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978-1-107-12186-7 - Contingent Pacifism: Revisiting Just War Theory

Larry May

Excerpt

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1 Introduction

This is a study of a relatively new version of pacifism, called contingent pacifism by some of its adherents. The guiding idea is that the possibility of a just war is conceded, but not at the current time or into the foreseeable future due to the contemporary nature of armed conflict and geopolitics.¹ In addition, when one takes account of the full range of justice considerations (in the initiation,² conduct,³ and ending⁴ of a war), even those wars in the past that seemed to be just wars were unlikely to have passed this tripartite test of a just war. While it is sometimes true that a given war is initiated for a just cause, for instance for self-defense, the question of the morality of war does not end here. The war has to be fought justly, as well as ended justly. It is the combination of these three justice-based considerations that makes a war just, not merely that it is initiated for just cause. And it is highly unlikely that wars in the past passed this test.

Contingent pacifism is only relatively new. There are three significant instances of the espousal of contingent pacifism to which I wish to call attention. First, as I will argue later, Erasmus seems to have held this view in the sixteenth century. Indeed, Erasmus is one of the best examples of a pacifist who employed Just War criteria to show that most if not all wars were unjust.⁵ Erasmus will be discussed at length in the next chapter. Second, consider Cardinal Alfredo Ottaviani's 1949 comments in "The Future of Offensive War" which are also drawn in Just War terms:

All the foregoing reasoning [of traditional Just War thinking] is cogent enough if we confine ourselves to a purely theoretical treatment of warfare. But in practice and in relation to present conditions the principles enunciated do not seem to hold. They were

¹ See John Rawls, *A Theory of Justice* (Cambridge, MA: Harvard University Press, 1973), p. 382.

² See Larry May, *Aggression and Crimes against Peace* (Cambridge University Press, 2008).

³ See Larry May, *War Crimes and Just War* (Cambridge University Press, 2007).

⁴ See Larry May, *After War Ends: A Philosophical Perspective* (Cambridge University Press, 2012).

⁵ See James T. Johnson, "Two Kinds of Pacifism: Opposition to the Political Use of Force in the Renaissance-Reformation Period," *Journal of Religious Ethics*, 12 (Spring 1984), 39–60. For a contrasting view, see Jose Fernandez-Sanamaría, "Erasmus on the Just War," *Journal of the History of Ideas*, 34 (April–June 1973), 209–26, arguing that Erasmus was a conditional Just War theorist, not a pacifist.

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meant, we should remember, to cover warfare of a special kind, that between mercenary armies, and not our mammoth warfare which sometimes entails the total downfall of the nations at grips with each other; the principles, in fact, cannot be applied in the life of modern nations without doing serious damage to the particular peoples involved, and (leaving aside a question of a defensive war begun, under certain conditions, for the protection of the state from actual and unjust aggression) no state is justified any longer in resorting to warfare when some right has not been given its full due.⁶

Even for this conservative Catholic cleric employing Just War criteria, war is unjust now and this has been true for quite a while as well as into the future. Third, consider the case of Japan after its defeat during World War II. Until very recently, Japan has referred to itself as a pacifist nation; and Japan's constitution is often said to be a "pacifist constitution."⁷ Article 9 of the Japanese Constitution says that the Japanese people "forever renounce war as a sovereign right of the nation and the threat or use of force as a means of settling international disputes." Yet, Japan has recognized that war for self-defense can be justified. In all three cases, war is seen as justifiable in principle but not at the moment and it is rare indeed that war is now seen as having been justified in the past.

I The point of this book

This book's main purpose is simply to get people to take the position of contingent pacifism seriously. The point of the book is not to show that contingent pacifism is right and those who support the idea of a just war are wrong; or that contingent pacifism is right and traditional pacifism is wrong. This is not a "debate" book, as is so common today, where someone comes away thinking that I have either won or lost the argument. Rather, the point of the book is to argue that there are many commonalities between contingent pacifism and conceptions of the just war. The hope is that the gap can be closed between these two normally opposed positions on the politics, morality, and legality of war. The book will succeed in my view if at the end the reader sees contingent pacifism in a positive light, not if the reader is converted to contingent pacifism. Indeed, in my view contingent pacifism is not the kind of thing one should be converted to. Rather it is a position taken after serious rational consideration of a great many factors. In my own case, as will become clear, I continue to recognize the possibility of a just war – contingent pacifism is not opposed to the recognition of such a possibility.

Pacifism has been with us for as long as there have been wars. And there is a good reason for this: war involves the intentional killing of lots of men and

⁶ Alfredo Ottaviani, "The Future of Offensive War," translation published in *Blackfriars*, 30/354 (September 1949), 415–20.

⁷ See the Editorial, "Japan and the Limits of Military Power," *New York Times*, Thursday, July 3, 2014, p. A20.

women. Yet the intentional taking of life is condemned in every society. If we did not have the institution of war, there would probably be less intentional killing in the world. War is an institution that involves the intentional killing of the members of society who are at their most promising, the young men and young women who are asked to serve and die in those wars. So, it should be no surprise that every time there is a war, or even the talk of war, some members of society have arisen to challenge those wars and to argue that there is something wrong – morally wrong – with going to war.

Traditional pacifists have a reputation for being in a certain sense moral exemplars, almost always acting on principle and courageously going against the nationalistic fervor of the time. Pacifists like Mahatma Gandhi and Martin Luther King are looked up to by most people from nearly every society. They stand out from the mass of society because they do not feel that they have to act as everyone else does. Indeed, it is the single-minded pursuit of what their consciences tell them is the right thing to do that has enhanced the moral reputation of pacifists over the centuries.

But pacifists also have the reputation of being unworldly, naïve, and even dangerous for a society that must vigilantly protect its borders to prevent the aggression of its neighbors. For many “realists,” pacifists are simply to be pitied at best. Pacifists are people who have let their principles blind them so they cannot recognize the simple fact that war has always been with us. And they are pernicious because they do not see that those who do not employ war will be enslaved by others who are not afraid to use war to get what they want. It is for this reason that some today are exploring a non-traditional version of pacifism, called contingent pacifism.

As I use the term, “contingent pacifism” admits the possibility of a just war but sees that wars in the past were unlikely to be just wars, and sees no wars at the moment or into the foreseeable future to be just wars. Many believe that there have been just causes to go to war, such as to stop Nazi aggression and genocide in World War II. But if one considers such World War II tactics as fire-bombing and carpet bombing, as well as dropping the atomic bomb on a population center, even World War II was not clearly a just war. Here while there might have been a clear just cause, this condition is only one of the conditions of just initiation of war, and does not tell us anything about whether the conditions for justly conducting or ending war are also satisfied.

For there to be a just war today, such a war would have to cause fewer violations of human rights than protections of rights. And rights need to be considered at each of the three levels of analysis of the justice of waging war. It is my judgment that it is unlikely that war can be justified, especially if the human rights of all of the soldiers involved are taken seriously. The lives and rights of civilians have been the paramount concern in the Just War tradition as well as in contemporary international law. I am urging that we explore the

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justifiability of war from the perspective that the lives and rights of soldiers are also given major concern, in a somewhat different way than the Just War tradition has understood such things as proportionality and necessity. By taking all of the lives and rights of soldiers seriously, contingent pacifism is presented as a soldier-friendly position in the debates about the morality and legality of war.

In the next section of this introductory chapter I will discuss some of the reasons in favor of introducing contingent pacifism into the debates about the morality and legality of war. In the third section I clarify some methodological issues concerning my approach. In the fourth section I then explain what contingent pacifism is “contingent” on, and what the appeal is of a “contingent” pacifism. In the fifth section, I address some of the issues in contemporary moral and legal theory that seemingly support contingent pacifism. In the final section, I then say something brief about the role that conscience should play in the debates about the morality of war.

II Roots of contingent pacifism

The contemporary doctrine of contingent pacifism admits that in principle some wars can be just, but it is highly unlikely that any actual wars have been or will be just. There are two groups of reasons in behalf of contingent pacifism as I understand it. First, for a war to be just it must satisfy conditions of a just initiation, conduct, and ending of war. If a war is initiated without having a clearly just exit option, or a clear way to wage the war in a just manner, then war cannot even be initiated justly. Second, for war to be just there have to be conditions that are ripe for a just war in the sense primarily that the human rights of all of those who are concerned in the war are given their due by the States or other entities that are waging war.

Contingent pacifists are unlike traditional pacifists in that contingent pacifists do not have *absolute* principled reasons to oppose violence, or even to oppose all wars. Contingent pacifism calls for a case-by-case assessment of whether given wars involve such serious moral risks that they make participation in those wars morally problematic. As with other theorists who have argued for this position, sometimes called “just war pacifism” or “practical pacifism,”⁸ I look to the Just War tradition for the initial criteria by which war is to be judged morally problematic, although I differ in how I understand some of the key conditions such as proportionality and necessity. And I look to the emerging normative understanding of human rights law as applied to war to argue for the legally problematic nature of war.

The Just War tradition began with the writings of Cicero and Augustine, during the Roman era. Cicero addresses the justice in initiating war, the justice of

⁸ For a view that reaches very similar conclusions to my own but sometimes from very different arguments, I recommend Andrew Fiala, *Practical Pacifism* (New York: Algora, 2004). Fiala comes to these debates from the American Pragmatist tradition, whereas I do not.

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the conduct of war, and justice at the end of war. Concerning initiating war he argues that war must only be started as a last resort;⁹ it must be conducted for a just aim; and there must be a formal declaration of war.¹⁰ Concerning conduct during war, he says that only soldiers are permitted to fight during war;¹¹ and that cruelty should not be employed. Unlike many early Just War theorists, Cicero also considers justice after war ends, specifically that at the end of war those who were not cruel should be spared,¹² and that those who have laid down their arms must also be spared.¹³

Unlike Cicero, Augustine was initially influenced quite heavily by other Church leaders and scholars who were at his time largely pacifist. Augustine thought that only very few wars could be justified, employing roughly the same criteria that Cicero had proposed. Augustine argued: “the wise man, they say, will wage just wars. Surely if he remembers that he is a human being, he will rather lament the fact that he is faced with the necessity of waging just wars.”¹⁴

Most significantly, Augustine was suspicious of what are today the paradigmatic just wars among Just War theorists, namely wars of self-defense. And Augustine was convinced that very few wars could be justified at his time as well. Augustine said: “Indeed, even when men choose war, their only wish is for victory; which shows that their desire in fighting is for peace with glory.”¹⁵ In addition, Augustine proposed that there are “laws of war.”¹⁶ And this had strong influence on the later thinkers in what came to be known as the Just War tradition.

As the Just War tradition developed in significant ways through the Middle Ages and the early modern period, the core of the doctrine remained the same but many of the details changed, some significantly. Writing in the sixteenth century, Francisco Vitoria provided what he called the “canons or rules of warfare.”

1. “Assuming that a prince has authority to make war, he should first of all not go seeking occasions and causes of war, but should if possible live in peace with all men.”
2. “When war for a just cause has broken out, it must not be waged so as to ruin the people against whom it is directed, but only so as to obtain one’s rights.”
3. “When victory has been won and the war is over: the victory should be utilized with moderation and Christian humility.”¹⁷

⁹ Cicero, *On Duties*, trans. Walter Miller, Loeb Classical Library 30 (Cambridge, MA: Harvard University Press, 1913), Book I, para. 34.

¹⁰ Ibid., para. 36. ¹¹ Ibid., para. 37. ¹² Ibid., para. 35. ¹³ Ibid.

¹⁴ Augustine, *City of God*, Book 19, sect. 6, repr. in Larry May, Eric Rovie, and Steve Viner, *The Morality of War* (Upper Saddle River, NJ: Prentice-Hall, 2007), pp. 16–20 (16).

¹⁵ Ibid., pp. 16–17. ¹⁶ Ibid., p. 19.

¹⁷ Francisco Vitoria, *De Indis et de Ivre Belli Relectiones (On the Law of War)*, trans. John Pawley Bate (Carnegie Institute of Washington, 1917), p. 187.

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Here Vitoria clearly enunciated all three of the sets of conditions that govern a just war.

Just War theorists have not often seen how the three sets of conditions need all to be satisfied for a war to be just. Francisco Suárez, writing in the early seventeenth century, is one of the clearest exceptions in this respect. He said that “in order that a war may be justly waged”:

1. “the war must be waged by a legitimate authority”
2. “the cause itself and the reason must be just”
3. “the method of its conduct must be proper”
4. “due proportion must be observed
at its beginning,
during its prosecution,
and after victory.”¹⁸

Today those who write about the just war have made further refinements and changes that I will discuss throughout this book.

Let me here say something preliminary about how my own use of Just War criteria somewhat differs from the use of those criteria in traditional Just War analysis. I do not have the same understanding of the specific criteria that are often employed today in the Just War tradition, but I do appeal to the same broad criteria, especially of just cause, last resort, proportionality, and necessity. And like other recent pacifists, I focus on the killing of the innocent in war as that which makes war most problematic.¹⁹ I differ from traditional Just War theorists, except for the few who followed Cicero, in seeing that all three branches of Just War criteria must be satisfied before a war is just. Surprisingly, this has not often traditionally been the position of Just War theorists. I will spend three chapters re-conceptualizing proportionality, necessity, and innocence – the key concepts in Just War theory over the ages as well as today. I show how a re-conceptualization of proportionality, necessity, and innocence could support contingent pacifism.

I also need to say something here at the beginning about the way that my analysis of international human rights law as applied to war differs from traditional ways to understand the legality of war. I focus on how the law should be, rather than focusing on what the law is. I will be influenced by the actual state of international law, but will primarily build on the extensive normative

¹⁸ Francisco Suárez, “On War” (c. 1610), in *Selections from Three Works of Francisco Suárez . . . De Triplici Virtute Theologica*, trans. Gwladys L. Williams, James Brown Scott, and Henry Davis (Oxford: Clarendon Press, 1944), repr. in May, Viner, and Rovie, *Morality of War*, pp. 60–65 (62).

¹⁹ See Jenny Teichman, *Pacifism and the Just War* (Oxford: Basil Blackwell, 1986), esp. chap. 7; Robert L. Holmes, *On War and Morality* (Princeton University Press, 1989), esp. chap. 6; and James P. Sterba, “Reconciling Pacifists and Just War Theorists,” *Social Theory and Practice*, 18/1 (Spring 1992), 21–38.

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discussion in international legal theory of how we should understand the legality of war and armed conflict. In international law, there is a new movement toward seeing human rights law as applicable to wartime. I will spend three chapters discussing how this movement could be understood as supporting contingent pacifism today.

I believe that the morality of war should not be understood as utterly distinct from the legality of war. Institutions are important for morality in a variety of ways. War is itself an institution, and the morality of war is a morality of an institution. It is a matter of moral concern how the people who are associated with war and armed conflict see their obligations. And it is normally through the lens of law that the most important of institutional obligations are understood. The rules of war are the norms governing this institution and rarely do people understand the rules of an institution if not at least in a somewhat legalistic way.²⁰

Morality is a matter of objective universal prescriptions and virtues, but morality also must be interpreted subjectively, at least in the domain of recourse to war that is the main subject of this book. Some theorists of war today address morality as completely an objective matter – where the facts on the ground as well as the reasonable judgments of soldiers and civilians do not matter. Yet, it is my view that in some situations, such as concerning responsibility, subjective considerations are also important. In this respect, we might learn from a sixteenth-century discussion of just war.

Francisco Vitoria wrote about whether the Spaniards of his time were justified in waging war against the Indians of the Americas.

There is no inconsistency, indeed, in holding the war to be a just war on both sides, seeing that on one side there is right and on the other side invincible ignorance. For instance just as the French hold the province of Burgundy with demonstrable ignorance, in the belief that it belongs to them, while our Emperor's right to it is certain, and he may make war to regain it, just as the French may defend it, so it may also befall in the case of the Indians – a point deserving of careful attention. For the rights of war, which may be invoked against men who are really guilty and lawless differ from those which may be invoked against the innocent and ignorant.²¹

We will often ask about the morality of participating in war. Such questions are of just the sort that Vitoria identified. The objective morality of participating in war is modified by the reasonable subjective judgments made by a particular soldier concerning the morality of so participating. As long as the soldier is not negligent in forming his or her judgments, the subjective judgment will constitute a significant part of the answer to the question about the morality of him or her participating in the war.

²⁰ See Allen Buchanan, *The Heart of Human Rights* (Oxford University Press, 2013).

²¹ Vitoria, *De Indis et de Ivre Belli Relectiones*, sect. III, para. 394, p. 155.

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For the contingent pacifist, what matters most is not that everyone killed in war is innocent. Instead, what matters is that there are very many ways that victims of an attack in war could turn out to be innocent, as a contingent matter. Contingent pacifists admit that war could be justified, but given what we know of wars and of political leaders now, war is rarely if ever justified.²² Part of the contingent pacifist's brief is to explain why even though some wars may appear to be just, it is likely today that all wars are indeed unjust and this is true for wars that can be imagined occurring into the foreseeable future.

Think of war fought for humane reasons, a war of so-called humanitarian intervention. Such wars seem to be the most obvious wars that would be considered just. Indeed, Augustine said that these wars were the paradigm of just wars, more so than wars of self-defense, because the former were more selfless and hence less likely to be morally problematic than the latter.²³ But humanitarian wars are notoriously hard to distinguish from masked wars of aggression. At least in part this is because wars are almost always fought for mixed motives. And it is extremely hard to disentangle the motives and ascertain the true reason for why the war is being fought. So, from the standpoint of what evidence is available, it would be wrong to engage even in humanitarian wars today. Of course, I will need to say much more in defense of this controversial claim as the book proceeds.

There is a variety of moral risks that soldiers should consider, and that jointly support contingent pacifism. Contingent pacifists do not start by criticizing those who are combatants but rather counsel that the best response for soldiers who are contemplating participating in wars is not to fight because of war's moral risks. Indeed, this way of thinking of pacifism makes it a commonsense view rather than a view that is "unworldly." It is important that those who are critical of pacifism have a target that starts from a commonsense position of giving advice to soldiers rather than a position that might be seen as blaming those who fight in war.

While some wars like World War II seem to have been justified, wars today do not seem to be justified, largely because the reasons to go to war as well as the tactics and strategies of contemporary war are morally objectionable, or at least not clearly unobjectionable. Yet, contingent pacifists are not opposed to all wars, and the reasons to oppose war are not grounded in absolute principle but in the commonsense idea that States and peoples are too quick to go to war and when they do go to war the tactics and strategies generally do not match the reasons for engaging in war. Here the necessity of going to war, or of using a particular tactic, will be paramount considerations. And as we will see in

²² I here draw on H.L.A. Hart's discussion of the minimum content of the natural law in *The Concept of Law* (Oxford University Press, 1961), especially his idea that humans could one day develop hard shells, like crabs, that made them impervious to physical attack.

²³ Augustine, *City of God*, Book 19, sect. 6.

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Chapter 5, I have a strikingly different way to understand necessity than the way that term is used today in Just War theory or in the law of war.

III Notes on method

Next let me present some preliminary procedural comments concerning the style and method of argument of the book. I will often refer to debates in the history of moral and legal thought for guidance, as I just did in the case of Vitoria's sixteenth-century account of the morality of the Spanish conquest of the Indians in the Americas. One reason to do this is that I feel that the plausibility of a particular position can be enhanced if it has stood the test of time by some of the great theorists throughout history having espoused similar things.²⁴ This is especially true of moral and legal theorizing which depends so much on one's intuitions. In order to make sure that our current intuitions about a particular case are not historically idiosyncratic or biased, it will be useful to see whether those intuitions were also held in earlier historical periods.

In addition, I am simply intrigued by how many people writing on the morality and legality of war do not know that the very same issues have indeed been debated for centuries and in some cases for millennia. And also I myself am more often drawn to the historical discussions because they seem to proceed more quickly to the theoretical heart of the matter, without feeling that all of the current literature has to be surveyed first. In any event, I admit my own bias toward the historical rather than the contemporary debates, and ask the reader's indulgence in this regard.

In addition, I aim in this book to appeal to a broader audience than merely those philosophers and lawyers who are writing on war today. For this reason, I will avoid technical terminology whenever possible, especially Latin terms of art in debates about the morality and legality of war today. The ideas of pacifism and the just war are not merely an academic subject, but an intensely public topic. I will engage with some of the most important and most recent scholarship, but will largely confine those discussions to the footnotes.

There is also a methodological dispute about how to begin to understand cases of war and armed conflict. As Seth Lazar has said, "Contemporary discussion of the ethics of war is dominated by reductive individualists. Reductive individualists believe that justified killing in war reduces to justified acts, by individuals, of self- and other-defense."²⁵ Like Lazar, I do not subscribe to this assumption of many contemporary Just War theorists.

²⁴ See Hugo Grotius, *De Jure Belli ac Pacis* (*On the Law of War and Peace*, 1625), trans. Francis Kelsey (Oxford University Press, 1925), Prolegomena.

²⁵ Seth Lazar, "Necessity in Self-Defense and War," *Philosophy and Public Affairs*, 40/1 (2012), 3–44 (23–24). Lazar is one of the few analytic philosophers working in the Just War tradition who does not subscribe to this reductive account.

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I think of war and armed conflict as largely matters involving the interactions of collectives. In this respect, role morality is as important as individual morality. So, while I agree as a methodological matter that all collective action is merely a matter of organized individual action, the forms of organization matter and cannot themselves be reduced to individual mental or physical states.²⁶ Quite a bit is lost if one fails to note the complex organizational structures that are indicative of war.

Perhaps more importantly, I disagree with nearly all contemporary Just War theorists in that I think that highly stylized hypothetical cases do not reveal much about the morality of war and armed conflict. Speaking personally, I simply do not have strong intuitions, or often any intuitions at all, about the highly stylized hypothetical cases that dominate the current literature. Also if we who work on philosophical issues concerning war want to say something to our fellow citizens who must make decisions about how to regard today's wars, we will need to speak in an idiom that an educated citizenry can understand. And highly stylized examples, as well as the use of many technical terms, in my experience, simply do not have much purchase for the educated public. Since I want this book to be able to speak to an educated public, I will not appeal to such stylized hypothetical examples, and I will not engage with the literature that relies on such examples. For some readers, this may be sufficient reason not to read any further – I accept that fact.

Nonetheless, I will try to engage with the ideas presented in the Just War, and pacifist, literature today. But I will do so without following most of the philosophers in those current fields in assuming that all cases in the morality of war must be reduced to cases of individual self-defense. And I will not engage in what is sometimes called “intuition mongering” by use of certain current methods. This is not to say that I will not be appealing to intuitions, mostly the intuitions of an educated public, but that I will not do so by reference to examples that are hard to imagine ever occurring let alone ones that the reader could imagine being involved in.

IV Why “contingent” pacifism?

Contingent pacifism owes debts to both traditional pacifism and the Just War tradition. One question to ask is whether or not contingent pacifism is sufficiently different from the dominant views about the morality and legality of war for it to be truly a third option. In this section I will give a preliminary answer to this question that points to why at very least our debates about war should include the term, and the corresponding concept, of contingent pacifism. If nothing else, exploring the terrain of contingent pacifism will help both traditional pacifists and Just War theorists better to see not only what is at

²⁶ See Larry May, *The Morality of Groups* (Notre Dame University Press, 1987).