

Rethinking the Just War Tradition

Michael W. Brough, John W. Lango, and Harry van der Linden (Eds.), State University of New York Press, 2007, 265 pp.

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The editors of *Rethinking the Just War Tradition* invite readers in their role as citizens to take individual responsibility for demanding that warfare conducted in their name be just (pp. ix and 11). They do well in calling for an exploration of the success of Just War Theory, since, as John Stuart Mill famously points out, ‘in political and philosophical theories as well as in persons, success discloses faults and infirmities which failure might have concealed from observation.’ [1] With Walzer’s highly popular *Just and Unjust Wars* in its fourth edition (as of 2006), Just War Theory (JWT) may have triumphed in the realm of academia, the classrooms of the U.S. Naval Academy, and the halls of the United Nations. But does it succeed in the face of contemporary challenges such as genocide, weapons of mass destruction, and terrorism, or does it need to be re-thought or even rejected?

Rethinking the Just War Tradition takes up this question in a number of ways and from various disciplinary perspectives. It is divided into three parts, with four essays per part. The essays in Part One (entitled ‘Theory’) step back from, and examine, JWT to see whether its categories of *jus ad bellum* (the justice of going to war), *jus in bello* (justice in conducting war), and *jus post bellum* (justice in the conclusion of war and in the creation of peace settlements) are sufficiently subtle to handle modern challenges such as environmental degradation and the shift from a balance of powers to the rise of a superpower. The essays in Part Two (entitled ‘Noncombatants and Combatants’) explore the *jus in bello* distinction between combatants and noncombatants, both to assess whether the distinction needs further development in order to handle the rise of child soldiers and asymmetrical warfare and to evaluate its logical relationship to *jus ad bellum* principles. The essays in Part Three (entitled ‘Intervention and Law’) focus primarily on whether (and, if so, how) assassination, preventive war, and humanitarian intervention can be allowed under the *ad bellum* principle of just cause for going to war.

Before exploring the value of this volume’s essays, it will be helpful to understand the context in which they are written. The editors helpfully include an Appendix that serves three functions, the first two of which are most important here for

context-setting purposes. [2] First, they briefly describe JWT as a view that has arisen as an alternative to Realism (the ‘non-moral’ view that ‘anything goes’ in war for the sake of ‘national interest’) and Pacifism (the view that the resort to war is always morally wrong). In contrast to Realism and Pacifism, JWT holds that war can be morally permissible and that it can be conducted in a moral fashion. Second, the editors outline the main *jus ad bellum* principles (just cause, legitimate authority, right intention, last resort, reasonable chance of success, and proportionality) and *jus in bello* principles (discrimination between combatants and noncombatants and proportionality of means to the end pursued). [3] In order for war to be moral on JWT, all of these principles must be satisfied, with the ability to satisfy *jus in bello* principles being built into the *jus ad bellum* principles. Thus, a paradigm case of just cause for going to war – self-defense against an aggressor state – must be accompanied by having exhausted all other means short of war for resolving the initial aggression, be initiated by a legitimately authorized agent, have a reasonable degree of certainty that the good to be achieved will outweigh the bad to be undergone, and intentionally target only combatants and nonhuman threats. For purposes of *jus post bellum*, though, *jus ad bellum* is held to be logically separable from *jus in bello*, with soldiers being held responsible only for *jus in bello* considerations regardless of the justice or injustice of the cause for which their states sent them to war (which is referred to as the ‘moral equality of combatants’ thesis).

It is against this generally understood context of JWT, then, that the volume’s contributors were asked to ‘rethink the just war tradition.’ An examination of the twelve contributions to *Rethinking the Just War Tradition* reveals a few things: (1) many theorists do not think that JWT needs to be re-thought, but merely freshly applied to new circumstances; (2) few theorists share an understanding of JWT, so they are not all applying the same theory when they ‘apply’ JWT; and (3) it is high time to consider whether the basic premises of JWT bear scrutiny.

Given the title of this collection, one might have expected a much greater amount of rethinking and criticism of JWT than actually occurs. Eight of the twelve essays clearly accept the basic tenets of JWT and then apply them to relatively new phenomena (e.g., terrorism and weapons of mass destruction) or areas of concern (e.g., the environment). [4] Of the remaining four essays, two of them claim to rethink JWT, but in fact only consider additional factors that complicate the application of its principles. [5] While the preceding ten essays raise some good points and apply JWT in nuanced ways, it is a bit disappointing to see so much of JWT taken for granted. This is perhaps to be expected when JWT is the entrenched

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view in academia, in the U.N., and among non-governmental organisations (NGOs).

It is the remaining two essays that genuinely rethink JWT. Interestingly, John Lango claims only to revise JWT in his 'Generalizing and Temporalizing Just War Principles: Illustrated by the Principle of Just Cause,' but despite using much JWT language he ends up actually rejecting so many elements of JWT that it is difficult to call what remains JWT. In 'Just War Theory and Killing the Innocent,' Frederik Kaufman offers what amounts to the most radical piece in the collection. He not only explicitly critiques contemporary JWT (especially as defended by Walzer), but also draws out the implications of JWT's principles concerning intention in such a way as to indicate how and why JWT is beyond rethinking or revising.

Despite what appears to be a great deal of endorsement of JWT in this volume, there is under the surface less consensus than meets the eye. JWT emerges – as the title of the volume indicates – from a specific moral tradition. However, 'the just war tradition' encompasses many complex principles, has undergone change over the centuries, and has manifested both religious and secular variants blending deontological and consequentialist approaches to morality. Indeed, this is so evident that Brough, one of JWT's supporters, refers to 'the body of just war thought' as 'a moral goulash' (p. 162). Before being able to assess whether someone has suitably applied JWT to a new circumstance or area of concern, then, one needs to ask (à la MacIntyre), 'Whose justice? Which just war theory?' [6] I will first describe a couple of cases where the phenomenon of discrepant JWTs appears in this volume and then explain the difficulty to which this gives rise.

Spatt and Hoag, for example, both raise concerns over how the United Nations operates in relation to humanitarian intervention. Spatt finds problematic the 'narrowness of Security Council representation' (p. 219), while Hoag finds problematic the inadequacy of international law 'on using military force to defend human rights' as reflected in the U.N. Charter (p. 226). However, they part company over the issue of the moral permissibility of humanitarian intervention, with Spatt allowing it only with the unanimous consent of all U.N. member states (which is practically tantamount to not allowing it) and Hoag allowing it to occur unilaterally. They each take their respective positions for reasons that are supposed to comport with JWT principles. On the one hand, Spatt takes 'right authority' to be the most salient JWT consideration, since the justness of the cause and the purity of intention can go nowhere without proper authorisation that people

can trust to reflect and direct their wills (pp. 205-6). This right authority is taken to be a Kantian or Rawlsian universal state sovereignty that exists only when an 'ethical commonwealth' or 'fellowship' of nations emerges from an 'overlapping consensus' (pp. 217-18). Any act of humanitarian intervention that falls short of 'an expression of the will of the entire community of nations' (p. 220) would disrespectfully 'threaten to infantilize rather than to restore one's sense of equality with one's saviors' (p. 219).

On the other hand, Hoag finds that the U.N.'s legalist paradigm unjustly hobbles the ability of states to act on a 'moral pull to intervene in response to supreme humanitarian emergencies of the sort endured in Rwanda' (p. 227). Hoag draws on the Thomist and Grotian strand of JWT in order to 'resurrect' the 'just cause' principle of 'interposing to protect the defenceless' (p. 233), and advocates 'international violent civil disobedience' (on the model of domestic civil disobedience) in order to serve a higher moral law and to encourage international law to close the gap between the legal and the moral (pp. 230-31). Hoag then takes great pains to demonstrate how such unilateral violations of international law meet not only the just cause principle, but also the last resort, proportionality, right intention, and right authority principles of JWT (pp. 234-7).

Another example of discrepant JWTs occurs with Lango and Brough. Lango uses a great deal of JWT language and claims merely to revise (and thus strengthen) JWT by 'generalizing' and 'temporalizing' the principles so as to take into account the fact that both goals and circumstances change during the course of a war (p. 75). He takes 'just cause' to be the most fundamental JWT principle and understands 'cause' as a goal rather than as a state of affairs or an event, which leads to the possibility that the cause can change over time, thus rendering it necessary to re-evaluate the justice of the cause at each stage of a conflict as well as the means used to attain that cause (p. 83). Lango argues that the result of this reasoning is to undermine the *jus ad bellum/jus in bello* distinction, because there will only be one proportionality principle (rather than two) that is governed by the *jus ad bellum* principle of just cause. This, in turn, challenges the 'moral equality of combatants' thesis, since any combatant's actions must be proportional to the justice of his cause (pp. 89-90). Indeed, Lango goes on to claim that 'combatants who embrace unjust goals are especially morally blameworthy; but even combatants who are oblivious to those unjust goals – and given that a reasonable person should have known about them – also are morally blameworthy' (p. 90). War can thus only be fought justly if the 'moral equality of combatants' thesis is rejected.

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Brough, by contrast, vehemently upholds the logical independence of *jus ad bellum* and *jus in bello* in order to retain the 'moral equality of combatants' thesis. He endorses the Walzerian line of argument that since 'most soldiers lack both the ability to understand the moral issues involved in going to war and the faculties to discern between truth and government-propagated lie, we usually cannot hold a soldier blameworthy for his participation in an unjust war' (p. 151). If combatants are convinced that their side is just and the opposing side is unjust (as Brough and Walzer seem to think all combatants on all sides will come to believe), the argument goes that there will be no check on the 'wartime inclination . . . to dehumanize one's wartime opponent' (p. 151). Such tendencies will lead to overt racism, atrocities at massacre-level proportions, and finally feelings of self-loathing and dishonour at vanquishing an enemy not really worthy of the fight (pp. 153-9). The My Lai massacre of the Vietnam War lurks in the background of this discussion. [7] War can thus only be fought justly if the 'moral equality of combatants' thesis is upheld.

Without even trying to determine who has the better argument in either of these two sets of examples, an underlying problem should now glaringly be clear: JWT can be used by its supporters to reach opposite conclusions. It simply will not do to claim, as Brian Orend does elsewhere, that the JWT 'tradition simply lacks consensus on this developing point [of 'moral equality of combatants']'. [8] This is because there seems no way to reach consensus. What could possibly determine how to reach a consensus if the theory is itself 'a moral goulash'?

One could wave aside such JWT in-fighting and claim that there is something central that all of the JWT variations share in common despite their significant differences, and it is this that is endorsed by JWT supporters and that the contributors to this volume were asked to rethink. If pressed to point to such a central element of JWT, it might arguably be the Doctrine of Double Effect (DDE), which distinguishes 'between people it is permissible to target for killing and those who are not legitimate targets' and which Frederik Kaufman calls 'the cornerstone of morally acceptable warfare' (p. 100). The DDE is in origin a Catholic doctrine that seeks to balance considerations of intention and consequences in moral deliberation: 'Provided military action is directed against legitimate targets only, undertaken with due care for the innocent lives put at risk, and the military value of the targets is somehow proportional to the lives at risk, then the action is permissible, even though we foresee that innocent people will be killed' (p. 100).

Kaufman genuinely takes up the difficult task of re-thinking the DDE in relation to the impulse that draws people to it, namely, the right to life. Many JWT proponents – Walzer chief among them – want to have it both ways: an absolute respect for the right to life and the permissibility to take life for the sake of life in ‘supreme emergencies.’ For example, Walzer repeatedly alludes to the ‘inevitable’ moral quandary created by the necessity of killing in war when war is criminal: ‘The rules of engagement have not been replaced [despite the designation of aggression as criminal] but expanded and elaborated, so that we now have both a ban on war and a code of military conduct. The dualism of our moral perceptions is established in the law’ and ‘We want to have it both ways: moral decency in battle and victory in war; constitutionalism in hell and ourselves outside.’ [9] This chronically conflicted perspective has led to the creation of a concept known as ‘dirty hands,’ which refers to the existence of moral dilemmas whereby no matter what one does, one is doing something bad. In such dilemmas, one is supposed to pick the ‘lesser of two evils,’ but that means picking an evil nonetheless and having to live with the guilt that creates. Walzer has this to say about ‘dirty hands’:

One of my examples was the ‘ticking bomb’ case, where a captured terrorist knows, but refuses to reveal, the location of a bomb that is timed to go off soon in a school building. I argued that a political leader in such a case might be bound to order the torture of the prisoner, but that we should regard this as a moral paradox, where the right thing to do was also wrong. . . . But extreme cases make bad law. Yes, I would do whatever was necessary to extract information in the ticking bomb case – that is, I would make the same argument after 9/11 that I made 30 years before. But I don’t want to generalise from cases like that; I don’t want to rewrite the rule against torture to incorporate this exception. Rules are rules, and exceptions are exceptions. I want political leaders to accept the rule, to understand its reasons, even to internalise it. I also want them to be smart enough to know when to break it. And finally, because they believe in the rule, I want them to feel guilty about breaking it – which is the only guarantee they can offer us that they won’t break it too often. [10]

It is precisely this line of JWT argumentation that Kaufman seeks to thwart, and he does so by means of a promising route. (I believe that he takes a wrong turn that does not lead him to exactly the right destination, but he’s at least heading in the right general direction.)

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The tactic that Kaufman employs to avoid the false dichotomy of mass sacrifice and total war, while also avoiding the false dilemma of 'dirty hands,' is to draw on Judith Jarvis Thomson's distinction between 'violating a right' and 'infringing a right.' He explains that '[o]ne infringes a right when one negates what the right protects; one violates a right by wrongfully infringing it' (p. 101). Violations of rights are thus always wrong (tautologically, in virtue of their wrongness), but infringements can be morally permissible, which requires that the concept of 'rights' be re-thought. It is this daunting task, too great for one article to accomplish, that Kaufman begins to undertake. He states that 'war starkly reveals how rights . . . are flexible and context dependent rather than immutable moral bulwarks that guard our vital interests' (p. 102). We need to figure out, then, much more precisely what it means to have a right to life, and to do so in a way that adheres consistently to a moral theory. If, as those many JWT proponents who pay homage to the exigencies of 'supreme emergency' believe, it is the case that it is morally justifiable to target innocent civilians in those cases, then doing so is not merely morally excusable, but rather 'it would be required, if we are to act morally' (p. 106). Kaufman concludes that 'once we allow for infringements of a right that do not violate it, the paradox [of 'dirty hands'] disappears. . . . If killing the innocent in a supreme emergency is morally justified, then their deaths do not violate their right to life, and so do not count as murders' (p. 107). Our hands are then washed clean, and the blood is on the hands of those who initiate aggression. Kaufman's argument leads to a place Lango beckoned us as well, namely, the sphere of just cause, only this time we will need to navigate our way by means of a rights theory free of the moral paradox that haunts JWT.

Let us take up again the question from the beginning. Does JWT succeed, need to be re-thought, or need to be rejected? JWT succeeds, if the benchmark of success is to insist that warfare needs to be just and practitioners pay heed to this need. However, JWT's ambitions for success are much more substantive than this rather minimal requirement that barely keeps Realism and Pacifism at bay; here I would have to say that JWT ultimately is unsuccessful on account of its protean nature. It is not really clear that JWT can be re-thought, given that there is not a JWT but rather a number of JWTs in 'the tradition.' The one attempt in this volume to re-think what seems to be central to all JWT variants leads one to the conclusion that JWT is perhaps best jettisoned. It does not follow from this that war should not be conducted justly, but that a new ethic of war is required that can meet the demands of justification, consistency, and, justice. [11]

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Notes

- [1] Mill 2003, p. 153.
- [2] The third function is that the editors provide a brief annotated bibliography of further readings.
- [3] For *jus post bellum* principles, see Orend 2005. These principles, according to Orend, include proportionality, publicity, rights vindication, discrimination, punishment, compensation, and rehabilitation.
- [4] These eight essays include Mark Woods, 'The Nature of War and Peace: Just War Thinking, Environmental Ethics, and Environmental Justice'; Eric Patterson, 'Jus post bellum and International Conflict: Order, Justice, and Reconciliation'; Pauline Kaurin, 'When Less Is Not More: Expanding the Combatant/Noncombatant Distinction'; Reuben Brigety and Rachel Stohl, 'Just War Theory and Child Soldiers'; Michael Brough, 'Dehumanization of the Enemy and the Moral Equality of Soldiers'; Whitley Kaufman, 'Rethinking the Ban on Assassination: Just War Principles in the Age of Terror'; Hartley Spatt, 'Faith, Force, or Fellowship: The Future of Right Authority'; and Robert Hoag, 'Violent Civil Disobedience: Defending Human Rights, Rethinking Just War.'
- [5] These two include Harry van der Linden, 'Just War Theory and U.S. Military Hegemony,' and Jordy Rocheleau, 'Preventive War and Lawful Constraints on the Use of Force: An Argument against International Vigilantism.'
- [6] MacIntyre 1988.
- [7] See also Walzer 2006, pp. 309-15.
- [8] Orend 2007, p. 476.

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[9] Walzer 2006, p. 47.

[10] Walzer 2003.

[11] I am grateful to Irfan Khawaja for valuable feedback on an earlier version of this essay.