

Review

War and Individual Rights: The Foundation of Just War Theory

Kai Draper. Oxford: Oxford University Press, 2015. 272pp.

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Rights are a cornerstone of much contemporary moral and political philosophy. They tell us what we are owed by others, what protections we enjoy against both private citizens and against the state, and they inform us of the restrictions on our freedom that morality and law demand.

However, despite the seeming hegemony of rights in political and moral discourse, there exists a theory that casts doubt on them, namely, the theory of the just war. The argument goes something like this. War kills, and notoriously, war kills not only those who are (arguably) liable to be killed. It is not just the unjust warrior, or even the just warrior who lie among the fallen, but also non-combatants and neutral parties, bystanders and children. War maims and kills the guilty and the innocent alike, infringing upon and violating rights on a grand scale. It would seem, then, that a respect for rights would demand outright rejection of war or, alternatively, that the possibility of wars being just tarnishes the very idea of rights. Either way, it would seem that one has to go.

In *War and Individual Rights*, Kai Draper resists this conclusion, arguing for a rights-based account of the just war. The book attempts to provide a framework of rights

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that can accommodate common moral intuitions about the values of freedom, autonomy, and safety, while also developing a moral guide for the enforcement of our rights. The author then argues that such a rights-enforcement account can explain how war can sometimes be justified, even in spite of the fact that it often results in the foreseeable deaths of innocents. More than this, Draper argues that war can sometimes be the best, or indeed only, means to enforce rights, if certain conditions are met.

One of the main contributions of the book is its effort to begin with a foundational moral and political value—namely rights—and use it alone to develop an account of the just war. This provides a level of clarity and precision of argumentation that is often lacking in works on just war theory, as it is common to focus on aspects of morality and war without making clear one’s prior philosophical commitments and how those may impact on the conclusions. The explicit and faithful reliance on rights has the added benefit of making Draper’s work relevant to both scholars working from within the rights-based philosophical tradition and those opposed to it, as his assumptions and intuitions are laid bare at the outset, removing a potentially significant source of disagreement. As such, even a purely utilitarian student of the morality of war may gain much from *War and Individual Rights* by seeing how a rights theorist argues from within that tradition, without being distracted by the justifications of that tradition itself.

The book begins by sketching its broad methodological commitments and then presents a Lockean framework for rights. In these sections Draper highlights that his starting point is as much strategic and political as it is philosophical, as one of the aims of the book is to provide a just war theory that is palatable and useful to policy-makers and military strategists from his own country, the United States. As the Lockean tradition has tremendous influence in both the founding documents of the United States and many of the current political, moral, and legal practices, it provides a useful point of departure. Moreover, theorists who reject the Lockean theory of rights will at least concede that its understanding of justice, self-ownership, autonomy, and well-being infuse many common moral intuitions about rights, making it a natural starting point for such an account.

The core of Draper’s account is the right of self-ownership, which is violated whenever an individual unjustifiably harms another. Self-ownership gives rise to a number of other rights, and also sets the stage for Draper’s account of self-defense and rights-enforcement. He argues that it can be permissible to harm an aggressor when such harm “eliminates or at least reduces the threat of unjust harm posed by the aggressor, where to

pose a threat of unjust harm is to behave in such a way that, barring preventive action, one will infringe upon rights and thereby jeopardize interests protected by those rights” (67).

His rights-enforcement principle is not only deontological in nature though, as it includes within it necessity and proportionality restrictions which demand that the harm one impose on an aggressor be necessary for the elimination or reduction of unjust harm (necessity), and also that the harm imposed on an aggressor be proportionate to the unjust harm that is eliminated or reduced (proportionality). Importantly, his conceptions of necessity and proportionality discuss not “goods and bads achieved,” as is common in much just war literature, but rather tracks to his rights-based account and is, therefore, concerned with “elimination or reduction of unjust harm.” As a result, it is possible for his account to render impermissible certain acts that might be overall beneficial, in a utilitarian sense, if those acts would not reduce unjust harm. Therefore, his account tracks the common intuition that it is wrong to kill one innocent for the sake of saving two innocents, because in such a scenario there is no reduction in unjust harm, only a reduction in harm.

In developing an account that is concerned with unjust harm, and not simply harm as such, it is also crucial that there be an accounting of the distinction between doing harm and merely allowing harm to occur, as this is generally taken to be a core difference between justice-based theories of morality and war and consequence- or utility-based accounts. In exploring this distinction Draper makes a significant contribution to the literature on the doctrine of doing and allowing harm (hereafter DDA). His treatment of DDA provides compelling analysis of the state of the literature, and probes deeply into underlying aspects of causation and responsibility that are crucial for properly understanding or employing DDA. Moreover, he persuasively argues that his rights-enforcement account provides a stronger basis for DDA than competing deontological theories, and that it better explains the relevance of DDA for moral decision-making.

However, the greatest accomplishment of Draper’s work is to be found in chapter six, where he argues against the doctrine of double effect and related principles, arguing that a rights-based account can accommodate the intuitions thought to be supported by such principles, without inheriting their problems. Very roughly, the doctrine of double effect maintains that unintentionally but foreseeably killing innocents can be justified if (1) their deaths are not intended (that is, only the good is intended), (2) the good secured by the action that caused their deaths greatly outweighs the moral disvalue of their deaths, and (3) their deaths are not a means to the securing of the good. Given that the principle purports

to provide a justification for bringing about the deaths of *innocents*, it has become virtually ubiquitous in deontological just war theories. However, despite its regular employment, the doctrine of double effect has suffered significant and compelling criticism from philosophers of all stripes. Draper argues that these critiques cannot be surmounted, and that the intuitions the doctrine seeks to explain can be better accommodated via a rights-enforcement account. His arguments to this effect are subtle and incisive, and serve to lay a sound deontological foundation for how and when killing the innocent may be permissible without committing one to any of the errors that accompany the doctrine of double effect or related principles. This alone makes Draper's account well worth exploring for any student of the morality of war.

In chapters seven through ten, Draper applies his principles and findings to situations of war, exploring the rights of innocent bystanders in war, and when those may be permissibly infringed upon (chapter seven), how war can be justified at all given a rights-enforcement account (chapter eight), the scope of liability in war, both with respect to combatants, non-combatants, those who assist combatants, and those who do not (chapter nine), and finally addressing how citizenship may affect liability in war (chapter ten). Throughout these chapters, he stays true to the underlying principles that drive his account (namely, basic negative rights), providing a clear logic that one can follow from his simplest assumptions all the way to the justification of war itself. Moreover, his purely rights-based account provides novel answers to particular common objections, and subtle arguments for common moral intuitions.

However, despite the many accomplishments of Draper's work, there are a number of significant shortcomings. The first is that his methodology is highly intuition-based, rendering many of his arguments convincing to only those who already possess the appropriate intuition. Potential principles or examples are tested only against his own bare intuitions, leaving the reader uncertain of what to believe in cases where those intuitions are not shared, thus rendering his conclusions suspect. Furthermore, the emphasis on intuition often leads him to begin with conclusions and then work backward, calling into question whether the aim is to develop a coherent rights-based account of the just war, as he claims, or rather to simply fit rights-based intuitions to other common intuitions about morality and war. This is most starkly exemplified in his discussion of DDA, where after having considered and rejected a number of formulations he arrives at what he takes to be the correct interpretation, saying that with it "we get the results *we want* in most of the

cases we have considered thus far” (52, emphasis added). Now, the very idea of determining which results one wants and then devising arguments to obtain them seems suspect at best, and casts doubt on the conclusions he does reach.

Draper’s reliance on thought experiments and the intuitions they bring up also leads him to drift away from his rights-account in many core arguments. This is not necessarily a problem *per se*, but it does call into question the degree to which his account really is a *rights-enforcement* account, and to what extent it is something novel and worth pursuing. Draper characterizes his position as a “moderate deontological perspective,” which skirts the boundary between absolutist principles and consequentialism. In this way, he hopes to give rights their due while still paying heed to the moral relevance of consequences, thereby explaining and also codifying the myriad intuitions that we have on rights and war. However, his elucidation of what a “moderate deontological perspective” entails provides absolutely no guide to weighing rights and consequences against one another, despite having fully committed himself to just that. Consider the following passage:

Suppose, for example, that by infringing upon one individual’s right to life we can prevent someone else from infringing upon the right to life of n individuals... Most moderate deontologists will say, for example, that if $n = 2$ or even 10, then (*ceteris paribus*) our behavior is unjustifiable, but if $n = 1,000,000$, 100,000, or even 10,000, our behavior, if necessary in the relevant sense, is justifiable. (171)

Now, this is fine as far as intuitions go, but it does not tell us what the rights are good for (if anything), given that they seem to not count for much so long as the consequences will be good enough. Furthermore, it does not give an accounting of how the consequences and rights weigh against each other, a crucial element to include if his rights-based account is to provide anything more than an argument for placing a weight in the consequentialists’ scales. Moreover, it is not clear that Draper himself recognizes the tension, the near contradiction, inherent in this position, as he just pages earlier states that:

[T]he moderate deontologist believes that, although, for example, killing (even intentionally) someone who has a right not to be killed cannot be justified simply by an appeal to overall consequences, if its consequences are good enough, it is justified. (165)

With such statements he makes clear that he is neither an absolutist deontologist nor a consequentialist, but he fails to explain what his theory actually is, and how it in fact fits between these competing schools of thought.

This brings us to the final critique, that Draper fails to provide any compelling argument to convince us that his account is the only, or best, or even a better account than those already on the market. At the outset, it appears as though this will not be problematic, as he seems to endorse a form of theoretic agnosticism, instead providing an account of what a rights-enforcement theory of the just war *would look like, provided one was looking for such a thing*. However, as the arguments progress, he regularly attempts to justify or motivate his position, at the expense of competing theories, without substantiating these claims. The most striking example of this outright rejection of alternate theories without arguing for such sweeping claims is in his treatment of the just war account of Jeff McMahan, which has been incredibly influential in past years. Draper presents McMahan's basic theory and then simply concludes that "because his [McMahan's] account is not a rights enforcement account, it is untenable" (100). Draper goes on to provide a very brief justification for why this would be such a drastic failing for McMahan's position, but the core of his objection is simply that McMahan holds a theory that is not ultimately about enforcing rights, as is Draper's, and so must be wrong. This species of "argument" is common in *War and Individual Rights*, and is problematic in that it dismisses serious objections and counter-theories without providing reasons why. For a book on the morality of war, such a cavalier attitude towards justifying one's position seems quite dangerous, given the magnitude of the conclusions.

However, all told, the book provides important insights about how rights and violence interact, and gives, at the very least, a fruitful starting point for future rights-based explorations of just war theory. More than this, the book makes a great contribution to the literature on the morality of war by clearing up many aspects of the distinction between doing and allowing harm, a common element of just war theories, and by providing a plausible alternative to the doctrine of double effect, thereby giving deontological just war accounts a more theoretically satisfactory manner to explain how it may sometimes be permissible to harm the innocent in war. For these reasons it is well-worth exploring, even given the above shortcomings.