

Public Ethics Radio

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Transcript of Episode 7, Jeff McMahan on Proportionality

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MATT PETERSON: You're listening to Public Ethics Radio. I'm Matt Peterson. This podcast features conversations between our host, Christian Barry, and scholars and thinkers who engage with ethical issues that arise in public life. The show is an independent production, supported by of the Centre for Applied Philosophy and Public Ethics and the Global Justice Program at Yale University, in association with the Carnegie Ethics Studio at the Carnegie Council for Ethics in International Affairs. You can visit us on the web at www.publicethicsradio.org, where you'll find archives, transcripts, and links to people and writings we discuss on the show.

MATT PETERSON: A couple of weeks ago, while the fighting was still raging in Gaza, I saw this ad in the New York Times. You might have seen it too—I think it was in other papers. It has this map of Gaza overlaid on a map of New York City, and it show rockets coming out of Gaza and into New York.

It's got some text, that says "Imagine if Hamas terrorists were targeting you and your family. No country would allow such danger on its border, and neither will Israel. That's why Israel is fighting back."

It's a powerful sentiment, one especially powerful I think in New York, where people still feel the effects of terrorism viscerally. I also think the argument, presented in this abstract way, is pretty much correct. The threat of rocket and mortar fire by Hamas into Israel is essentially intolerable. So emphasizing that threat is a great way to promote the war and mount a justification of Israel's actions.

But at the same time, I think many of us who are sympathetic to the danger faced by Israelis are also horrified at the level of devastation that was caused by the Israeli assault. It seems all out of proportion to the threat of rocket fire.

In 2008, four Israelis were killed by rocket and mortar attacks prior to the Israeli operation that started on December 27. Nine more Israelis have been killed since then.

Also since then, some 1300 Palestinians have been killed, about a quarter of whom were children. Was it right for Israel to kill all those Palestinians to protect its own citizens?

Although we can't settle the big questions of who's right and who's wrong, we can at least elaborate on the kinds of considerations that go into judgments of proportionality in war.

To assist us in this process, we are delighted to have on Public Ethics Radio one of the world's foremost just war scholars: Professor Jeff McMahan of Rutgers University. Jeff McMahan sat down with Christian Barry in Highland Park, New Jersey.

CHRISTIAN BARRY Jeff McMahan, welcome to Public Ethics Radio.

JEFF MCMAHAN: Thanks.

CHRISTIAN BARRY Jeff, one of the things that's been on people's minds, and in the news media, quite a bit recently—particularly in light of the hostilities between Israel and Hamas—has been the question of proportionality. In a recent editorial in the *Wall Street Journal*, Alan Dershowitz called the Israeli military action “perfectly proportionate.” Other people have been talking about it as disproportionate.

Now, without getting into the details of this particular conflict, the idea of proportionality has a history philosophically, and it has a role in the way that philosophers think and talk about war. Could you explain a little bit about how this idea is understood?

JEFF MCMAHAN: In thinking about war, we don't really think about the proportionality of military action taken against enemy combatants. The focus is instead on civilian casualties. And the question in just war theory is, really, are the goals of military action sufficiently important to justify the harms that will inevitably be caused to innocent bystanders.

The proportionality in war looks at relations among the harm that someone will cause if not prevented from doing so. The extent to which the individual or the group of individuals would be morally responsible for harm that they would otherwise do. And the degree of harm that has to be inflicted on them to prevent them from inflicting a harm.

So it's forward-looking in that it is looking—typically in war—looking at the prevention of harms in the future, and asking whether the harms that are inflicted to prevent harms from occurring are proportionate in relation to the harms that are thereby prevented.

CHRISTIAN BARRY So, on your view, entering into armed conflict has to be proportionate—that the good effects, on some understanding, outweigh the bad effects.

Talking of good and bad effects is very open-ended and very broad. There can be all sorts of good and bad effects. Is that what the proportionality test is about, or is it more restricted?

JEFF MCMAHAN: Well, it is about the good and bad effects. But, it is also restricted.

It's clearly a bad effect in some sense whenever a person gets killed, but it may make a big difference whether the person who gets killed is a combatant fighting in an unjust war, or an innocent civilian in a neutral country. These deaths count differently in the proportionality calculation.

CHRISTIAN BARRY But how should we go about thinking about the priorities and weightings in thinking about these things. Especially in messy situations where it's not always obvious how to classify different types of agents.

JEFF MCMAHAN: Well, I think you should think about it in the following way. Something like this. People who are entirely innocent, people who have no responsibility for the wrong that the war is intended to prevent or correct or whatever. People who are in no way responsible for that, their deaths count fully. Any harm to them counts as a bad effect that's in no way discounted in our thinking about proportionality.

On the other hand, if there are people who are responsible to a very high degree for the wrong that we're trying to prevent or correct by going to war, then harms to those people will be discounted to some degree in our thinking about proportionality. And the degree of the discounting will depend, among other things, on the degree of their responsibility for the, their side's unjust war, or whatever it is that has provided the just cause for the other side's resort to a just war.

CHRISTIAN BARRY We're going to take a brief break, and we'll be back with more on proportionality with Jeff McMahan.

MATT PETERSON: You're listening to Public Ethics Radio.

CHRISTIAN BARRY One of the points that often comes up in real conflicts, particularly in the context of Israel and Gaza is—they will make the claim, well, we shouldn't even think of the civilians we are killing as a result of these attacks as on par, or even roughly on par, with those being killed, because we're not intending this. They're firing at us from certain densely populated areas, and we're trying to actually attack them, and of course people may die as a result, but we can't simply sum up even the innocent civilians on their side and even on our side because they're directly targeting our civilians, whereas we are not. How does proportionality deal with these types of issues which seem to do with intention and targeting and—

JEFF MCMAHAN: Good. I think that the notion of proportionality in the conduct of war is sensitive both to considerations of innocence and noninnocence, or innocence and liability, and to considerations of intention.

Now, in a case like Gaza, I'm willing to take Israel's word for it that they are not intending to kill civilians. It's not that I trust what Israeli officials say, it's just that it doesn't seem that Israel could have any conceivable interest in harming or killing innocent people. It works very much to their disadvantage when their missiles kill children, for example. It turns the whole world against them. So it makes sense both morally and prudentially to try very hard not to kill people who are entirely innocent. So I'm willing to grant that they're not engaged in deliberate terrorism in Gaza.

I do think on the other hand that when Hamas shoots missiles into Israel and tries to aim for populated areas, that they are trying to kill innocent people. And I do think that makes the difference. It makes a moral difference. That is really the difference between terrorism and legitimate acts of war that foreseeably harm or kill innocent people.

But there's also this further question about whether some of the people, anyway, who are harmed by the retaliatory strikes by Israel have made themselves liable to suffer at least some harms if they are, if they have elected Hamas as their government, knowing that Hamas is committed to a program of terrorist attacks, and knowing that Hamas has been launching those weapons from within residential areas in Gaza. That seems to me to be not irrelevant to questions of proportionality.

It doesn't mean—I'm not saying that what Israel is doing is not disproportionate, I'm just saying there are complexities here in the very nature of the proportionality requirement that have to be taken into account. I don't know enough about the actual facts to want to commit myself to making claims about the justifiability of Israeli or Palestinian action. Just saying, the level of theory—it's a lot more complicated than people think.

CHRISTIAN BARRY One thing that you mentioned earlier, and is also evident from your writings on the topic, is that you think of proportionality as being intimately related to whether some side in a conflict has just cause. That is, whether they have a—and correct me if I'm wrong—a compelling reason which permits them to go to war.

JEFF MCMAHAN: Right.

CHRISTIAN BARRY Or which the aims for which they would fight would be justifiably defended through military action.

JEFF MCMAHAN: Right.

CHRISTIAN BARRY In conflicts like this—ongoing long conflicts—one of the things that seems to be difficult to ascertain, is who—if either of the sides have just cause.

JEFF MCMAHAN: Right.

CHRISTIAN BARRY Many of course would want to broaden the range of considerations more generally. So they would say, well, Israel is involved in unjustified

seizure of territory, that the settlement policy, in extending the settlements, is something that is supported by a great number of people. And once you start to get into this sort of complexity, it becomes really difficult to find out even how we should go about even thinking about proportionality. How—

JEFF MCMAHAN: Yeah.

CHRISTIAN BARRY Yeah. How is a philosopher—obviously without getting into the messy details—how should we even begin to think about issues in the context of an ongoing conflict like this.

JEFF MCMAHAN: I think you're right about that, that it's all complexly interrelated, and you just can't detach proportionality from the larger issues.

And one reason for that is that proportionality is really just this. It is a condition of the permissibility of action. It's not a justification. It's not a positive reason for doing anything. It's a constraint on action. So it's a condition of permissibility. If an act would be disproportionate, it's just ruled out. It's wrong. But that it would be proportionate isn't a justification for doing it. It provides no positive reason for doing it that the act would be proportionate. The reasons would have to come from somewhere else.

So it seems to me that the question of proportionality arises in the case of acts that would otherwise be permissible. And what that means is that if these acts are causing harm, they have to have some positive justification. So unless you're otherwise positively justified in doing some act, proportionality is not an issue. If an act is wrong, no question of proportionality. If people are fighting an unjust war, all the harm they're causing is wrong. The intended actions, the intended harms and the unintended harms are just wrong. And there's no question of proportionality.

So, if we ask the question, are the harms that Israel is causing to innocent Palestinians proportionate, we're actually presupposing that Israel has some justification for launching these attacks. Otherwise there's no question of proportionality.

CHRISTIAN BARRY Right, so even if—the Israelis might say, the harms that have been done to Israel, because of the intentions, because of who's been harmed, because of the targeting, far exceed the numbers that we are actually killing, even those civilians for various reasons. That still would go no way towards justifying its claim that it's met the proportionality criterion.

JEFF MCMAHAN: What's been done to Israel and Israeli civilians in the past by Hamas or anyone else is utterly irrelevant to what it's proportionate for Israel to do now to Palestinians. The only harms that are relevant to proportionality calculation with respect to acts of war committed by Israel now are the harms that would be prevented from occurring by those acts of war.

It's not backward looking in this way to harms that Israel has suffered in the past. It's not tit for tat or anything like that.

CHRISTIAN BARRY Just following up on that, and talking about the relevance of the past. And while the relevance of what's happened to Israel in the past may not be relevant to proportionality considerations, one thing that often comes up in discussion of armed conflict is that what has happened in the past is relevant to the types of principles and constraints under which we may fight.

And this is certainly something you'll often hear in the, some of the media surrounding Israel, is to say, "Listen, they'll do anything. We're trying to watch ourselves, we're trying to not target civilians and so on and so forth. But to hold us to these type of very strict criteria when our opponent is acting this way is simply implausible. It's constraining us in such a way that's going to result in greater losses and casualties of our own people and so on."

JEFF MCMAHAN: Right. Thanks for saying that because it forces me to qualify a bit what I said a moment ago. What people have done in the past isn't irrelevant to what it's permissible or proportionate to do now. Wrongful action that can still have continuing bad effects makes a person morally liable to defensive action or preventive action.

But there's also this. That a person's action in the past, or a group's action in the past, provides evidence for what you can expect from them in the future. And that can be the basis for reasonable predictions about what harm they will do unless they are prevented from doing it.

And so if people have acted in wrongful ways in the past, they've caused a lot of harm and they're poised to act again, it's not irrelevant to look at what they've done in the past for evidence about what they may do in the future if not prevented.

CHRISTIAN BARRY We're going to take a brief break, and we're going to be back with more with Jeff McMahan on proportionality in war.

MATT PETERSON: You're listening to Public Ethics Radio. Christian Barry is talking to Rutgers philosopher Jeff McMahan about just war theory. We asked Prof. McMahan if he thought it was relevant that so many more Palestinians than Israelis were killed over the last few weeks.

JEFF MCMAHAN: The asymmetries in power between Israel and the Palestinians mean that whenever Israel uses force against the Palestinians, especially given that Palestinians are living in these crowded, densely populated areas, the number of casualties are extraordinarily high. And whenever you look at the ratio of casualties between Israelis and Palestinians in any of these conflicts, the Palestinians always have the worst of it by many orders of magnitude. I mean...

Would Israeli be doing all of this to knock out those rockets in Gaza if the civilians it was killing were Israelis? Answer is no, because the number of Israelis who've been killed by Palestinian rockets or by rockets fired by Hezbollah from southern Lebanon is tiny in comparison with the number of southern Lebanese civilians and Gazan, Palestinian civilians that were killed by Israeli retaliatory strikes. And it seems to me that's the basis for—the reasonable basis the claims that Israel's responses are disproportionate.

They're disproportionate to the extent that they are because the casualty figures among the Israelis from the attacks launched by Hamas from Gaza and launched by Hezbollah in 2006 from southern Lebanon are very small. Not very many Israelis were killed by Hezbollah in the summer of 2006. Not very many Israelis have been killed by Hamas rockets fired out of Gaza. So when Israel in attempting to knock out these weapon sites kills ten times the number of Palestinian civilians as the number of Israeli civilians who've been killed. The reason that's disproportionate is that the figures from the past for Israeli casualties gives some indication of the magnitude of the threat that Israel faces in the future. I'm really making—

CHRISTIAN BARRY Unless there's some indication that this capability is likely to increase if not checked.

JEFF MCMAHAN: Is going to... if not increased. Yep.

The point here is that the casualties that Israel has suffered from these missile attacks in the past give a measure of the threat that Israel faces in the future, at least in the near future. And it's in relation to the future threat that these strikes that Israel is making can be argued to be disproportionate.

CHRISTIAN BARRY Let me relate what you just said to some other things that came up earlier. And that is, because proportionality considerations are forward-looking, so that we have to be making some claim on the basis of our knowledge of the past, the motivations of the different actors involved—

JEFF MCMAHAN: Christian, can I interrupt. Can I interrupt, please?

CHRISTIAN BARRY Yup

JEFF MCMAHAN: Can we just figuratively rewind to the end of what I was saying.

CHRISTIAN BARRY Yes. By all means.

JEFF MCMAHAN: And let me just add one thing to what I was saying a minute ago, and it's this.

That it's important in understanding what I just said to distinguish between the people who are liable to be attacked, and I do think that members of Hamas who fire missiles into Israeli territory are liable to attack, I don't think—whatever you think the, the merits

of the Palestinian cause, whatever it is. And I think that the Palestinians have been grievously wronged by the Israelis.

Nonetheless, wrongful attacks against civilian areas in Israel are not permissible. This is not the way the Palestinians ought to be pursuing what I think of as their just cause. They certainly have a just cause vis-à-vis Israel. But it's not a just cause for random attacks against civilian populations. So in my view, when Hamas fires weapons into Israeli residential areas, into Israeli cities, if they can reach them, that makes the people who fire those rockets liable to retaliatory attacks.

So let me make one point clear here. If Israel could prevent one innocent Israeli child from being killed by a Hamas rocket by killing 50 Hamas rocket firers, that would be proportionate on my view. That is, you could kill 50 Hamas fighters to prevent them from killing one Israeli child.

But the important comparison here is between the harms that innocent Israelis will suffer if Israel doesn't attack gun batteries in Gaza and the harms that will be inflicted on innocent people in Gaza by the Israeli retaliatory strikes. And there's where the disproportion is. It's not permissible to kill ten Palestinian children to prevent one Israeli child from being killed. All these children are equally innocent.

CHRISTIAN BARRY Since thinking about proportionality will involve thinking, dealing with the messy reality on the ground, and making different predictions about what is likely to happen... We have all sorts of standards that we apply in different contexts. I just wondered if you had views about what types of standards we should apply in this context.

JEFF MCMAHAN: There's a standing bias towards conservatism in the use of force.

CHRISTIAN BARRY Because the costs of getting it wrong are so high, given the asymmetry—

JEFF MCMAHAN: It's also—not just looking at the outcomes, it's a matter of what you're doing.

If you're going to do harm it takes greater certainty that your aims are going to be achieved by the doing of harm, particularly when it's the doing of harm to the innocent.

You don't have to have so much caution if you have confidence, if you have reasonable certainty that the people whom you're harming are liable to be harmed. This I think is a very interesting point.

If your uncertainty is about whether people are liable to be harmed, that is, whether you're harming people who are innocent or noninnocent, that's a really crucial form of uncertainty. And there you really—the presumption is against acting when you don't know whether the people you're harming are innocent or noninnocent.

On the other hand, there's another kind of uncertainty, and that's uncertainty about, let's say, how much harm you're going to cause to people, whether the harm you cause is really going to be effective or not. But if you're certain that the people you're attacking are responsible for wrongdoing, then your uncertainties about whether harming them is going to do good or not don't matter as much.

The precautionary principles, I think, don't have the same weight in these circumstances. You can go ahead and harm people who are responsible for wrongdoing even in the face of uncertainty about how much good it's going to do, just because the really important thing is whether people are innocent or whether they're liable to be harmed.

So, if your uncertainty is about whether people are innocent or not, that's when the precautionary principles are at their strongest. What you don't want to do in war is cause harm to innocent people.

CHRISTIAN BARRY Jeff McMahan, thanks for joining us on Public Ethics Radio.

JEFF MCMAHAN: Thanks for having me, as they always say.