The trouble with rights: moral sacrifice in just war theory

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The Trouble with Rights: Moral Sacrifice in Just War Theory

Introduction
Approaches to military ethics that treat the problem of war as a genuine moral challenge (whereby the challenge lies in the fact that some wars can be morally good, and others morally evil) have been dominated throughout history by the school of thought known as just war theory. And, although in the contemporary period rival accounts are beginning to emerge, none has the same influence, complexity or popularity of just war theory. However, the modern state of just war theory is far from ideal; in fact, many of the rival accounts that are emerging aim to introduce ideas that have historically been part of just war theory: questions of virtue, character and the specific vocation of the warrior, for example. All of these questions are present in the writings of Aquinas and Augustine, but modern-day theories have shifted toward a more legal understanding which emphasises war as an interaction of various rights, many of which are violators. The morality of war becomes a question of upholding rights, reducing their violations, and punishing transgressors. This approach addresses what we might consider the bare minimum of morality; however, at a conference considering ethical excellence, it is appropriate to take the time to explore what a bare minimum approach leaves out. In the case of war, a bare minimum approach undermines the idea of the warrior as a sacrificial figure, for there are very few (if any) circumstances in which rights-discourse will justify the foregoing of a right. This paper will argue that in order to accommodate the sacrificial image of the soldier, just war theory must take an interest in ethical excellence rather than mere rule adherence.

1: Sacrifice, martyrdom and charity
Few concepts are more commonly evoked on military memorial days than that of sacrifice. On solemn days of memorial, civilians and military personnel alike gather to pay tribute to men and women who have made “the ultimate sacrifice.” As Babak Rahimi explains, “soldiers are not merely those who die on the battlefield, but they also become figures that attain an immortal reality
through self-sacrifice.” To this, proponents of the “functional thesis”, which holds that soldiers are called to be virtuous insofar as those virtues enhance the function of the military unit, add that “military folk will not be able to do their jobs if they are not, to a certain degree, selfless.” “Otherwise”, the function theorists argue, “they would not be able to tolerate even the ordinary hardships of military life, much less be willing to risk their lives.” According to this view, sacrifice is intrinsic to the practice of soldiering. However, despite the strong association between soldiering and sacrifice, the word does not appear at all in the Australian Army’s 242 page Law of Armed Conflict, nor in the United States equivalent. It does, however, appear in the 2006 US Field Manual on Counterinsurgency:

Combat, including counterinsurgency and other forms of unconventional warfare, often obligates Soldiers and Marines to accept some risk to minimize harm to noncombatants. This risk taking is an essential part of the Warrior Ethos.

Although the above suggests that a soldier is expected to be selfless, the framework through which his actions are morally evaluated – just war theory – does not require him to be. This makes sense from within the legalist paradigm; sacrifice requires – in the sense applied to soldiers – going “beyond the call of duty.” Soldiers are celebrated for paying the “ultimate price” because they forfeit their lives for fellow citizens. In so doing, they do more than what citizenry duties, and possibly even their military obligations, require. These type of actions are supererogatory and therefore not legally prescribed. However, the Field Manual on Counterinsurgency it goes beyond the Deontological Question by invoking “The Warrior Ethos” – what it means to be a warrior. This idea connects much more closely with character and identity, and thus with the Virtue Question, than with modern rights-based formulations of just war theory.

A conception of self-sacrifice as supererogatory is undermined by Walzer when he argues that “when it is our action that puts innocent people at risk, even if the action is justified, we are bound
to do what we can to reduce those risks, even if this involves risks to our own soldiers.” The word “bound” is significant here: it implies a moral duty that one is required to perform. An action one is bound to do is not supererogatory. This argument is made partly on the basis of civilian rights to immunity; i.e. we ought to reduce collateral damage in war even if it enhances personal risk, but also partly with reference to Albert Camus’ argument that one cannot kill unless one is willing to die. Camus’ argument could hardly be formulated as saying “only when one is willing to die does one earn the right to kill another”; rather, what Camus (and, via citation, Walzer) is saying is that there are particular attributes of moral character, a particular psychological state, requisite for an agent’s killing to be just. These are necessary, but not sufficient conditions for morally acceptable intentional killing. Implicit in Walzer’s stance is an interest in character and moral psychology that a purely rights-based approach cannot justify. Instead, Walzer invokes the Virtue Question in explaining why soldiers should be expected to make sacrifices to protect civilian lives. (By contrast, the Australian and US Laws of Armed Conflict discuss civilian protection as an adjective – a description of those protected from direct attack – rather than as a verb, requiring soldiers to actively protect civilians). That Walzer has to go beyond rights-talk to justify asking soldiers to take on increased risk in performing their roles suggests that perhaps just war theory should not limit itself to focussing on human rights.

A virtue-based approach to sacrifice would understand it as a manifestation of the virtues of courage and charity; and indeed, these are the two virtues that Aquinas attributes to “martyrdom”. (In this context, martyrdom can be seen not only as dying for one’s faith, but as dying in defence of truth, as Aquinas notes, “martyrdom consists essentially in standing firmly to truth and justice against the assaults of persecution.”) In explaining this, Aquinas also accepts – as was established above – that sacrifice is supererogatory, saying “martyrdom is an act of charity as commanding, and of fortitude as eliciting. For this reason also it manifests both virtues. It is due to charity that it is meritorious, like any other act of virtue: and for this reason it avails not without charity.” Here, remembering that for Aquinas peace is an act of charity, an immediate
connection can be seen between sacrifice and the ultimate aim of war being peace. Sacrifice and peace are functions of the same virtue: charity. Charity, love of others, provides an individual with the motivation to sacrifice himself for another, but it alone is not sufficient to transform that motivation into action. To do so also requires courage. Once I have determined that to sacrifice myself for another (or many others) would be charitable, “it belongs to the virtue of fortitude to remove any obstacle that withdraws the will from following the reason.” Here we have a new way of understanding the popular view that soldiers are especially called to self-sacrifice: all just wars are a practice of charity, and therefore all just combatants should be motivated by charity. Presumably, a just combatant has either gone to war to defend his own nation or the victim of another nation which has been unjustly attacked. Therefore, in both situations he has gone to war to defend the innocent. In Kosovo 1999, NATO undertook a strategic bombing campaign as a means of quickly and safely (for NATO troops) ending the genocidal Serbian attacks on Kosovar civilians. However, as Walzer notes, “risk-free intervention undertaken from far away [...] is likely to cause an immediate speed-up on the ground.” Therefore, as a matter of military fact, more troop-risky modes of warfare needed to be employed in order to actually protect the innocent. The problem, Walzer notes, is that it is unclear under a rights-based model why that risk should be taken.

The aim of the intervention, after all, is to rescue people in trouble, and fighting on the ground, in the case as I have described it, is what rescue requires. But this is no longer risk free. Why would anyone undertake it?

They would undertake it, the virtue theorist will respond, because that is what charity requires. If a nation’s motivation in sending its military to war is to defend the innocent (either themselves or – particularly – others), then to take actions within the war that endanger the innocent would be unreasonable. A soldier’s failure to be motivated by charity during wartime is to undermine the reason for engaging in war in the first place; a politician who declares war for reasons other than
charity corrupts its ultimate moral purpose. However, awareness of what charity requires is one thing; to act on those requirements is something else entirely. This is why courage is a central virtue in martyrdom. Because all men love life, to risk death naturally provokes fear, but the courageous man is not overcome by that fear because he recognises the value of the innocent lives for which he will fight and perhaps dies. “Thus,” says G. Scott Davis (quoting Aristotle), “courage involves fearing “the right things and from the right motive in the right way and at the right time”, where rightness means seeing things for what they are.” Thus, the soldier-martyr, whilst knowing that charity requires him to take risks and sacrifice his life for the innocent, will not take undue risks. Rather, he will only take those risks as are necessary and reasonable in defence of the innocent. As Walzer notes:

If we are bombing military targets in a just war, and there are civilians living near those targets, we have to adjust our bombing policy – by flying at lower altitudes, say – so as to minimize the risks we impose on civilians. Of course, it is legitimate to balance the risks; we cannot require our pilots to fly suicidal missions."

To take serious risks that do little to advance the cause of protecting innocent lives is to fail to recognise the value of one’s own life. Aquinas argues that “it is contrary to the natural inclination, and therefore a sin, to fall short of loving [life] in due measure.” Note, however, that this only applies to the type of charity which affects martyrdom: the willingness to risk or sacrifice one’s life in defence of truth and justice. If a soldier jumps on a grenade to save the lives of his fellows, he is motivated by feelings of fraternity and fellowship with his comrades, not by the desire to defend an ideal like truth or justice. This type of action is clearly a sacrifice, and is supererogatory. However, the type of motivation displayed here is that of friendship, not charity. These actions are not especially suited to the person qua soldier, but qua friend. We do not, and should not, ask the soldier to be the friend of everyone he meets in wartime, but it is reasonable to ask him to be charitable to all those he meets; particularly those he aims to defend.
A: The Politics of Forgiveness

Forgiveness is a sub-species of sacrifice that warrants more focussed discussion. To forgive the enemy in the interests of peace requires a substantial moral sacrifice on the part of one, or both, parties. In an influential piece on forgiveness, Aurel Kolnai argues that forgiving someone who has not been punished is unjustifiable, because in not being punished he persists “in his plain identity qua offender.” For Kolnai, one can only be forgiven if one meets the conditions that would justify forgiveness: “what renders forgiveness ‘genuine and unobjectionable’ is that the wrongdoer has (in the forgiver’s eyes, at least) repented.” Against the conditional approach to forgiveness, Zenon Szablowinski argues that “[i]nterpersonal forgiveness does not depend on repentance by the offender; it is a gift offered generously to a person who does not deserve it but needs it.” Leo Zaibert also offers Jacques Derrida’s idea of forgiveness against Kolnai’s conditional approach. For Derrida, forgiveness must be unconditional, because forgiveness (paradoxically) forgives “the unforgiveable.”

The very concept of forgiveness, logic and common sense agree for once with the paradox: it is necessary ... to begin from the fact that, yes, there is the unforgivable. Is this not, in truth, the only thing to forgive?

However, in focussing on interpersonal forgiveness, each of these competing notions of forgiveness fails to captures what is truly at stake when one political community forgives another in the interests of peace building. The difference is that in peace building scenarios, it is unlikely that either party is willing to admit to having done wrong. Both sides in a war usually make claims to having just cause, and so believe themselves to have the moral high-ground whether or not their actions are morally justifiable (we might call this “subjective just cause” – which may or may not also be “objective just cause”). Forgiving the enemy, therefore, requires a group to relinquish its subjective claim to just cause. As Duncan Morrow notes, “without both acknowledgement and forgiveness, it is hard to see how antagonism can be resolved by anything other than victory.”
language of claims is important here. If a nation claims to have just cause, then it is claiming the right to go to war. Typically, the right to go to war is claimed in order to restore some prior injustice (aggression, for example). If we understand just cause as a claim (as rights-based theories do), then there are two ways in which just cause can be resolved: either by obtaining the good that is being claimed, or by terminating the claim itself. In a military context, the former is usually called victory; the latter is not widely discussed, but should be acknowledged as a kind of forgiveness. In the same way that a nation can “forgive” another nation’s debt – meaning they will no longer expect repayment, a nation can forgive another nation the need to make restitution for an unjust (or allegedly unjust) war. Forgiving the national debt does not, at least primarily, mean forgiving a nation for irresponsible economic planning leading to the inability to repay a loan; forgiving in the context of war – similarly – is primarily about relinquishing a claim. This type of forgiveness does not require, as Richard Swinburne suggests (with regard to interpersonal forgiveness), that “the wrongdoer must make atonement for his wrong act, and the victim must forgive him.” Rather, it is what P. E. Digesar calls “political forgiveness”: Digesar argues that “it is possible to conceive of forgiveness as the public release of either a moral or financial debt.” This type of forgiveness “divest[s] […] of any personal feelings whatsoever in favor of a performative account in which such overt behaviors as pardoning a criminal or waiving a debt signify forgiveness.”

This type of forgiveness is sacrificial because it requires my group to abstain from claiming a good to which we have rights. It sacrifices my moral entitlement to a particular good in the interest of ending the state of war. Morrow, speaking about the Northern Irish “Troubles,” suggests that divergent claims between groups perpetuate perceptions of “other-ness” between them. His argument concerns claims of sovereignty, but they also apply to claims about just cause.
[W]here more than one claim is made over [by] the same territory or people, the most likely consequence is the emergence of persistent division between groups divided into competing claims.\textsuperscript{29}

Peace building in such situations is, according to Morrow, nothing short of miraculous.\textsuperscript{30} The polarising tendency of just cause is directly connected to the fact that they are rights-based claims. Because the concept of rights is based more deeply in the practice of claiming,\textsuperscript{31} there is no room within rights discourse to explain why one might want to forgo enforcing a claim – or whether it might be moral to do so. Under such a conception, Kohnai’s argument makes sense: if one has a just claim, and justice demands that the claim be rewarded, to gratuitously decide not to pursue that claim would be contrary to justice. As Walzer says, “the defense of rights is a reason for fighting,”\textsuperscript{32} and although he does not argue that it necessitates fighting, he makes clear his preference for resistance over appeasement in such cases. If not necessitated by justice, then justice at least makes the decision of rights hugely important. But it is also true that the end of war is peace. For Walzer and other just war theorists (myself included), not just any peace will do; it must be a just peace. The proportionality requirement of \textit{jus ad bellum} demands that the state-of-affairs caused by war be better than that generated by not warring. However, it is not clear that there is anywhere a tipping point. At the time of the declaration, clouded by the fog of war, I may believe proportionality to be in my favour. Over time though, complications mean that the moral costs of the war have been much graver than I first anticipated. Should I cut my losses and leave? That would surely be to leave the world worse off than it was before the war begun. It seems, then, that I must continue to pursue my original goal: my rights. In this case, the world may be faced with a state of war \textit{ad infinatum}, as neither side gives (nor gains) ground. In such situations – and the case of Northern Ireland is a striking example – the only solution is forgiveness. The paradox however is that this necessary forgiveness is not justifiable under a just war theory concerned only with the Deontological Question. Rights-based theories seem unable to justify forfeiting a claim, even in cases where forfeiture would be in the interests of peace. Understanding the goal of war to
be a “just” peace – viz, a peace where all rights are restored to a state equal to or more secure than they were before the outbreak of war – places these theories at risk of seeing wars continue in situations where conflict may have otherwise been resolved.

Forgiveness proves problematic for rights-based theories because there is no mechanism within these theories for explaining why or when it might be morally good for a nation to forego a valid claim. In cases where both sides are militarily equal and both genuinely believe in the justice of their cause, this is a recipe for perpetual war. As Tara Smith observes, “[f]orgiveness [seems] incompatible with justice. For isn’t forgiveness a matter of overlooking trespasses?” A virtue-based approach understands the importance of the valid claims that a just cause for war represents, but suggests that there are times when it is in the best interests of all involved for the cause to no longer be pursued. When might these claims be prudently forgone? Here we are again reminded that all just wars aim at peace, one should forego pursuing a valid claim by war when the costs of such pursuit become too high to be considered consistent with the common good. However, determining when it is appropriate to embark on such forgiveness requires prudence. (Although I am following Digesar in developing an account devoid of interpersonal emotion, it is worth noting that this type of forgiveness also requires political virtues to possess virtues that regulate anger and pride; viz. meekness and humility, I will return to these in Chapter 5 when I discuss the virtuous political leader.)

Applied to relations between political communities, one can see prudence as one of the virtues that bears on the ad bellum principle of proportionality, the “estimates of costs and benefits of a war,” to the international community. Where war’s continuation is likely to see a continued diminution in the overall flourishing of the international community, it ought to be abandoned in the interests of peace. Just as it is unreasonable to avoid all risk in a war intended to defend the innocent, it is unreasonable to continue to fight a war when the peace it aims at will be a worse situation than the current one. Here we see that prudential forgiveness can be brought to bear on
the *ad bellum* condition of probability of success. If there is little chance of a war being brought to a just resolution (that is, of victory), then it is in the interests of peace that one not engage in war at all.

The contrary is also true though: if a political community’s failure to enforce its valid claim would leave the international community in a worse state than going to war, then it ought to go to war. When Cicero encouraged Brutus to be severe with Caesar’s sympathisers, he is said to have remarked that “if we wish to be clement, there will be no end of civil wars.” In this case, according to Cicero’s assessment, the common good was best served by going to war. (Notwithstanding the question of whether there was just cause or legitimate authority in this case.) Here, forgiveness challenges the uncompromising stance of rights-based just war theories such as Walzer’s, who notes in his criticism of appeasement that “[i]n just war doctrine, as in the legalist paradigm, the triumph of aggression is a greater evil.” For Walzer, even though aggression is usually committed by a powerful state against a weak one, appeasement is almost always “a failure to resist evil in the world.” However, this does not undermine an appeal to political forgiveness, as the virtue will not always justify appeasement. As Digesar notes:

> If there exist acts that lie beyond the pale, that create a permanent stain, that generate an irreparable breach in the moral fabric, then we need to consider the possibility of absolutely unforgivable acts. Such acts result in a debt from which the transgressor can never be released and they forever destroy the possibility of a fruitful or valued relationship between the victim and the doer of the deed.

Again, in making prudential judgments about political forgiveness, we must consider the common good. In situations where aggression will mean the installation of a totalitarian, violent and oppressive regime, an argument could be made that the international community would be left in a better state were such a regime to be resisted, even if that resistance was unsuccessful. Prudence may, perhaps, suggest that a nation accede to aggression where the new regime will likely do little
to damage the common good. What is most important, and what sets a virtue-based approach to forgiveness and peacebuilding apart from a rights-based approach is that this approach provides a moral framework through which political communities can depart from a state of war and revert to a state of peace when that peace is in the interest of the common good.

**Conclusion**

This paper has argued that the idea of sacrifice, so commonly held as a key element of the warrior’s craft, cannot be justified under a rights-based approach to just war theory. Rights-based theories, rather, are focused on achieving a bare minimum standard of morality that does not entail supposedly supererogatory acts like sacrifice and forgiveness. As a model of international law (adopted by, for example, the International Criminal Court), this might be an acceptable model. However, moral philosophers should be interested in more. Soldiering can be an avenue to excellence, fully integrated with the *eudaimon* life, but such a noble goal requires that soldiers be trained to strive for, and achieve, excellence.

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3 J. Carl Ficarrotta, ‘Are Military Professionals Bound by a Higher Moral Standard?’, p. 64
4 J. Carl Ficarrotta, ‘Are Military Professionals Bound by a Higher Moral Standard?’, p. 64
9 Walzer, *Arguing About War*, p. 16
10 Walzer, *Arguing About War*, p. 17
11 The accompanying conditions would be those that rights-theorists have done well to point out: that the person being killed has somehow forfeited their right not to be killed by performing such-and-such an action.
12 See: Australian Defence Force, ADDP 06.4, 5.35 and Chapter 9; Johnson & Gillman (eds.), *Law of Armed Conflict Deskbook*, pp. 91-120
13 ST, II-II, Q. 124, Art. 1
14 ST, II-II, Q. 124, Art. 2
15 ST, II-II, Q. 123, Art. 3
Therefore, while he will fear the things that are not beyond human strength, he will fear them as he ought and as reason directs.