

Did Marine A do Wrong? Biggar's Lethal Intentions

In 2011, after their base in the Helmand River valley had come under attack, a patrol of Royal Marines Commandos found a severely wounded Taliban fighter. Gunfire from a supporting Apache attack helicopter had left the fighter with a sucking chest wound and unable to defend himself. The prisoner was dragged to where he and the patrol could not be seen by the Apache or the ground-based radar system at the base. Sgt Alexander Blackman—referred to as ‘Marine A’ at the subsequent trial—then shot him in the chest with his pistol. Blackman was convicted of murder by a court martial in 2013. At the time of writing he is serving an 8-year prison sentence.

Nigel Biggar's *In Defence of War* is a stimulating read, synthetic in scope, and is a robust re-articulation of the just war tradition. In particular, Biggar defends the Grotian and Augustinian claim that war is sometimes properly retributive (see especially Chap. 2). That is, it may be punishment of the unjust by the just for the harm they have improperly caused. This is an alternative justification of war to self-defence, which has in recent decades been the basis on which the exercise of coercive force has usually been defended. Although the retributive claim has fallen into desuetude, perhaps the central contribution of *In Defence of War* is to foreground its importance and moral viability. (See also Luban 2011 for a philosophical discussion of the claim.)

I agree with much of *In Defence of War*. But in conjunction with another plausible premise, the retributive claim has a consequence that will be unpalatable to many, even Biggar. It implies that Marine A did no wrong.

The task of this response is to explain why Biggar is committed to the legitimacy of Marine A's battlefield execution. I first exegete Biggar's revised version

of the doctrine of double effect (§1); then argue that intentional killing is sometimes permissible, including by soldiers, if retribution is taken as a sound justification for war (§2). I conclude the counter-argument with the plausible additional premise, the claim that moral reasons for war distribute (§3). In conclusion, I identify how Biggar can reject the claim; all possible ways require revision of his position (§4).

1. Unintentional killing

Biggar argues that soldiers should not and need not intend to kill their enemy. The claims are rendered plausible given the notion of intention that he employs, in a revision of the classical doctrine of double effect.

Soldiers are obliged not to kill intentionally, according to Biggar. He argues as follows. To kill a person is always to cause an evil (91). But killing is not always murder. One may kill justifiably only if it is unintended, proportionate, effective, and necessary (93-96; I use ‘effectiveness’ as the converse of ‘vain’). I kill intentionally if I both choose and want that death. I kill unintentionally if, even though I choose to act in a way that I know or reasonably believe will lead to someone’s death, I do not want that death (95). Because soldiers kill, they do so justifiably only if that killing is unintended, proportionate, effective and necessary. So the just soldier kills in war merely accepting the death of their enemy, thus unintentionally, and not wanting their death.

Not only are soldiers obliged to kill unintentionally, it is possible for them to do so, Biggar claims. He provides a nice justification for this claim.

When a soldier intends to kill, in the sense of having as his primary aim the death of his enemy, then, having shot and felled him, should he draw near in the aftermath of the battle and find him still breathing, he would shoot him again until

his breathing stopped. If he does not shoot his incapacitated and non-threatening enemy, then that implies that it was not his death—as such—that he wanted. (105)

This is surely correct. Furthermore, a great many soldiers through history have taken wounded enemies captive rather than killing them, sometimes even giving them life-saving first-aid. It is possible for soldiers to fight in such a way that—on Biggar’s stipulative definition—they do not intend to kill their enemy.

In the next section I turn to critique.

2. Killing in war

Is Biggar right that justifiable killing must be unintentional? The claim is not obvious. While it is controversial whether capital punishment is morally permissible, suppose for the sake of argument that sometimes it is. I claim that executioners, who kill criminals as a result of a due process of conviction, then do so intentionally and justifiably. To see this, note that the executioner has not fulfilled her task until the criminal is dead. If she finds the felon still breathing on the rope, she may pull on his legs till the noose tightens and he ceases.

Contrast the executioner with the police marksman. If there is an axe-wielding maniac running through the streets attempting to kill anyone she finds, the marksman may properly use force to prevent harm to innocents. The marksman should use the minimum feasible harm to do so; if he shoots her, this must be because shooting her is the least destructive means to prevent further carnage. If he incapacitates her by shooting, but successfully avoids killing her, he should then take the axe-wielder into custody pending trial. He should call for first-aid in the meantime.

Note that the propriety of the intention to kill varies according to the reasons for killing. The police marksman acts only in self- and other-defence. There is no judicial element to his action; that is, it is not expressive of a public judgement of the wrongfulness of the axe-wielder's actions, which comes about only as a result of a court's verdict, even though his use of force may precede and be preparatory to such a judgement. He should not intend to kill. The executioner, on the other hand, enacts public anger at the criminal for the harm he has committed. Her use of force, resulting in the criminal's death, is partly constitutive of public judgement and is the starkest result of it. This is compatible with regret for the way events have transpired (a 'sorrow for tragic necessity', 106), but does not qualify the wanting of the criminal's death. She should intend to kill. The executioner's force is punitive; the marksman's not.

Which role is that of the soldier morally equivalent to—the police marksman, or the executioner? It depends on what you think the justification for war is. If you think that war is justifiable only on grounds of self-defence, whether collective or individual, then the soldier is morally akin to the police marksman. He should use force only when and to the degree required to prevent further harm. Incapacitated enemies should accordingly be taken prisoner and given medical help. If you think that war is justifiable on the grounds of public retribution for the wrongful harms committed by the enemy, then the soldier is morally akin to the executioner. He enacts public judgement against injustice, imposing the penalty of death. In claiming that war may justifiably be retributive, Biggar is committed to the moral equivalence of the soldier to the executioner.

(Note that this conclusion does not rely on the moral permissibility of capital punishment. The executioner example merely makes vivid the internal connection between the reason for killing and the intention to kill. Killing is punitive when the

target deserves to die; someone's liability to lethal force arises due to their deserving of it. In self-defence, liability to die arises from the harm posed to innocents. If war is sometimes permissibly punitive, then the punishment incurred by war is permissibly lethal. The advocate of this view must deny the same premise from Biggar noted earlier about the moral necessity of unintentional killing that the defender of capital punishment must also deny. Namely, it is not the case that one may kill justifiably only if it is unintended, proportionate, effective, and necessary. The denial of this premise is conditional on the internal connection between a retributive reason for killing and the propriety of intentional killing, *not* on the permissibility of capital punishment.)

Identifying the soldier as morally equivalent to the executioner, in exercising public retributive force, however, is not yet to justify the killing of incapacitated enemies. A further premise is required. Biggar endorses this premise too.

3. Distribution of moral reasons

There is a way to deny that soldiers' killing in war is intentional, while retaining the retributive justification. The issue is this: are moral reasons for war collective only, or do they also distribute? The significance of the question is as follows.

The Second Amendment to the United States' constitution prescribes that 'A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms shall not be infringed.' This is ambiguous between two readings. In one, the people's right to bear arms is satisfied if they have the right to form an armed militia. This is compatible with arms not being generally available; a militia's forming and possessing arms may be done without the whole population taking up arms. In another reading, the right is satisfied only if every person is able to acquire arms. The former reads 'people' collectively, with the right inhering in the group; the

latter reads 'people' distributively, with the right inhering in the individuals who comprise the group.

Just war theory has traditionally held that moral reasons for war apply only collectively. At most one of the sovereigns engaged in a war does so justly, having fulfilled the criteria of *jus ad bellum*. Individual soldiers owe a duty of obedience to their sovereign. As a result, while they are responsible for fighting within the *jus in bello* rules, they are exempt from responsibility for deciding on the justifiability of the particular war they are engaged on. They encounter their individual enemies on the field of battle as equals in this regard. Michael Walzer is a contemporary exponent of this doctrine of the Moral Equality of Combatants (2006).

The doctrine of the Moral Equality of Combatants has been subject to serious counter-argument in recent years. David Rodin (2002) and most fully Jeff McMahan (2009) have argued that individual soldiers are morally responsible for the causes in which they fight. They do not encounter their enemy as moral equals; at most the soldiers on one side of a conflict fight justly. (See Rodin and Shue 2008 for further discussion.)

I do not take a stand on this debate here. My point is that Biggar does, implicitly. 'It seems to me that anger, even with the intensity of rage and hatred, can sometimes be a morally fitting motive on the battlefield. Despicable deeds deserve no less of a reaction' (88). He continues to make it explicit that such rage and hatred are individually-held moral emotions, and can be justified. For Biggar, moral reasons for war sometimes distribute.

The implications of the foregoing can now be stated. If moral reasons for war distribute, then the soldier encounters his enemy on the field of battle as a moral adversary. If the enactment of public punitive force is a justifiable reason for war, then

the unjust combatant is liable to lethal force because *he* deserves to die, not only because the people he fights for and represents have done wrong and deserve punishment. A soldier may then intend the death of his enemy. Incapacitated enemies should be finished off. Marine A, it seems, did no wrong.

4. Rejecting lethal intentions?

There are four ways for Biggar to deny this conclusion. All entail giving up a claim which he has endorsed.

First, Biggar may deny that war is sometimes justified as an act of public retribution for wrongful harm and injustice. An alternative justification would be required for the just war theorist, and Biggar surely is that; but it would likely be an appeal to self-defence, and he has other objections there. This would also be to abandon a central claim of *In Defence of War*, and indeed one I think to be valuable.

Second, Biggar may deny that the due penalty imposed by just warriors is death. The penalty of war should be something lesser, such as destruction of property. This is equally unattractive, I think. The permissibility of killing which is characteristic of war would still require grounding. Again, it is likely to be in self-defence.

Third, Biggar may deny that moral reasons distribute. This is the least costly of the options for his position taken as a whole. There is indication that he may welcome it too. ‘I do not think, however, that resenting the enemy’s invasion is quite the same as hating his troops—RAF pilots were quite capable of bitterly resenting German attempts to bomb their homeland without turning their machine guns onto Luftwaffe pilots who had baled out of their burning aircraft’ (110). But if he denies that moral reasons distribute, other treatments of the individual warrior’s moral emotions must be rendered consistent.

Fourth, Biggar may bite the bullet. All the foregoing may be accepted, with the result that soldiers sometimes permissibly intend to kill their enemy. Yet it should be noted that this does not yet justify Marine A; he may have done wrong, just on other grounds. An account of such grounds is then required.

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