

What Makes an Act of War Disproportionate?

Dr. Jeff McMahan

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Dr. Jeff McMahan



Jeff McMahan is Professor of Philosophy at Rutgers University and Visiting Research Collaborator at the Center for Human Values at Princeton University. He received a BA in English Literature from the University of the South (Sewanee). As a Rhodes Scholar, he studied philosophy at Corpus Christi College, Oxford University. He also studied at St. John's College, Cambridge University, where he was a Research Fellow.

One reviewer referred to McMahan as “one of America’s leading contemporary moral philosophers and perhaps one of its most courageous.” He is the author of several books and countless articles. *The Ethics of Killing*, published in 2002 by Oxford University Press, was widely acclaimed, with the *Bulletin of Medical Ethics* calling it “recommended reading for anyone who wants to be informed about the arguments surrounding issues at the margins of life, whether they ultimately agree or disagree with what he has to say.”

McMahan is currently working on a sequel, entitled *The Ethics of Killing: Self-Defense, War, and Punishment*, which will also be published by Oxford University Press as part of its Oxford Ethics Series. The Press is publishing two of his shorter books as well: *Killing in War*, based on the Uehiro lectures McMahan delivered in June 2006 in Oxford and *The Morality and Law of War*, based on the Hourani lectures presented at the University of Buffalo in November 2006.

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**This evening was supported through the generosity of
William and Carolyn Stutt.**

This is an edited, abridged version of the original lecture transcript.

Preface by Dr. McMahan

My original plan was to substitute a polished written text for the transcript of the lecture. But since I gave the lecture, I have published a few of the ideas presented in it in a book called *Killing in War*, and I intend to develop some of the other ideas in an article on proportionality that I will publish in an academic journal. So it now seems to me best to preserve the text of the lecture as I gave it, lightly edited to ensure clarity but preserving the informality that characterized the occasion, as I spoke from notes rather than reading from a script. This will also ensure the continuity in tone between the lecture and the subsequent discussion. The only material I've added that's not in the transcript of the lecture is a short afterword in which I clarify my view of one issue that arose in the discussion.

Welcome and Introduction

Colonel Athens

Good evening, ladies and gentlemen. My name is Colonel Art Athens, United States Marine Corps Reserve. I'm the director of the Vice Admiral Stockdale Center for Ethical Leadership here at the Naval Academy, and I want to welcome you to the William C. Stutt Ethics Speaker Series.

This series was provided by Mr. and Mrs. Stutt starting in 2005. Mr. Stutt is a 1949 graduate of the Naval Academy, who served in the Navy for five years and then joined an investment firm by the name of Goldman Sachs. He eventually became a limited partner of that organization. Mr. Stutt established this speaker series because he understood the importance of leadership, ethics, and honor, and he felt that it was important for all of us to think deeply about these subjects. Tonight we have an opportunity to fulfill Mr. Stutt's vision as we listen, reflect, and then take action.

Our guest speaker tonight is Dr. Jeff McMahan, a professor of philosophy at Rutgers University and a visiting research collaborator at the Center for Human Values at Princeton. His B.A. is from the University of the South. He is a Rhodes Scholar, M.A. from Oxford, Ph.D. from Cambridge. He is the author of several books and numerous articles. The most well known is his book entitled *The Ethics of Killing*. He is considered to be one of America's leading contemporary moral philosophers. Please join me in welcoming Dr. Jeff McMahan.

Lecture

Dr. McMahan

Thank you very much. It's really an honor to be here. I'm going to start tonight by giving you some words of wisdom from somebody I know at Princeton, a philosopher named Anthony Appiah. Appiah is a famous philosopher, and he flies around a lot, and when he is on airplanes, people chat him up. When they ask him what he does, he says he is a philosopher. Sometimes they then ask him, when he has confessed that he's a philosopher, "Well, what's your philosophy?" The reason I know this is that he reported it recently in an interview in the New York Times. What he replies when he's asked "What's your philosophy?" is that "everything's a lot more complicated than you think it is." And that's what I'm going to try to tell you tonight about the requirement of proportionality in war. This is what I was asked to talk about, the notion of proportionality, so I'm going to try to give you some sense of the difficulty and the complexity of this apparently rather simple notion.

You're probably aware that the notion of proportionality has to do with weighing up the effects of war, weighing the good effects against the bad effects. If the good effects outweigh the bad effects in some way, then the war or the act of war is proportionate. If the bad effects outweigh the good effects, then the act is disproportionate. You'll notice that I mentioned the act of war and the war itself. There are actually, in the traditional theory of the just war, two different requirements of proportionality. There's one that applies to the resort to war. It applies to the war as a whole. Are the expected effects of going to war going to justify the harms that are going to be caused by the war? But there is also a parallel requirement in the traditional theory that applies to every individual act of war. Will the good effects outweigh the bad?

Beyond that, most people understand relatively little about proportionality. You shouldn't confuse it with other conditions on the use

of force in war. Where the resort to war is concerned, you shouldn't confuse it, for example, with the notion of necessity. A war can be proportionate in the sense that the expected good effects will outweigh the expected bad effects and still be unnecessary, and wrong because unnecessary, if those same good effects can be achieved in some way other than by resorting to war. And an individual act of war can be proportionate, in the sense that the good outweighs the bad, and yet be wrong, because it's not an instance of minimal force. That is, if your objective could be achieved by causing less harm, then the act will be wrong even if it's proportionate. I mention that because a lot of people run proportionality together with necessity and with the parallel requirement of minimal force in combat.

Most people assume that there are just these two proportionality requirements, one on the resort to war and the other on individual acts of war. But I think it's actually quite a bit more complicated than that, and I'll explain to you why. I think that each of these requirements breaks down into two proportionality conditions. There is one proportionality condition for harms that we intentionally inflict on those who are liable to be harmed. When you go to war, you're intentionally aiming to attack and harm some people whom you take to be legitimate targets of attack, and that aim is subject to a proportionality condition. I call this the narrow proportionality requirement. It contrasts with what I call the wide proportionality requirement, which isn't concerned with harms that one deliberately inflicts on people one judges to be liable to attack but rather focuses on harms that one unintentionally causes to people one believes to be innocent.

Let me say a little bit about narrow proportionality. You are familiar with the idea that there is a proportionality constraint on punishment in criminal law. We determine how much punishment a person deserves, and if a person is punished in excess of his desert, the punishment is wrongful, because it is disproportionate, and a similar kind of constraint applies on the use of force in self-defense. If you are an individual defending yourself against a wrongful attack, there is a certain level of force to which the attacker may be

liable, beyond which the exercise of defensive force will be wrong, because it's disproportionate.

Let me give you an actual example here of a notorious case. In 1984, there was a case in which a man, Bernhard Goetz, was being panhandled on the subway by some threatening-looking people, four guys, and he pulled out a gun and shot them. He was tried for this, and one of the issues that arose and was debated in the trial was whether his resort to the use of the pistol on the subway against these four people he judged to be threatening him was a proportionate response to the threat that he faced from them. I think it's pretty uncontroversial that it was a disproportionate response.

In war, when we attack legitimate targets only—that is, when we confine our attacks to enemy combatants—we assume that this problem just doesn't arise, and that's because all enemy combatants are supposed to be liable to attack at all times during the course of the war. And that is actually true in law, so that in law, it's really hard to imagine how an act that is directed solely against enemy combatants, and that will have no other effects, would ever constitute a disproportionate use of force against the enemy combatants.

I think that there really are moral limits in this narrow sense of proportionality even if we don't really reach them very often in practice. But it's probably not necessary to go into that.

Let me turn now to the proportionality requirement that's actually really important in war, and that's the wide proportionality requirement. This is again the constraint on acts of war, or on the resort to war, governing unintended, harmful side effects to innocent people, usually civilians. This condition doesn't arise as often in individual self-defense. If somebody is attacking me, and I engage in individual self-defense, I normally don't have to worry about side effects on innocent bystanders, though it's interesting that the Goetz case provides a nice instance in which what I'm calling the wide proportionality condition came into play as well. When Goetz shot the four people he judged to be threatening him on the subway in New York City, he was also endangering the lives of the innocent

bystanders who were passengers in that car on the subway. As it turned out, he didn't hit anybody. Nobody else was hurt, but you might judge in advance that shooting a gun in a crowded subway car would be a form of self-defense that might be disproportionate in this wide sense that it would impose unreasonable risks on innocent bystanders.

But as I said, this doesn't often arise as an important issue in individual self-defense, but it is the most important issue of proportionality in war, and that's because obviously wars nowadays tend to be fought where a lot of people live. It's very difficult to engage in acts of war without causing harm to innocent people as a side effect.

There is a lot more that one could say about the distinction between narrow and wide proportionality. I'm not going to go into it in any detail. I've mentioned that it's the issue of wide proportionality that's most important in war, though it's not what's important in individual self-defense. So there's an interesting divergence between the proportionality condition that matters most in individual self-defense and the proportionality condition that matters most in war.

Let me just mention a couple of complications that arise when we're thinking about the side effects of military action in war. One is that when we're doing this proportionality calculation, we can't simply aggregate or add up good effects and bad effects without taking account of how they are produced and how they are distributed. So for example, suppose as a side effect of an act of war, we're going to kill 100 innocent people. But suppose we're also going to be able to save 100 innocent people in the same way by the same act. Maybe that's because when we kill these 100 innocent people, that's going to free up their organs for transplantation, so we'll be able to use their organs and save 100 people in the hospital down the road. So we could kill 100 and save 100, both as side effects. Is that proportionate? Probably not. Here there's a question about how outcomes come about, and killing is morally different from saving.

There are also a lot of important issues concerning which good effects of an act of war count in the proportionality calculation. Some good effects are of the wrong kind to count in a proportionality analysis. Imagine that you're fighting a war and that you're contemplating a certain act of war that you judge would be just barely disproportionate. That is, you think it would be disproportionate, but if there were a bit more good that could be achieved, then it might be proportionate. But as things stand, the bad effects outweigh the good, but only by a little bit.

But now suppose you learn a new fact. All the people in your unit are going to get tremendous pleasure out of this mission, out of this act of war. It's going to give them a real thrill. Does the pleasure that they will get from conducting the mission count in the proportionality calculation? Can an act that was going to be disproportionate become proportionate once you add in the pleasure that the people are going to get from doing it? Intuitively, it doesn't seem that it can. That doesn't seem to be the kind of good that can factor into our reasoning about consequences of an act of war.

I'm actually not going to go any further into this. My time is limited, so I want to change course and introduce a few other complications in the notion of proportionality in war. In particular, I want to ask about proportionality in an unjust war.

Clearly proportionality is a constraint on a just war. That is, if you've got a just war, you're still going to be subject to a proportionality condition in the fighting of that war. That's what the second of the two recognized proportionality conditions is all about. It's called the *in bello* proportionality requirement, and it governs individual acts of war, and that includes acts in a just war.

But what about unjust wars? Well, there are various ways in which a war can be unjust. A war can be unjust, according to the traditional view, just by virtue of being disproportionate. That's one of the ways in which a war is considered unjust. If the bad effects are going to outweigh the good, that makes it an unjust war according to the traditional theory. But in fact, most wars that are unjust

are unjust because they lack a just cause. They lack a just aim. In other words, they are pursued for wrongful reasons.

So what about a war that's unjust because the aims of the war are unjust? Could such a war be proportionate, the war as a whole? I think obviously not. It can't be proportionate in the narrow sense, because the people on the other side haven't done anything to make themselves liable to be attacked. So you can't even judge the proportionality relation in respect of those people you are intentionally attacking. It's not disproportionate. It's just indiscriminate, and if it's indiscriminate, the issue of proportionality doesn't arise.

Let's think about individual acts of war in an unjust war. Suppose that you are in a war. It is objectively an unjust war, and you know this, so I'm making this an easy test case for you. Let's eliminate uncertainty for the purposes of thinking about this. There is no uncertainty about whether this is an unjust war, and you know this for sure. Can your conduct of the war still satisfy the requirement of proportionality? On the traditional view of the just war, it can. It's supposed to. The proportionality condition is supposed to be a requirement on people who are fighting in a just war and equally on people who are fighting in a war without a just cause. These rules of war are supposed to be neutral between just and unjust combatants, that is, those who are fighting in a just war and those who are fighting in an unjust war. That's certainly true of the law of war. The law of war is formulated in such a way that the proportionality restriction applies equally to people on all sides in a war. It doesn't make any distinction between those who are fighting in a just war and those who are fighting in an unjust war.

So suppose you are fighting in an unjust war, and you want to know whether your acts of war are satisfying the proportionality condition. Well, as I've said before, there's not just one proportionality condition on individual acts of war. There are two. There is the narrow proportionality condition and the wide proportionality condition. The narrow condition governs what you are doing intentionally to the targets of your attack. These are the people you are attacking intentionally, because you believe that they are liable

to be attacked. The problem here is that if your war is unjust, they haven't done anything to make themselves liable to attack. So the same situation arises here as arises in the case of the resort to war. There is nobody who is liable to be attacked here; therefore, you can't even begin to think about the narrow proportionality condition, so you are not going to be able to satisfy the narrow proportionality condition.

What about the wide proportionality condition? If you are fighting in an unjust war, and your acts of war are going to cause harm as a side effect to innocent people, can you judge whether the harm you are going to cause to those innocent people is proportionate or disproportionate? Well, in the law, the way you're supposed to think about this is that you're supposed to compare the bad effects of your act, and here we are talking about the side effects on innocent people of your attacks on military targets. You are supposed to weigh that harm—what's called collateral damage—against something called military advantage. That's the term that you will find used in the Geneva Conventions where the drafters were trying to define proportionality in a neutral way so that both just and unjust combatants alike can satisfy the requirement of proportionality.

But how are you supposed to weigh the killing of innocent people against military advantage in an unjust war? What is the cash value of military advantage? Well, the cash value of military advantage in an unjust war is that this act of war is going to make a contribution to victory in an unjust war. That is, it's going to bring you closer to the achievement of ends or aims that are unjust and wrong. How can that possibly be a good thing to be weighed against the harms to innocent people?

Imagine that you are a Nazi soldier, and you are getting ready to conduct some mission that you know is going to harm a lot of innocent people as a side effect, and you ask yourself whether this will be proportionate. How are you going to think about that? You say, "I am going to weigh the harms to these innocent people, the killing of these innocent people, against an increased likelihood of

Nazi conquest of this country.” That doesn’t look like a coherent comparison to me. If you’re going to do a proportionality calculation, you’ve got to be weighing harms against good effects, but if you’re fighting an unjust war, there aren’t any good effects. Therefore, it looks to me as if, if you’re fighting in an unjust war, you can’t satisfy either the narrow proportionality restriction on individual acts of war or the wide proportionality restriction on individual acts of war.

Most people in the tradition of thought called the just war tradition think that proportionality is a necessary condition of permissible action in war – that is, an act is not morally permissible in war if it’s disproportionate. And what I’m suggesting now is that almost any act of war in an unjust war, and in particular any act of war that is going to harm innocent people as a side effect, isn’t going to be able to satisfy the proportionality requirement. It’s going to be disproportionate, or it’s not going to be subject to the proportionality rule at all—or, rather, the narrow rule—because there is nobody who is liable to be attacked.

I’m going to say a few more things, but one of the main points I would like to stress is that it’s very hard to separate the just or permissible conduct of a war from the question whether the war is a permissible war in the first place. Yet you will find that it’s actually a tenet of the traditional theory of the just war, also found in the international law of war, that the principles governing the conduct of war are completely independent of the principles governing the resort to war.

I’m currently reading a new book by two law professors at Columbia University. The book is called *Defending Humanity*, and what they say is that you can fight a just war in an unjust manner, and you can fight an unjust war in a perfectly just manner, and that’s what most people have assumed for a very long time. What I’ve just tried to explain to you with reference to the requirement of proportionality is that I think that that’s false. It’s false at the level

of morality, and it's hard to understand it at all at the level of law.

I've got just a couple more minutes left. There are several other problems that I wanted to mention. I'm probably not going to have time to go into all of them, but one question that arises when you're thinking about proportionality is this. Are all innocent people or all noncombatants the same? Do they have the same moral status? Do they have the same weight in the proportionality calculation? A lot of people think that there are relevant distinctions between your innocent fellow countrymen, your compatriots, innocent people in neutral countries, and innocent people in the enemy country. How should these different groups of people factor into the proportionality judgment? Do your own co-citizens count for more? Do enemy civilians count for less? How should you think about this?

It may well be that your compatriots count for more in certain choices, but these aren't choices that are really relevant to the proportionality restriction on acts of war which are acts of killing. So, for example, if you can either save 10 of your fellow countrymen or 15 enemy civilians, it's perfectly acceptable in my view to save fewer people by saving those who are your compatriots. That's permissible. But when we're talking about killing people, what's at issue is not the right to be saved but is instead the right not to be killed. Innocent people have a right not to be killed by your efforts to engage in defense, and it seems to me that that right not to be killed in the course of other people's defensive action, if you're a wholly innocent person, is completely independent of facts about your nationality. People from other countries don't have weaker rights not to be killed as a side effect of your action. They have the same right that your compatriots have.

So in my view, you shouldn't take account of personal partiality arising from co-nationality when you are thinking about proportionality in war. Here is an example. Suppose there is a terrorist in a hotel room, and you know this, and this is a known terrorist. I'm thinking here of a case of targeted killing, and suppose you can kill this terrorist by shooting a missile into that hotel room, but it's

going to blow up inside the hotel room. To make sure you get him, you've got to launch a missile in there. It's got to be done from a distance, and it's going to kill a number of people in the rooms nearby. Suppose that the terrorist in the hotel room is in a hotel in New York City. If you judge that it would be disproportionate to shoot the missile into the hotel room in New York City, because too many innocent people would be killed, then I think you should make exactly the same judgment if the terrorist is in a hotel in Baghdad rather than in New York City.

I had a couple more points that I wanted to make, but I also know that we don't have a lot of time, so I think I should probably stop here to allow for 15 minutes of question and answer. Thank you very much.

Questions and Answers

Question

In a just war, one of the requirements is that a war must have a reasonable chance of success. If you're fighting a war against a faceless enemy, such as a group of terrorists, there may not be a way to fully achieve success. You said that you wouldn't be able to use narrow or wide proportionality if you couldn't justify the war itself. Are you saying that you wouldn't ever pursue terrorists?

Dr. McMahan

No. That's the short answer. I think your question challenges the traditional criterion of reasonable hope of success. There's a lot to be said about this criterion of reasonable hope of success, more than I can say here. First, in my view, reasonable hope of success is not a distinct requirement. It is subsumed by the proportionality requirement—that is, the *ad bellum* proportionality requirement, the condition that says that the good to be achieved from going to war has to outweigh the bad. If you don't have any hope of success, you are nevertheless going to be doing a lot of harm, but you're not going to achieve the relevant good—namely, the just cause for the war. So it looks like if you have no chance of success, the war must be disproportionate.

The problem with the war on terror is that it's not like a traditional war in a great many ways, but one of the ways in which it's not like a traditional war is that there's nobody who can surrender to us on behalf of these various little terrorist groups that we lump together under the label "Al Qaeda." What that means is we don't know how such a war could possibly end. It can't end in the normal way by having some sort of peace treaty or a surrender, because they are not organized that way. There's no authority among them that can say on behalf of all of these people, "We as a group surrender to

you. We are not going to fight anymore.” They are too decentralized for that to be true.

That means you have to redefine what success means in this kind of case. It doesn't mean victory where the other people surrender, and the war terminates at a certain date with the conclusion of a peace treaty, or a cease fire, or something like that. Success means something else. It may mean that we get hit by fewer terrorist attacks than we would have otherwise, and we have to judge what we do in relation to that rather vague and nebulous goal, but it doesn't seem to me that because what's called the war on terror isn't a war in the traditional sense that the action that we take against terrorism can't satisfy the hope of success criterion.

Just for the record, I think the hope of success criterion is actually a mistake and that it's perfectly good sometimes to fight a war that has no reasonable hope of success in the traditional way where success means achieving the just aim of the war. Suppose you're a tiny little country, and you're being attacked by a superpower. You have absolutely no chance of defending your sovereignty or whatever but still can be justified in fighting for a variety of reasons. You can make the outcome less bad by fighting. You can vindicate your dignity and honor, and so forth, and these are contributory goods. These can count in a proportionality calculation. So a war that doesn't have any reasonable hope of success with respect to the main goal—maybe national self-defense or something like that—can still be a permissible war even though it doesn't satisfy the traditional reasonable hope of success condition.

Question

Given everything you said, do you consider the United States' presence in Iraq just or ethical considering the current administration's policies?

Dr. McMahan

Again, the short answer is that I don't think the Iraq war was a just

war, and that is because I don't think it could be justified as an instance of preventive defense, and I don't think it can be justified as an instance of humanitarian intervention or humanitarian rescue of an oppressed people. It can't be justified as an instance of preventive defense for the reason that you all know, namely Iraq didn't pose any threat to us or really to anybody else. There were no weapons of mass destruction. The conventional forces had been contained and weakened. It can't be justified, and by the way, I think that was pretty clearly known to this administration when the war was initiated.

It can't be justified as an instance of humanitarian intervention, because although it's true that the people of Iraq by and large were very oppressed politically, and I think a majority of them despised their own government and would have liked to have had a different government, there was nevertheless no indication that they wanted us to come fight a war where they live in order to free them from their government. And I think it's a condition of justified humanitarian intervention that you should have some compelling evidence or some compelling reason to believe that the oppressed people want your help. Otherwise you are exposing them to risks to which they are not consenting, and that I think is wrong.

The latest figure I've seen for civilian deaths in Iraq since the beginning of the war in March 2003 comes from the World Health Organization, not a puppet of the Bush Administration or of any other government, so it has a certain claim to neutrality. The figure that they released about a month ago was 151,000 civilians killed in the course of this war in Iraq. That's more than twice the number of American soldiers killed in about 15 years of war in Vietnam. That's a lot of dead people who would be alive now had we not fought this war. We didn't ask their permission to do this.

There's another question here about whether we should just pull out even when we've destroyed the system of authority in a country. After the initial invasion, there was no longer any political authority. Something had to be done, and so your question was about our presence there. Yes, our presence is justified in the sense that it

would be a mistake for everybody to pack up and go home tomorrow. That would be the wrong thing to do.

Question

I'd like to return to the question you posed about differentiating between civilians of our own country versus civilians of another country. I by no means am advocating harming innocent civilians in order to reach a tainted objective. However, when you're trying to judge in that wide scope you're talking about, about protecting civilians, and say for instance you had Osama Bin Laden. We knew exactly where he was, but he was with many civilians, as terrorists are always embedded with civilians. In 1997, we had chances to do so, but we did not take him out. Would you see the reasonableness in taking out a terrorist for the sake of preventing the future harm to innocent civilians?

Dr. McMahan

Good question. All I was saying was this, that if Osama Bin Laden is surrounded by a bunch of civilians, whether it's permissible to kill him and kill all the innocent civilians who are around him shouldn't depend on whether those civilians are Americans or Afghans or Pakistanis, if they are really innocent people.

Now here is one of the things that I wanted to say at the end of the lecture that I didn't get time to say, and that is that very often the people who are surrounding terrorists aren't completely innocent people, even if they are noncombatants. They are often supporters, shelterers, people who provide various things for the terrorists. If you're helping terrorists, that's one reason why you might be in their immediate vicinity. It's unlikely that Osama Bin Laden just hangs out with a whole bunch of people he doesn't know. Wherever he is, he is sure to have around him only people he knows and trusts. And the people he knows and trusts are helping him, and to that extent, I think they make themselves liable to the risks that go with helping a terrorist. They may not be people whom it's permissible for us to target directly just because they are friends of his or

they like him. But if they are hanging out with him and supporting him, then they may not have much ground for complaint if they get hurt when we go after him.

Question

Sir, as a group of people training to go fight what you classify an unjust war, what should we do? Should we all quit?

Dr. McMahan

I do think that if you are being commanded to fight in a war that is objectively unjust, and you know that it is unjust, then you should conscientiously refuse to fight. Maybe you shouldn't quit, but you should refuse to fight in a war that is in fact unjust.

Now we would admire that in a Nazi, wouldn't we? Take a case of an average Nazi soldier. Suppose this guy signed up in 1932. He is a volunteer and has been in the German army for a while. Hitler takes over, and Hitler says, "Go invade Poland, go invade Czechoslovakia, go invade..." all the other countries he in fact invaded. And if the Nazi says, "No, I signed up to fight only in just wars and not in wars of conquest and aggression, and I refuse to fight," I think you would admire him. It takes a lot of courage to do that, more courage than it takes sometimes to go out and fight, depending on what the relative risks are. Anybody who did that with Hitler would have been shot on the spot of course. That's not going to happen to you if you refuse to go fight in Iraq.

But I don't think Iraq is like World War II. That is, it's not a clear case of an unjust war, and as I said, a lot of the people who are in Iraq right now are engaged in activities that are intended to be helpful and sometimes are helpful: reconstruction, providing security for people, distributing food. These activities are activities that a person can do even in the course of a war that is by and large, in my view, an unjust war.

So it doesn't follow that if a war is unjust, you must refuse to go

there, but in some cases, that does follow. If I were a soldier in the Nazi army, and Hitler ordered me to go into Poland and start shooting people in Poland, the right thing for me to do would be to refuse.

Question

Can a war that was not justified when we entered it become justified during the course of it? Saddam Hussein was going to die at some point. All of this that is breaking loose right now in Iraq would have eventually happened. Do you think that we headed that off by making our presence felt now and by eliminating Saddam Hussein?

Dr. McMahan

There is a lot presupposed in what you're saying. Let me answer the simple theoretical question first. Sure, a war that starts off unjust can become a just war, and a war that starts off just can become unjust. It all depends on what goals are being pursued at a particular time. It all depends on how things are going. A war that starts out looking like it's going to be proportionate can become disproportionate. And by the way, one of the things I should have said at the outset was that the larger proportionality requirement that governs war as a whole doesn't apply just at the start. It applies continuously throughout a war. You may enter a war believing that it was going to be proportionate, and halfway through it you find out it's in fact not proportionate. That's something you have to reconsider at all times.

There's the particular question about Iraq. You're assuming that the society was going to disintegrate at some point, as soon as the authoritarian system that held everybody back from tearing each other's throats out was eliminated. I'm sorry, I don't know how to think about that. If you are assuming that the society was definitely headed for civil war and chaos and bloodshed no matter what, and that the only thing that was keeping it together was Saddam Hussein's dungeons and secret police and Republican Guard and so on,

then it may well be true that our intervention has resulted in fewer deaths among Iraqis than would have occurred had things unraveled there without our intervention. We're getting into a lot of empirical speculation here, and I really don't know what to say about that except this: that by and large, I think it should be people's own choice what kind of risks they run.

Now if it's evident to you that Iraq was being held together only by the dictatorial power of Saddam Hussein, that was presumably evident to Iraqis as well beforehand, and so they should have been anticipating too: "Whenever Saddam Hussein goes, we are going to be at each other's throats, and a lot of us are going to die." That should have entered their thinking. They might have thought: "In that case, it might be good to have somebody like the United States come in, overthrow Saddam Hussein, and provide security for us, so we won't devolve into civil war." But they weren't thinking that way as far as I know, and from everything that we can tell, there was nothing like overwhelming popular support among the vast majority of people in Iraq, who loathed Saddam Hussein, for an American intervention.

One thing to remember is that when you're thinking about humanitarian intervention, it makes a difference who the agent of the intervention is. There are some intervening powers you might trust and other intervening powers that you don't trust, and people in Iraq remember that it was George Bush's father who fired a lot of missiles into their capital and insisted on economic sanctions that wreaked great damage on the population there over a long period of time. The Iraqis, I think, did not regard us as their friends on whom they wanted to rely for their own release from the tyranny of Saddam Hussein.

Afterword by Dr. McMahan

I would like to take the opportunity offered by the publication of the transcript of this lecture to correct a misleading impression I apparently gave during the discussion. It seems that some in the audience interpreted my responses to questions about the Iraq war as implying that I believe that anyone who serves in Iraq is guilty of wrongdoing and could even be likened to a Nazi soldier. But a careful reading of the transcript should dispel that impression. It is true that only toward the end of my response did I realize that the questioner was rightly distinguishing between the invasion of Iraq and the subsequent US military presence in Iraq. I too should have carefully distinguished between the invasion and the occupation. I believe, as I indicated, that the invasion was unjustified. But it does not follow that the occupation has also been unjustified. As I have argued in an article forthcoming in the *Loyola International and Comparative Law Review*, a war that is unjust can create conditions in which an occupation becomes justified—in this case because the destruction of institutions of political authority required an external military presence to provide security until political structures could be reestablished. I accept, therefore, that it can be objectively permissible to serve in the occupation (which I nevertheless believe was managed by the Bush administration in ways that were incompetent, corrupt, cynical, and self-defeating).

I also observed that the Iraq war “is not a clear case of an unjust war” —in explicit contrast to the German invasions of various countries in World War II. I should confess that I myself was not opposed to the war when it was initiated, though I was not in favor of it either. I did not trust the Bush administration’s professed motives, but I was open to the possibility that there was a just cause that might be achieved through the removal of Saddam Hussein and his associates from power. I would therefore be holding American combatants to a higher standard than the one to which I hold myself if I were to say that they have no excuse for believing the lies they were told by the Bush administration about weapons of mass

destruction in Iraq, or for believing that the overthrow of the tyrannous and barbaric regime of Saddam Hussein was a just cause for war. Indeed, I think that the members of that regime were morally liable to be deposed. They had no legitimate complaint about being forcibly removed from power. It was, rather, the people of Iraq, and in particular all those who were killed, maimed, or forced to flee their homes, who were wronged by an invasion they neither requested, consented to, nor welcomed. But, at least at this moment in history, one cannot hold ordinary combatants accountable for failing to appreciate that it is a condition of justified humanitarian intervention that it be welcomed by the intended beneficiaries.

Still, the claim that American combatants were not blamable for participating in the invasion of Iraq does not entail that their participation was objectively morally justified. What it means is that the responsibility for the immediate consequences of their action, such as the deaths of well over 100,000 Iraqi civilians, lies primarily with those who, through deception and manipulation, used them for purposes they preferred not to acknowledge. (The Bush administration was finally forced to concede that there were no weapons of mass destruction in Iraq and no program for acquiring them. They also had to recognize that their forces were meeting with formidable resistance from the people they claimed to be liberating. But did any official say, “We fought a war to eliminate Iraq’s weapons of mass destruction but have now discovered that that reason for going to war was illusory. We made a terrible mistake.” ? No. Instead they proceeded just as they would have if the tales about weapons of mass destruction had been no part of their justification for going to war. We were left to speculate about what their real reasons were.)

In summary, although American combatants had no objective justification for participating in the invasion of Iraq, they were not blamable for believing that they were in fact justified. There has, moreover, been objective justification for participation in many aspects of the subsequent occupation, including the provision of domestic security and the facilitation of reconstruction. There is therefore no basis for comparison with Nazi soldiers, who had

neither justification nor excuse and whose unreflective obedience to orders caused harms immeasurably greater than those suffered by Iraqi civilians. I mentioned Nazi soldiers during the discussion only to provide a vivid illustration of my claim that conscientious refusal to fight can sometimes be not only permissible but even highly admirable.



“Morality lurks in all the shadows surrounding our profession. To not only ignore it but fail to embrace it will ultimately ensure your failure in the service.”

—VADM James B. Stockdale

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