossible to put into practice *in order to* make war impossible to wage. Though he doesn't actually admit this in the book, he comes close to doing so on at least five occasions (pp. 17, 39, 99, 106, 124), alluding cryptically to what has come to be called a 'contingent pacifism.' According to contingent pacifism, the rules governing the conduct of war are so stringent that it may well be impossible to wage war by adherence to them. In that case, the rules governing the conduct of war would veto even a war of self-defence against aggression: a war that can only be fought by 'illegitimate means' is not to be fought at all, regardless of its necessity or how (otherwise) justified it is.

III.

One would expect a book with so bold and radical a thesis to devote some substantial space to justifying its major claims. The sceptical reader would (reasonably enough) want an identification and defence of May's basic premises, a clear account of how the premises led to the relevant conclusions, and an extensive effort to state and deal with obvious objections. Appearances to the contrary notwithstanding, none of these things actually materialises in this book. It is not an exaggeration to say that the justification for every major claim of *War Crimes and Just War* reduces either to a blank assertion propounded without argument, an argument from the authority of some putatively eminent figure, an argument from the author's personal intuitions, or an argument that follows from or somehow vaguely 'meshes with' claims based on unargued assertions, authority, or intuition. It's impossible to convey in a 7,500 word review how utterly devoid of genuine arguments this book is – how densely packed it is with fallacies, evaded questions, unanswered objections, and tendentious factual or conceptual claims of one sort or another. Though May opens the book by telling us that it aims to supply 'the normative foundations of international criminal law' (pp. 1, 3), strictly speaking the book supplies no *foundation* for anything at all.

The book's argument proceeds from an assumption ubiquitous in the literature of just war theory, the supposed 'logical independence' or bifurcation of *ad bellum* and *in bello* considerations with respect to the morality of war. Traditional just war theory characteristically distinguishes the reasons for going to war (*jus ad bellum*) from the rules governing the conduct of war (*jus in bello*). The bifurcation of the

two sets of principles implies that the reasons that justify going to war are not just distinct from, but have nothing to do with, what is allowed during wartime.

Thus for purposes of *jus in bello* legislation both sides to an armed conflict are to be considered moral equals, and both must fight by the same rules even if both fight for utterly different sorts of reasons. Thus a weak victim of aggression is obliged to 'play by the same rules' as a powerful aggressor, for by in bello standards, the powerful aggressor is the 'moral equal' (or 'rough moral equal') of the weak defender, and *in bello* standards are neutral with respect to the substantive justice of the confrontation between them.

Though May notes in passing that some prominent philosophers have (finally) begun to question the *ad bellum/in bello* bifurcation, he himself says nothing to defend it, and nothing to rebut objections to it. [3] It thus enjoys the status of an axiom throughout the book. Because it does, May is systematically oblivious to any objection to his thesis that arises from the rejection of the bifurcation, no matter how obvious.

The most obvious objections are those that firmly privilege one's own side in warfare against that of an aggressive enemy that has initiated the conflict and aims to destroy, subjugate, or simply inflict grave harm on, its victim. If I'm a soldier (or officer or political leader) on the victimised side of such a war, I will very likely regard my own survival or that of my military unit as (far) more important than the well-being of any individual or group on the other side. I may also prefer a relatively quick and painless victory that is 'unfair' to the enemy as against a long and drawn-out stalemate that shows him mercy.

May sporadically and half-heartedly acknowledges the force of such claims (e.g., pp. 133-34), but they are obviously not his *real* concern, and when they are overshadowed by his real concerns (as they usually are), he dismisses them with an amazing insouciance: 'We need a showing that our compassion will be met with significant loss of our own security before it is not the case that we are required to act compassionately, even toward our enemies' (p. 179). How any of this squares with May's initial invocation of self-interest as the basis of his argument is unclear (p. 52). Nor is it an accident that the book's index lacks entries for 'self-interest', 'self-preservation,' 'solidarity', and 'victory.' A soldier interested in keeping himself alive, in seeing his unit through the fight, and in winning battles or wars will find absolutely nothing of relevance in this book.

The book's basic claim is that the principle of humanity quoted in the previous section is the 'cornerstone' of (existing) *jus in bello* norms, and that the principle of humanity in some sense stands on a 'higher' moral plane than what May (misleadingly) describes as considerations of 'justice' (or 'narrow justice' or 'retributive justice'). The principle of humanity, we are told, involves considerations of 'honour' and of (obligatory) 'mercy' that trump or supersede 'narrow justice.' Thus where 'narrow justice' would (according to May) rationalise indiscriminate slaughter and wanton torture, the principle of humanity staves off such evils. It persuades soldiers to shoot only at those who can perceptually be verified as shooting at them first, and otherwise to pause, reflect, and when at all possible, to refrain from shooting on the battlefield. When reciprocated by the enemy, the principle of humanity minimises violence and suffering on the battlefield. (May frequently assumes that the principle will be reciprocated, but offers no reason for thinking so.) When not reciprocated, a commitment to the principle exemplifies the sort of honour that befits a true soldier (admittedly honour that comes at a high price). The begged questions and confusion contained in this argument would probably require a book of its own to unravel, but consider a few obvious problems.

For one thing, May offers nothing that even pretends to be a defence of the principle of humanity. Such 'argument' as he offers consists either of expositions of his favourite early modern philosophers (e.g., Grotius), or the obviously circular and question-begging assertion that the principle of humanity accounts for standard in bello norms better than the absence of an account. But exposition is not argument, and in any case, it is precisely the *in bello* norms *themselves* that require a justification independently of the principle of humanity. It won't do to accept the legitimacy of the *in bello* norms right from the start, then to posit a principle that accounts for their antecedently assumed legitimacy better than the non-existence of an account (what wouldn't?), and *then* to declare the principle of humanity triumphant on its (dialectically uncontested) battlefield. This is not a justification at all, but a series of dialectical evasions travelling in circles of miniscule circumference.

Second, even if we ignore the issue of circularity, we are left with the bare assertion that humanity, honour, mercy, and the like trump 'narrow justice.' Though May repeatedly asserts that they do, there is not a single argument in the book to explain why they must. To the extent that May attempts such an argument, it consists of nothing more than lengthy expositions of anachronistic passages from Grotius (ch. 3). May's semantic revisionism with the terms 'mercy', 'equity', and 'justice' does not help matters, any more than do his confusing and undefined stipulations with

respect to 'narrow' and 'wide' justice, or his playing fast and loose with the classic texts on the subject. He assumes without argument that a concern for 'narrow' justice (itself cavalierly equated with 'formal' and 'retributive' justice, and sometimes with 'justice' as such) leads to wanton killing and torture. He then essentially equates equity with mercy (claiming implausibly to have gotten the equation from Aristotle), [4] manages to contrast Aristotelian equity with justice, and ends up with a view in which mercy is a fundamental obligation while justice is dispensable. To call each one of these claims contestable would be a cosmic understatement. To call them undefended is a straightforward observation of fact.

In any case, it seems to me that May's contrast of humanity/honour/mercy versus retributive/narrow justice is a red herring. The fundamental objection to his view is less a matter of what retributive justice would require than of what *victory* requires. 'Retributive justice' is a term drawn from contexts of domestic criminal law. 'Victory' is a specifically military term. The two concepts are as different as the contexts in which they operate. War may involve incidental acts of retribution, but it is not fundamentally a matter of punishing wrongdoers. It's a matter of neutralising a threat. As Locke very aptly puts it, 'I should have a right to *destroy* that which threatens me with destruction.' [5] The real question, then, is why humanity/honor/mercy trump the requirements of the *victory* of the justified side in a just war, not why they trump retributive justice. May's normative assumptions preclude any sustained engagement with this question – even if reality demands one.

It is in a way superfluous to discuss the arguments of the book beyond this. The preceding claims constitute what May takes to be the book's 'philosophical grounding.' If the 'grounding' is ungrounded, there is no reason to expect the superstructure to stand. And it *is* ungrounded. What's remarkable, though, is that in subsequent chapters, where May applies his framework to specific issues, he appears at least on the surface quite sensitive to objections to his claims, and states them, explicitly, in ways that challenge his thesis. What is equally remarkable, however, is the stunning failure of his responses to these objections.

Chapters 5 and 8 discuss the so-called 'principle of distinction' that is traditionally thought to immunise non-combatants from being regarded as legitimate targets in warfare. May's view on this subject, as we've seen, is more stringent than the traditional one, and on pp. 181-2, he wonders whether his view makes 'effective fighting in war all but impermissible.' After five pages of hemming and hawing, he concedes at last that in 'some cases' he has done precisely that (p. 187): 'But can a

war be waged successfully if soldiers must wait to fire to see if they are about to be fired upon? In some cases, the answer is "Perhaps not."' There is no way of knowing whether the word 'some' refers to a small fraction of the 'cases' or to the vast majority of them, but May decides to leave the matter there. His concession amounts to claiming that perhaps his theory has made effective fighting impermissible in the vast majority of cases, but if so, this is just something we have to live with (or die with).

Chapters 6 and 9 discuss the permissibility of unconventional weapons and tactics in warfare. As we know, May's view here is stringently prohibitory as well. Accordingly, on p. 197, he wonders whether considerations of 'military necessity' might make the use of supposedly impermissible weapons permissible. On a broad understanding of necessity, he concedes, this would seem to be the case:

> Military campaigns proceed from one battle to another almost endlessly. And it can be argued that employing certain tactics is necessary for winning each battle and, in turn, that winning each battle is militarily necessary in the sense that if it is not won the war will likely be lost. On this account, the principle of necessity does not have a narrow scope at all, and the gulf between acting humanely and doing what is necessary to wage war effectively seems very wide indeed.

May responds to this objection by asserting categorically that 'it turns out not to be true that in war situations of military necessity are rampant' (p. 197). This would probably come as a surprise to anyone familiar with the basics of military strategy or history. May supports it by way of the blatant non-sequitur that since torture is unnecessary, so are other putatively necessary weapons and tactics (pp. 197-98). As for the obvious question – how is torture relevantly similar to the broader range of weapons and tactics at issue? – May ignores it and moves on.

May then asserts that something is necessary only if it is the *only* way of achieving an end, denying that prohibited weapons and tactics can ever be the only way of achieving a militarily necessary end (p. 198). He offers no argument whatsoever for this claim. In any case, what if the use of a given weapon is not the 'only' but the *best* way of achieving a militarily necessary end? He ignores the issue. We are instead offered the question-begging assertion that military necessity lacks normative weight because there is never 'prima facie basis for thinking that one side should win a war' (p. 198). But why isn't there a reason for thinking that the justified side in

a just war should win the war? This, too, is ignored. In any case, it is utterly unclear how May's assertion purports to respond to the objection he himself has posed. The objection takes military necessity to be a broad, ubiquitous, and normatively crucial phenomenon. How is this objection *rebutted* by the sheer assertion that May takes it to be narrow, rare, and normatively insignificant?

Finally, May decides to understand military necessity by analogy with the 'defence of necessity in the criminal law.' 'These different types of necessity are actually close to each other…' we are told (p. 199). Really? There is not a word of argument in defence of this claim in the relevant section of the book, and it is May himself who alludes to the obvious (and analogy-invalidating) differences between them (p. 199). The defence of necessity in the criminal law is a defence against a prima facie plausible accusation of criminal guilt: it only applies in contexts where we agree that acts of a certain type are criminal in character (e.g., theft), and we're wondering whether a given individual's commission of the act is criminally culpable (e.g., Jean Valjean's theft of a loaf of bread in *Les Miserables*).

But this is precisely what May's interlocutor would not grant in the case of military necessity. May is simply not entitled to the presumption that militarily necessary act-types (e.g., the use of chemical weapons, strategic bombing) can be assumed a priori to be criminally culpable in nature, so that the 'permission' to engage in such acts is analogous to an accused criminal's defence against a criminal accusation. The objection May is trying to rebut doesn't claim that 'necessary tactics' are necessary *though* criminal (or even prima facie criminal). It claims that they are necessary, hence *not* criminal in any sense *at all*. [6] May deftly manages to sidestep this fatal objection to his analogy.

And then there are the objections, far too many to enumerate, that are neither articulated nor answered in the book. Consider merely the ones that arise with respect to May's treatment of one subject: prisoners of war. The obligations we owe a prisoner of war, according to May, are fiduciary responsibilities that on the one hand involve 'owning' (!) him (p. 151) and on the other require that we give higher weight to his interests than to our own. How does he reconcile this claim with the supposed (but quickly forgotten) basis of his argument in self-interest (p. 52)? May tells us that confinement of a soldier renders him harmless (pp. 147, 155). How does he reconcile this claim with empirical accounts of what happens in prisons? [7] He tells us that we ought to treat prisoners of war as though they were criminal suspects awaiting trial (p. 156) – but he also tells us that most soldiers ought not

to be put on trial (p. 152). In that case, why imprison them at all? Why not disarm them, and let them go their own way? Surely letting them go puts their interest before ours more firmly than imprisoning them.

For that matter, May tells us that a naked soldier taking a bath outdoors (in a battle zone) is not a combatant while bathing and cannot be made a target even if he will become a combatant two minutes from now, after ending his bath (pp. 111, 179): 'if anything, I owe that soldier protection' (p. 177). In that case, why even bother to *disarm* enemy soldiers at the moment of surrender? For they are not, at the moment of surrender, harmful or dangerous, and they are not criminal suspects, either. If the enemy declares itself defeated and ceases firing, why not leave it at that? Such questions may seem absurd, but they arise naturally from the absurdity of the claims made in the text, and it would be interesting to see May answer them in a consistent way.

May assumes controversially that Islamist terrorists qualify as POWs, and are thus owed the treatment due to POWs (including, presumably, the Geneva Convention's guarantee of 'scientific equipment, examination papers, musical instruments, sports outfits and materials allowing prisoners of war to pursue their studies or their cultural activities'). [8] What of the claim made by the Bush Administration that contemporary Islamic militants do not qualify as soldiers (hence not prisoners of war) in the legal sense, but belong in their own category, 'enemy combatants?' To this May answers, forthrightly, that such militants are prisoners of war simply because the International Committee of the Red Cross's (ICRC) Commentary on Geneva Convention IV says that they are soldiers, and every captured soldier is by definition a prisoner of war. For according to the ICRC's Commentary, *either* someone is a prisoner of war, *or* a civilian, or a member of the medical personnel: '*There is no* intermediate status...' (p. 84, emphasis in original). Since Islamic militants are neither civilians nor medical personnel, they must be soldiers, hence treated as prisoners of war.

Sixteen pages later, May manages, on an ad hoc basis, to invent an intermediate status precisely at odds with the ICRC Commentary he had just so vehemently endorsed. The intermediate status is 'terrorist', and it applies to U.S Special Forces, who are 'neither soldiers nor civilians' – nor, presumably, medical personnel (p. 100 n.12). Thus when criticism of the Bush Administration calls for it, *there is no* intermediate status – but when criticism of U.S. Special Forces calls for it, *there is*. How he manages to reconcile this set of assertions with his claim in chapter 14 that

'[t]errorists are like other types of accused criminals…' (p. 308) is obscure. How he manages to reconcile this latter claim with the claim that terrorism is best viewed on the model of war rather than crime (p. 310) is yet more enigmatic.

I won't belabour the point. Suffice it to say that the whole book is written like this.

IV.

As may perhaps be apparent by now, May's recommendations for the conduct of warfare lead to conclusions that, at face value, are either downright suicidal or are else systematically subversive of the requirements of victory. His failure to come clean about the role of 'contingent pacifism' in the book thus constitutes a major puzzle. It is simply unclear whether he intends the book to offer a viable, practicable ethic for the conduct of warfare by real militaries in the real world, or whether he means instead to show us that the demands of morality are such as to make a viable, practicable ethic of warfare impossible. His 'official' line is that the book is supposed to be taken seriously as something to be put into practice, but this 'official' line sits side-by-side with intimations to the reverse effect.

A passage on p. 124 conveys the cryptic nature of May's claims on this topic. In a discussion of 'banned and accepted weapons' he tells us that he is

> proposing the idea of a 'contingent pacifism' both as a reductio for those who would flee from the very idea of associating with a putatively pacifist view, and also because I am intrigued by the idea of a contingent pacifism, perhaps understood on the model of a contingent objection to capital punishment, where capital punishment is considered immoral because there are no trial procedures that can be used that will not risk the execution of the innocent. There may be ideal conditions where capital punishment and war are justified, but in our non-ideal world it is unlikely that such conditions will ever obtain.

It's hard to understand how a serious author could offer a claim of this sort for the credence of his readership. Here we are, 124 pages into the second volume of a multivolume series on the ethics of war (with some 200 pages left to go in the book), and the author has decided to confess that he is not yet sure whether war is justified. Isn't it a bit late for that?

Indeed, it is not even clear what claim May intends to be making here (and in the other passages on contingent pacifism, e.g., p. 106), much less how he intends to defend it. In what intelligible sense is contingent pacifism really being 'proposed' here? He tells us that it is proposed as a *reductio ad absurdum* – which suggests that he regards pacifism as an absurd conclusion, that is, as *obviously* deficient. But the next clause tells us that he is 'intrigued' by pacifism. Are we to infer, then, that he's intrigued by the absurdity of pacifism? That can't be, since he *half* seems to be endorsing the absurdity. Does he include himself as among those who would 'flee from the very idea of associating with a putatively pacifist view?' Clearly not, because he is associating with such a view. Is he then *baiting* those who would flee from pacifism? Apparently: that seems to be the point of the first half of the 'proposal.' Is he, then, a pacifist? Well, that can't be, either, since (a) he never *fully* endorses pacifism, and (b) he spends the book defending the right way to wage war.

One entirely plausible interpretation of the contingent-pacifist gambit is that May neither wants to face up to the possibility that his view leads to plain old pacifism nor wants to face up to the possibility that his view precludes victory. 'Contingent pacifism' is thus a convenient (if thoroughly confusing) way of hedging his bets and having things all ways at once. So it is that what began as an attempt to supply the 'foundations of international criminal law' ends up instead as an exercise in mystification.

V.

Imagine that a contemporary moral philosopher were to come forward offering up a theory of sexual morality, loosely inspired by the teachings of the early Christian Church Fathers. Asserting that the theory was both modern and secular, suppose that he insisted, entirely without argument, that our sexual capacities existed exclusively for reproductive purposes. Suppose further that he took this principle as an axiom from which to derive a sexual morality – or rather, to justify sex-regulative laws already on the books. Imagine that he set 'chastity' and its cousins ('modesty', 'humility', etc.) up as major virtues, pronouncing them – again without argument – as existing on a 'higher' moral plane than 'narrow love' of the sexual or romantic sort. And imagine, at last, that what emerged from this ethic in the way of specific rules was the familiar litany of religious proscriptions on the subject, condemning non-marital and non-reproductive sex, and by implication ruling out masturbation, homosexuality, contraception, abortion, and so on. Taking it as essentially obvious that a violation of these rules would lead us to indiscriminate

fornication, polymorphous perversity, and bestiality, he tells us to stick to the straight and narrow (except, perhaps, in rare and undefined 'emergencies'). As for the costs in unwanted children, botched abortions, alienation, repression, coercion, and frustration, they are scarcely dignified with discussion. 'But will these costs arise?' we ask, with some anxiety – to which the calm answer comes: 'Perhaps in some cases.'

It should be a matter of some astonishment that the very people who, with vehemence and outrage, would reject a theory of the preceding sort in sexual matters, have managed to make 'just war theory' one of the intellectual idols of our age. But in its current guise – in the guise that has dominated Anglo-American moral philosophy for the last fifty years – just war theory is a theory of precisely the same sort as the sexual morality I just described: a secularised theology of absolute commandments plucked from its theological context, accepted on faith, and systematically oblivious to considerations of context or consequence – which is to say, of life and death. Its earlier exponents were able to admit that with a certain clarity and candor. [9] Perhaps the rest of us should, too. [10]

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Notes

[1] MacIntyre 1984, p. 1.

[2] See Anscombe 1981c for a similar suggestion.

[3] See Kamm 2004 and McMahan 2004.

[4] Contrast Miller 1995, p. 83. On May's view, equity is a legally codified form of mercy at odds with justice. On Aristotle's view, equity is a non-legally codified form of justice offered in the context of a theory of justice that leaves no conceptual space for mercy.

[5] Locke 1678, sect. 16, my emphasis.

[6] May relies here on an otherwise unargued and unexplained claim of Douglas Lackey's, from Lackey 1989. As quoted by May: '[T]he principle [of necessity] does not say that whatever is necessary is permissible, but that everything permissible must be necessary' (p. 198). But that gets things backwards. The objection to which May is responding does not say what Lackey is here being quoted to say. It says that whatever is necessary is permissible, not merely that everything permissible must be necessary. More precisely, it says that necessity is the standard of optimality, and by implication of obligation and permissibility.

[7] See Golden 2006.

[8] Text of the Geneva Conventions accessed online at: http://en.wikipedia.org/wiki/Geneva_Conventions

[9] Anscombe 1981a, 1981b.

[10] Thanks to Carrie-Ann Biondi and Alan Johnson for very helpful feedback on this review.