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The Responsibility Dilemma for *Killing in War*: A Review Essay

I. INTRODUCTION

On one popular conception of how to do political theory, we should start with our considered judgments, try to work them together into a coherent theory, and then test our judgments against the theory, and the theory against the judgments, to see if either needs modification.¹ Philosophical discussion of the ethics of war has taken exactly this form: there are certain considered judgments, best enunciated by Michael Walzer, to which many hold.² Only combatants may be intentionally targeted in war; unintended harms to noncombatants must be minimized; wars of national defense and humanitarian intervention can be justified. Then there is the theory. Walzer's own loose attempt to synthesize these judgments has been largely discredited.³ In recent years, philosophers from a more austere ethical tradition have argued that these theoretical failings demand reevaluation of the considered

Versions of this article have been presented at workshops at Oxford, Keele, and the Association for Legal and Social Philosophy; many thanks to the conveners and participants of those meetings. For comments on recent drafts, special thanks to Zahler Bryan, Janina Dill, Cécile Fabre, Helen Frowe, Per Ilsaas, Larry May, David Miller, David Rodin, Klem Ryan, Guy Sela, Nicholas Southwood, Adam Swift, Victor Tadros, Peter Vallentyne, Lea Ypi, and in particular Henry Shue. Thanks also to the reviewers at *Philosophy & Public Affairs*, whose suggestions and objections were invaluable. Finally, Jeff McMahan has been both extraordinarily generous with his time and an inspiration. For all that this article is a critique of his work, *Killing in War* is the high-water mark of just war theory since *Just and Unjust Wars*.

1. John Rawls, *A Theory of Justice*, rev. ed. (Oxford: Oxford University Press, 1999), §4.

2. Michael Walzer, *Just and Unjust Wars*, 4th ed. (New York: Basic Books, 2006).

3. Walzer himself opposes an excessively theoretical approach to the ethics of war: "Response to Jeff McMahan," *Philosophia* 34 (2006): 19–21.

judgments with which Walzer began.⁴ Foremost among them is Jeff McMahan, whose recent book, *Killing in War*, synthesizes and develops his fifteen-year-long critique of Walzerian just war theory.⁵ *Killing in War*, however, is distinctive less for its opposition to Walzer, than for its compromises with his guiding intuitions. McMahan's early work argued that intentional killing in war is justified when one's target is culpable for an objectively unjustified threat.⁶ Since many noncombatants on the unjust side are likely to be culpable for the wartime threat posed by their country, and many combatants will be morally innocent, this would radically undermine the principle of noncombatant immunity from attack, while potentially rendering a just war unfeasible, since victory would require killing innocent combatants.⁷ In *Killing in War*, however, McMahan partially retreats from these controversial positions. He now believes just combatants may intentionally kill almost all unjust combatants, and that very few, if any, unjust noncombatants will be liable to the same fate (p. 213). In this article, I argue that these two compromises are at odds with one another. If noncombatants escape liability, so should many unjust combatants; if all unjust combatants are liable, then the same must go for many noncombatants. McMahan must choose between two unpalatable options: either adopt a contingent form of pacifism, or concede that many more noncombatants may be killed than is currently thought defensible.

Killing in War is a sustained assault on the linchpin of Walzerian just war theory, the moral equality of combatants (MEC). MEC states that, irrespective of whether their side justly resorted to war, combatants face the same moral prohibitions and permissions. It underpins Walzer's views in three ways: first, it grounds the principle of discrimination between combatants and noncombatants. Individuals lose the protection of their right to life, on Walzer's account, when they become a threat to others' lives. Hence all combatants are entitled to kill other

4. For example, Tony Coady, *Morality and Political Violence* (Cambridge: Cambridge University Press, 2008); David Rodin, *War and Self-Defense* (Oxford: Clarendon Press, 2002); Jeff McMahan, "The Ethics of Killing in War," *Ethics* 114 (2004): 693–732.

5. Jeff McMahan, *Killing in War* (Oxford: Oxford University Press, 2009). All page references in the text are to this book.

6. E.g., "Innocence, Self-Defense and Killing in War," *Journal of Political Philosophy* 2 (1994): 193–221.

7. *Ibid.*, p. 211.

combatants, but noncombatants, who pose no threat, are immune from intentional attack. Second, MEC underpins Walzer's account of just resort to war, which depends on the analogy between individuals' and states' rights to defend themselves. This 'domestic analogy' is very troubling for ethical individualists, who note that when states fight each other, individuals die, and remind us that individuals, not states, are the fundamental unit of moral concern (pp. 79ff.).⁸ Since the right to life is normally our most fundamental protection, this killing demands justification. However, if combatants on either side of a conflict can fight without violating their adversaries' rights, as MEC says they can, then the domestic analogy could be consistent with those rights. Third, MEC is vital to implementing Walzerian just war theory in international law. Without MEC, the laws of war are unlikely to secure widespread international agreement; moreover, rejecting MEC could have disastrous consequences: since countries and individuals rarely fight without a secure conviction (however unreasonable) of their justification, if we extend greater permissions to just combatants than to unjust combatants, all will assume that the wider set of permissions applies to them, and correspondingly wreak still greater havoc.⁹

McMahan, however, believes that MEC is a dangerous doctrine, widespread endorsement of which provides unscrupulous politicians with armies willing to serve their unjust ends. If individual combatants believed they can only fight justly for a just cause, they would be more cautious about which wars they fight, and fewer wars would result (p. 3). Moreover, he thinks that MEC is based on flawed reasoning. *Killing in War* substantiates this skepticism with three lines of attack against MEC. The first develops a theory of permissible killing, and criticizes alternatives defended by Walzer and other advocates of MEC. The second applies this theory to killing in war, and shows that it radically undermines MEC. The third acknowledges and accommodates the practical strengths of Walzer's account, while separating them from endorsement of MEC. In particular, McMahan argues that its legal advantages need not be lost if we reject it as a moral principle.

On its own terms McMahan's critique of MEC is in my view persuasive, and I do not seek to resurrect that principle in this

8. Rodin, p. 164.

9. McMahan is clearly aware of this (pp. 108–9).

article.¹⁰ Instead, I argue that the consistent application of McMahan's alternative to MEC would require such a radical revision of our considered judgments about war that we might be prompted either to reevaluate his critique, or to seek a different accommodation between our considered judgments about war and our moral theory. First, however, I must explain McMahan's account of the ethics of killing in general, and killing in war in particular.

In ordinary life, people have rights against being killed. According to McMahan, nothing about the nature of warfare undermines or vitiates these rights (p. 156). What grounds permissible killing in ordinary life, then, should also justify killing in war.¹¹

The right against intentional killing is universal, and almost absolute (p. 28). We also have a weaker right against being unintentionally but foreseeably—hereafter 'collaterally'—killed. In ordinary life, intentional and collateral killings can be justified in two ways.¹² Either the corresponding right is overridden, because infringing it is necessary to achieve some appropriately valuable good; or the right is lost, such that no wrong is done (pp. 9–10). In the latter case, the victim is 'liable' to be killed. A person can become liable to be killed, on McMahan's account, when he is morally responsible for an objectively unjustified threat to another person.

Moral responsibility can be minimal or maximal (p. 34). An agent A is minimally morally responsible for an unjustified threat X when X can appropriately be attributed to A's responsible agency. For this, A must meet the minimum standards for responsible agency; and he must have made voluntary choices that foreseeably contributed to the threat coming about. The criteria for responsible agency include some degree of physical and psychological self-control, and the capacity for rational

10. Other scholars are less pessimistic. See, for example, Yitzhak Benbaji, "A Defense of the Traditional War Convention," *Ethics* 118 (2008): 464–95; Patrick Emerton and Toby Handfield, "Order and Affray: Defensive Privileges in Warfare," *Philosophy & Public Affairs* 37 (2009): 382–414.

11. He discusses specific attempts to separate the morality of war from that of ordinary life, and finds them wanting (pp. 15, 36, 209ff.). Still, it is worth noting that in *Killing in War* he concedes that wartime self-defense involves protecting different values from those invoked in ordinary self-defense (p. 196), so there must be *some* difference between war and ordinary life.

12. One can also waive one's right against attack (pp. 51ff.).

choice.¹³ The foreseeability qualifier is weak, and in *Killing in War* somewhat vague: A's responsibility is only defeated if he could not have known that his action risked contributing to the threat (p. 166).¹⁴ Minimal moral responsibility can be called *agent-responsibility*.

Maximal moral responsibility presupposes agent-responsibility, but adds an additional element. A is maximally morally responsible for threat X when X can be attributed to A's agency, and A can appropriately be blamed or praised for his contribution to X. Blameworthy maximal moral responsibility is known as culpability. McMahan defines culpability negatively through his discussion of excuses, which defeat culpability. The principal excuses, duress and nonculpable ignorance, are discussed in Section III below.

Whether one poses the threat oneself is neither sufficient nor necessary for moral responsibility (pp. 154ff.). It is insufficient, because sometimes the threat may not be attributable to one's voluntary agency, if, for example, one has been used as a projectile. It is unnecessary, because one can be morally responsible for a threat that someone else poses, because of having facilitated that threat.

For example, suppose A has been sacked from his job, and blames his former boss B. To take his revenge, he buys a weapon from C, a gunsmith. C does not know A's intentions, and sells him the gun legally. A, who is a responsible agent, attacks B. On McMahan's account, A is maximally morally responsible for this threat, since he meets the standards for responsible agency, and he has no plausible excuse. Conversely, C is blameless for not predicting that A would use the gun this way. Yet he is agent-responsible for A's threat, because as a responsible agent he made a voluntary causal contribution to it, and selling weapons is a risky activity: one knows that they may be used unjustifiably.¹⁵

Moral responsibility for an objectively unjustified threat grounds liability to lethal attack as follows: B faces a threat X to his life, which he can only avert by killing A. There is a presumption against killing A,

13. Jeff McMahan, *The Ethics of Killing: Problems at the Margins of Life* (Oxford: Oxford University Press, 2002), p. 401.

14. Jeff McMahan, "The Basis of Moral Liability to Defensive Killing," *Philosophical Issues* 15 (2005): 386–405, at p. 397.

15. This yields the counterintuitive implication that, if B can only protect himself from C by killing the gunsmith (using him as a shield, say), McMahan's theory of self-defense would render this permissible.

because it is wrong, other things equal, intentionally to harm others. This presumption can be overridden by a relevant moral asymmetry between A and B (p. 169). In particular, when A is morally responsible for X, and X is unjustified, B may intentionally kill A, because if someone must bear the impending cost, it should be the person whose responsible actions generated the unjustified threat. The threat must be unjustified: McMahan argues that one cannot lose one's rights against attack by acting justifiably (pp. 14, 38ff.).¹⁶ This is an important departure from Walzer, who thinks that merely posing a threat makes one liable.¹⁷ The second key difference is that McMahan, unlike Walzer, thinks one can be liable for a threat that one does not oneself pose, provided one is responsible for it (pp. 154ff.).

Minimal moral responsibility is sufficient for liability to be killed (pp. 34, 197, 227).¹⁸ McMahan concedes, however, that this is *prima facie* disproportionate: one would ordinarily inflict such a harsh fate on only the culpable.¹⁹ He resolves this concern with an innovative take on proportionality in self-defense, arguing that liability comes in degrees, such that the more responsible B is for an unjustified threat, the more liable he is. Defensive harm should be "narrowly proportionate" to his degree of responsibility (pp. 18–23, 156).²⁰

So: A is trying to steal a precious vase that belongs to B (p. 156).²¹ B has four ways to defend her property right: *bottle*, *tackle*, *kick*, and *grab*. *Bottle* involves breaking a bottle over A's head, and will certainly succeed, without B suffering harm. *Tackle* involves rugby-tackling A. It will also certainly succeed, but will harm A less and leave B bruised. *Kick* involves kicking A in the shins. It is less likely to succeed, but will harm A the least and will not harm B. In *grab*, B lunges to grab the vase before A gets it, foreseeably knocking over a bottle next to the vase. The bottle falls on A's head, with the same force as in *bottle*.

16. *Killing in War* does not do much to justify this view (e.g., p. 44), nor is the underlying principle of fairness much explored.

17. Walzer, *Just and Unjust Wars*, p. 43.

18. McMahan, "Basis," p. 394.

19. See Seth Lazar, "Responsibility, Risk, and Killing in Self-Defense," *Ethics* 119 (2009): 699–728.

20. See also McMahan's "Just Cause for War," *Ethics & International Affairs* 19 (2005): 1–21, at p. 11; "Basis," pp. 394–95; *Ethics of Killing*, pp. 403–5; and "Killing in War," p. 724.

21. Defense of one's property rights, McMahan assumes, is relevantly similar to self-defense.

Ordinarily, defenders are only permitted to use the minimum force necessary to repel the impending threat. This requirement is ambiguous, however: may B use the force necessary to be certain of repelling the threat? Or may she use no more than will be reliably effective? The solution lies in narrow proportionality: the more responsible A is, the more B is entitled to make certain of success.²² If A is culpable, B may choose *bottle*; if A is merely agent-responsible, B should choose *kick* instead.²³

Narrow proportionality might also require division of the impending harm between B and A.²⁴ If A is only agent-responsible, and B can harm A less by herself accepting harms, she should opt for *tackle* instead of *bottle*. Note, though, that B probably need not endure very serious harms to minimize harm to A.

McMahan thinks we can be liable to collateral, as well as intentional harms, though the latter are morally more serious (pp. 20, 218ff.). Thus if B must choose between *grab* and *bottle*, if A is merely agent-responsible B may have to choose *grab*, while if A is culpable *bottle* may be permissible.

Wars involve many intentional and collateral killings.²⁵ For a war to be just, these killings must be justified: the rights to life of those we kill must either be overridden, or vitiated by their liability. McMahan thinks our right against intentional killing is near absolute, and is unlikely to be overridden in wartime. Collateral killing is a less grave wrong, so can more readily be overridden. To fight wars justly, then, we must show that the collateral killing we do is overridden by the good we achieve, and that the targets of intentional killing are liable to that fate, insofar as they are morally responsible for an objectively unjustified threat, and killing them is an effective and narrowly proportionate response.

Individuals can contribute to two types of wartime threat: specific micro-threats against individuals, and the macro-threat their state poses to its adversary. Micro-threats are objectively unjustified when the attacked are neither liable, nor are their rights overridden. McMahan ordinarily argues that macro-threats are straightforwardly reducible to

22. McMahan, "Killing in War," p. 724.

23. This does not give A an additional reason to harm B: if *kick* had as good prospects of success as *bottle*, A would have to choose *kick* irrespective of how culpable B might be.

24. McMahan, *Ethics of Killing*, pp. 403–4.

25. Wars also involve other grievous wrongs, of course. But if the killing is unjustified, then that is enough to render the war impermissible.

an aggregation of micro-threats.²⁶ In *Killing in War*, however, he suggests that there are additional determinants of the injustice of macro-threats (p. 196). These are not clearly specified; he simply notes that the macro-threat is unjustified when it does not meet the criteria governing just resort to war.

McMahan argues that combatants whose side resorted to war unjustly—unjust combatants—are responsible for unjustified micro- and macro-threats. They are therefore liable to intentional attack by just combatants. Moreover, since they aim at achieving a valuable just cause, just combatants are entitled to inflict some collateral deaths. Contra MEC, unjust combatants enjoy neither of these permissions: the just combatants they confront are responsible only for justified threats, so they are not liable to intentional attack. Moreover, since unjust combatants aim to achieve a positively disvaluable goal, there is no good to outweigh the collateral killings that they commit, so those rights cannot be overridden either (p. 27). They have no rights to kill at all: MEC is mistaken.

However, whatever the successes of McMahan's critique of MEC, they come at a price. His alternative theory of killing in war may have implications that most would reject. The first danger—the contingent pacifist objection—is that it may deny even just combatants the right to use lethal force. If liability presupposes responsibility for an objectively unjustified threat, and if some unjust combatants are not sufficiently responsible to be liable, then just combatants must discriminate between those who are and are not sufficiently responsible. To do this, they must know at least their adversaries' personal histories, the context of their decision to fight, their connection to a particular threat, their capacity for responsible agency, their beliefs and intentions, and that their own cause is just. In close-quarters combat, soldiers must often make snap judgments in fast-developing scenarios, based on minimal reconnaissance. Merely determining that an apparent adversary poses a threat can be difficult; to know more than appearances tell is near impossible. This is even more evident for aerial and artillery bombardment: pilots and gunners target coordinates, not individuals. However else we restrain the conduct of war, we could never make it less anonymous and impersonal. If just combat requires discrimination between enemy

26. In his "War as Self-Defense," *Ethics & International Affairs* 18 (2004): 75–80; and "Killing in War," p. 725.

combatants' degrees of responsibility, it requires the impossible, and we ought not to fight at all. Although a just war might be possible in theory, we should be pacifists in practice.

The second danger is that by arguing that liability is grounded in responsibility for unjustified threats, not the fact that one poses the threat, McMahan opens the floodgates to total war. In a modern state, we all make contributions, however small, to the capacity of our government to act. When our government goes to war, especially in liberal democracies, we are to some degree responsible for the threat that it poses. If this is enough to ground liability to lethal attack, then few besides children will escape liability.

McMahan has long known of these dangers. The contingent pacifist objection, indeed, impelled a crucial shift in his approach. In his early work, he believed liability presupposed culpability—not just agent-responsibility—for an objectively unjustified threat.²⁷ He acknowledged that many unjust combatants would not be culpable for fighting, and conceded that just wars might be in practice impossible. Recently, however, he has rejected this view, and he now argues that agent-responsibility is sufficient for liability to be killed. Although his account of narrow proportionality militates against it, McMahan emphasizes that when the threat is sufficiently grave even a very slight asymmetry can be decisive (p. 169). Additionally, in a line pursued heavily in *Killing in War*, he insists that an “overwhelming majority” of unjust combatants are to some degree culpable, so just combatants are entitled to presume this is true of them all (pp. 187, 199).²⁸

The total war objection has also forced McMahan to adapt his theory. In particular, *Killing in War* develops two responses: first, it appeals to narrow proportionality, arguing that most noncombatants are insufficiently responsible for liability to lethal force to be a narrowly proportionate response. Some, in particular children, are not responsible at all (p. 225). We must therefore presume that they are all impermissible

27. In 1994, he rejected “the view that absence of agency in the causation of harm defeats responsibility and therefore liability in a way that absence of culpability cannot.” See his “Self-Defense and the Problem of the Innocent Attacker,” *Ethics* 104 (1994): 252–90, at p. 265 n. 22.

28. This second response, note, casts doubt on his conviction about the first: if agent-responsibility is sufficient for liability, then why care whether unjust combatants are excused for fighting?

targets (pp. 218–19).²⁹ His second response is that even if killing noncombatants would otherwise be proportionate, it is almost never effective, and therefore cannot be justified as self-defense.

Agent-responsibility for a wrongful threat is not, in my view, an adequate basis for liability to be killed: the disproportionality between the two elements is too great; moreover, I doubt whether this argument identifies a salient asymmetry between just and unjust combatants. I cannot, however, defend that position here.³⁰ Instead, my critique of McMahan's argument is internal: I suggest that his responses to the total war and contingent pacifist objections contradict one another. If, to protect noncombatants, we set the liability bar high, then many unjust combatants will also be impermissible targets; if we forestall the contingent pacifist objection by setting the liability bar low, then many noncombatants may be intentionally killed. McMahan tries to walk a tightrope between contingent pacifism and the wholesale rejection of noncombatant immunity. I think he must overbalance, and choose which way to fall. I call this the responsibility dilemma for McMahan's theory.

I defend the responsibility dilemma in two stages. First, I argue that many unjust combatants are only minimally responsible for wrongful threats, so a low bar for liability must be set to avoid the contingent pacifist objection. Second, I argue that, if we escape the contingent pacifist objection in this way, then too many noncombatants will also be rendered liable. To solve the contingent pacifist objection, we must invite the total war objection. In particular, I undermine McMahan's attempts to protect noncombatants, using the narrow proportionality and effectiveness arguments. Ultimately, the responsibility dilemma seems sufficiently serious either to prompt reevaluation of McMahan's critique of MEC, or to suggest that we need a quite different approach to the ethics of war than that offered either by McMahan or by Walzer.

II. CAUSATION, AND THE RESPONSIBILITY OF UNJUST COMBATANTS

One of McMahan's key objections against Walzer is that, if our theory of killing in war is supposed to pay attention to individual rights, it should

29. See also McMahan's "Killing in War," pp. 727–28; and "The Morality of War and the Law of War," in *Just and Unjust Warriors*, ed. David Rodin and Henry Shue (Oxford: Oxford University Press, 2008), pp. 19–43, 38.

30. But see Lazar, "Responsibility."

genuinely do so: we should not generalize about combatant liability, but attend to specifics. Ironically, in *Killing in War* McMahan himself falls into this trap: all he does is halve the set over which we are generalizing. Instead of saying that all combatants may be treated the same, we say this of all unjust combatants. This move is supposed to resolve the contingent pacifist objection—if we can make sufficiently authoritative generalizations about unjust combatants' degree of responsibility, it may be possible to fight justly, despite the impossibility of knowing each adversary's degree of responsibility. I think this is inconsistent: if we want an account of killing in war that duly respects individual rights, we should not generalize at all. If this makes the theory impracticable, then we should perhaps reject the rights-based account of justified war. My response to McMahan's generalizations, then, is not to propose further generalizations. Instead, I argue that he is too harsh in his attribution of maximal responsibility to unjust combatants, and that a non-negligible number of unjust combatants in most wars are likely to be only minimally responsible for objectively unjustified threats. To avoid the contingent pacifist objection, then, we must set a low bar for liability, opening up the total war objection.

Although responsibility for a wrongful threat presupposes some causal contribution to that threat, it is unclear how to measure that contribution, and how its size affects the degree of responsibility. That combatants appear to make a larger causal contribution to their side's unjust threat than noncombatants, then, is a weak foundation for a response to the responsibility dilemma. Nonetheless, it is a likely counterargument, and merits rebuttal, as follows: many combatants make small and unnecessary causal contributions to micro- and macro-threats, and as such are similarly positioned to many noncombatants.

Broadly speaking, there are two ways to contribute to micro- and macro-threats. Either one is the agent of the threat, or one contributes to a threat ultimately posed by someone else. Whether through fear, disgust, principle, or ineptitude, many combatants are wholly ineffective in war, and make little or no contribution either to specific micro-threats, or to the macro-threat posed by their side (some are a positive hindrance). The much-cited research of Brigadier-General S.L.A. Marshall claimed that only 15 to 25 percent of Allied soldiers in the Second World War who could have fired their weapons did

so.³¹ Marshall's research methods have been criticized,³² but others corroborate his basic findings, arguing that most soldiers have a natural aversion to killing, which even intensive psychological training may not overcome.³³ This is especially likely to be true in the less professional armies against which liberal democracies tend to fight.³⁴

Many other combatants play only a facilitating role, without directly contributing to specific micro-threats. Military units rely on cooks, medics, mechanics, and engineers, who support their more lethal comrades. These are especially numerous in the air force and the navy: for example, a Nimitz-class aircraft carrier has a crew of over 5,500, but only houses between sixty and eighty aircraft, and has around ten principal armaments. Only a very small proportion of the crew can be directly responsible for specific micro-threats.³⁵ Many of the rest facilitate those threats, and so only make small contributions to the overall macro-threat.

Finally, some combatants neither pose nor contribute to immediate micro-threats, but might contribute, or have contributed to the overall macro-threat. Consider, for example, an artillery attack on reservists behind enemy lines, who have yet to arrive at the front; or an assault on a company that has finished its tour of duty and is being withdrawn; or a night assault on enemy barracks, when all but those keeping watch are asleep. Consider also support staff who play an ostensibly restraining role, such as Judge Advocate Generals in the U.S. Army.

The causal contributions of many unjust combatants to specific threats will be individually small and unnecessary. One might object that they pose a threat simply by being there, because they draw fire away from their more effective comrades.³⁶ But the only reason they contribute to the threat, in this case, is because the just combatants shoot at them. This makes for an odd argument: we are permitted to kill you because we are going to kill you, when we could be killing someone who

31. S.L.A. Marshall, *Men against Fire* (Gloucester: Peter Smith, 1978).

32. Joanna Bourke, *An Intimate History of Killing* (London: Granta, 1999).

33. David Grossman, *On Killing* (London: Back Bay Books, 1995); David Lee, *Up Close and Personal* (London: Greenhill, 2006); Mark Nicol, *Condor Blues* (Edinburgh: Mainstream, 2007).

34. Grossman, *On Killing*.

35. Thanks to Klem Ryan for suggesting this.

36. Thanks to Cécile Fabre and Helen Frowe for this response.

genuinely poses a threat. It is circular, and would mean that any non-combatants in the vicinity of the combatants we are targeting could count as contributing to the threat in the same way.

One might respond that combatants are responsible for making just combatants believe they pose a threat. Their liability is grounded in responsibility for the situation in which they are perceived as posing such a threat (pp. 135, 188). However, this view constitutes an alternative and (in *Killing in War*) undefended criterion of liability. Moreover, it is extremely suspect: both the unjust combatant and the just combatant are agent-responsible for this *situation* arising: each made voluntary decisions that contributed to its coming about.³⁷ So this only grounds an asymmetry if one, but not the other, is culpable for doing so.

The broader point, however, is that if small, unnecessary contributions, some of which one makes only by being in a particular space, are sufficient for liability to be killed, then many more noncombatants than is plausible will be pulled into the liability net. Many noncombatants also make small, individually unnecessary contributions to their side's ability to wage the war, both directly and indirectly. Direct contributions include paying taxes that fund the war, supplying military necessities, voting, supporting the war, giving it legitimacy, so attracting further support from others, and bringing up and motivating the sons and daughters who do the fighting. Indirect contributions include the ways they have built the state's capacity over previous years, giving it the strength and support to concentrate on war, and contributions they have made to the fighting capacities of specific combatants: the math teacher, for example, who imparts skills to a student, later necessary to his role as a gunner; the mother who brings up a strong, lethal son. Even children might make relevant contributions, by motivating their parents to fight.³⁸ Insofar as they are morally responsible agents, which McMahan thinks they can be (p. 201), and their actions are voluntary, with foreseeable implications, they too can be agent-responsible for a small contribution to the war effort. In the modern state, almost everyone contributes to the capacity of our government to act—all the more so in democracies. Though our contributions are individually small and unnecessary, that

37. Lazar, "Responsibility."

38. Noam J. Zohar, "Collective War and Individualistic Ethics: Against the Conscriptioin of 'Self-Defense'," *Political Theory* 21 (1993): 606–22.

does nothing to distinguish us from the combatants described above. If their causal contributions cross the liability threshold, then so do ours.

III. EPISTEMIC EXCUSES

A. *Uncertainty*

Combatants' degree of responsibility also varies along the blameworthiness axis, which is more significant still. McMahan has suggested that culpability can 'nullify' other important moral categories.³⁹ If McMahan could show that all unjust combatants are to some degree culpable for their contribution to the war, that would undoubtedly strengthen his case against the contingent pacifist objection. Hence over a quarter of *Killing in War* seeks to rebut attempts to excuse unjust combatants.⁴⁰ If these rebuttals fail, there is no alternative to setting the liability bar low indeed, inviting the full force of the total war objection.

Two types of excuse are relevant: epistemic excuses, and those grounded in duress. Although I focus on the former, note that the main argument against the duress excuse—that liberal democracies do not impose harsh penalties on selective conscientious refusers (p. 133)—is far weaker when we recall that liberal democracies normally fight much less liberal states, in which the punishments are more ruthless. For example, during both Gulf Wars, Iraqi conscripts faced the death penalty for desertion. Even if our combatants have no duress-based excuse, their targets might have one.

An unjust combatant has an epistemic excuse when he is nonculpably ignorant of the fact that he is contributing to an unjustified threat. That is, he mistakenly believes that his cause is justified, and he is not to blame for having that belief (pp. 43, 61ff.). Nonculpable ignorance depends on epistemic justification. A belief is fully epistemically justified when it is decisively supported by the available evidence. It is partially justified when, for example, some of the relevant evidence is unexamined, or ambiguous. Ignorance is nonculpable when one's mistaken beliefs are sufficiently epistemically justified, given the circumstances. Elements of those circumstances can both raise and lower the epistemic burden on combatants. McMahan concentrates on raising the epistemic

39. McMahan, "Innocence," p. 204.

40. Chapter 3, and much of chapter 4, focus on excuses.

burden. He argues that the moral risks of fighting mean that combatants are excused only if their mistaken beliefs warrant a high degree of credence (p. 184). I think he overstates his case and ignores other important factors that lower the epistemic burden on combatants, specifically, uncertainty and reasonable partiality. Once these are taken into account, more unjust combatants will be excused than McMahan allows.

It is unreasonable to expect people to formulate beliefs warranting high credence, when the moral and nonmoral evidence do not support a determinate conclusion. The moral principles, first, are complex and contentious. There are areas of general agreement, but this is apparent only: while paradigm cases may be perspicuous, each has fuzzy edges, in which most real wars take place. How, for example, should we apply principles of national defense when this war is the latest stage in an enduring enmity?⁴¹ When is aggression too trivial to justify defense? How serious and widespread must human rights violations be before humanitarian intervention is justified? Is humanitarian intervention a right or a duty? How do we weigh the innumerable incommensurable harms and goods that determine proportionality? If even the supposed experts can agree on few of these questions, how much can we expect of the average nineteen-year-old soldier?

Even if we had clear moral principles, the nonmoral facts might be obscured. Our leaders could violate at least five of the standard just war theory criteria, without anybody outside the circles of power knowing about it. They might have secretly provoked the enemy into attacking, to give the appearance of just cause; they might have adopted a disproportionate strategy; there may have been other options besides war, thus failing last resort; their intentions may be improper, say, the pursuit of resources; and they may know our prospects of success are slim, because of classified intelligence. Nor is such secrecy always unjustified: military intelligence should often be classified to avoid exposing sources; a unified chain of command is probably necessary for effective defense; a completely open decision-making process could be a strategic disadvantage.

Sometimes, however, our political institutions are insufficiently open and accountable. Worse still, the facts may be obscured by propaganda. Governments set on war make a concerted effort to justify their cause:

41. Consider the recent war in Georgia, or the ongoing conflict in the Middle East.

whatever their real purposes, wars are framed in terms of norms.⁴² An unjust combatant, deciding whether to fight, faces a barrage of information, from a source he is accustomed—and perhaps even has a right—to trust, which suggests he should fight. It can be very difficult to know where the truth lies.

Perhaps in democracies these problems are less severe. And yet, since democracies usually fight against authoritarian states, what matters is whether the *opponent's* government is open and honest. Moreover, we should not idealize contemporary democracies: the facts governing the resort to war are still kept close; British citizens, for example, waited almost seven years for a full, independent public inquiry into the decision to go to war.

Besides being obscured, the facts are sometimes intrinsically opaque. In particular, the causal story behind many wars is far more complex than simply 'country A invaded country B'. Usually wars result from diplomatic tensions, posturing, brinkmanship, escalating skirmishes, and long-held enmities.⁴³ Identifying which side 'started it' may be impossible. Worse, whether a war is objectively justified will depend on information that nobody, in principle, can know, because it is not yet available. We cannot know, when we initiate conflict, whether the proportionality criterion will be satisfied. The nature of warfare means that these facts will often be radically unpredictable. Of course, we can stop fighting if we later discover a disproportionality, but our ignorance about these consequences would still excuse us for the threats we pose, before the disproportionality becomes apparent. Additionally, many wars are morally ambiguous: in some respects just, but unjust in others. When the war is ambiguous, it is difficult to evaluate it correctly, making combatants' epistemic task still harder.

The debate between McMahan and Walzer suggests two further points. If McMahan is right about the widespread acceptance of MEC, this itself must surely excuse many unjust combatants.⁴⁴ If combatants were indeed equally entitled to fight, irrespective of their cause, there

42. Martha Finnemore, *The Purpose of Intervention* (London: Cornell University Press, 2003).

43. Again, witness Georgia 2008.

44. McMahan mentions this briefly (pp. 120, 137), but does not explore its implications. Other writers think adherence to MEC is less widespread: Roger Wertheimer, "Reconnoitering Combatant Moral Equality," *Journal of Military Ethics* 6 (2007): 60–74; Dan Zupan,

would be no compelling reason for them to research the war's morality; one could comfortably leave that decision to, for example, a democratically elected authority. If most combatants hold this view, and it is shared by most other members of their society, taught to them as part of their training,⁴⁵ and supported by reasonable arguments (such as the view that selective conscientious refusal would undermine national security, or that the military should defer to civilian authority), and if the alternative is a marginal position they would encounter only in philosophy departments, then how can they be accused of negligence in failing to research the justification of their cause (p. 153)?

Conversely, if McMahan's account were widely endorsed, combatants would face further epistemic hurdles. Besides needing to know their own cause is justified, they would have to know their adversaries' degree of responsibility for the threat they pose. As I argued above, this is in practice impossible. This reveals an interesting reflexivity in the responsibility-based conception of liability in war: whether my adversary is liable depends on how responsible she is for the threat that she poses to me; how responsible she is may depend on her knowledge (or lack thereof) of my degree of responsibility for the threat I pose to her. These facts about our respective degrees of responsibility can affect whether the threat that we pose is unjustified, for if she is not responsible for the threat she poses to me, then I pose a *prima facie* unjustified threat to her. This generates further complexities, which reinforce the conclusions of the contingent pacifist objection.

First, if McMahan is troubled by the total war objection, and so raises the liability threshold, it becomes harder to fight wars justly: it is harder to discriminate between liable and nonliable targets, because there are more nonliable targets to discover; and it is harder to tell of any individual whether he is responsible: the higher the threshold, the more information is required about each target. As the theory becomes more epistemically demanding, more combatants will enjoy an epistemic excuse, because they could not have known the relevant facts about their adversaries' degree of responsibility.

"The Logic of Community, Ignorance, and the Presumption of Moral Equality: A Soldier's Story," *Journal of Military Ethics* 6 (2007): 41–49.

45. George R. Lucas, "Advice and Dissent: 'The Uniform Perspective'," *Journal of Military Ethics* 8 (2009): 141–61; Zupan, "Logic of Community."

However, if it is harder to fight wars justly, this should strengthen our opposition to fighting at all—this is the central thrust of the contingent pacifist objection. We have, then, an interesting paradox: (1) It is impossible to discriminate between liable and nonliable combatants, because of the lack of information endemic to warfare; (2) Many combatants are not liable to be killed, because they are not sufficiently responsible for the threats that they pose; (3) Anybody who chooses to kill, knowing both 1 and 2, chooses to kill indiscriminately; (4) Anybody who chooses to kill indiscriminately is maximally morally responsible for the threats that he poses, and so liable to be killed; (5) It is therefore easy to discriminate between liable and nonliable combatants. The conclusion, 5, contradicts 1, and 4 contradicts 2. The implications of this paradox lie beyond the scope of this essay, but it is clear that if this additional complexity does not provide further grounds for excuse, it should certainly ground pity for combatants, should they have to apply such convoluted reasoning in the heat of battle.

B. Reasonable Partiality

As we consider the excuses granted to combatants, it would help to reflect briefly on the purpose of excuses in general. In my view, they provide space to recognize that it is sometimes very difficult to do the right thing, and that it is hypocritical to blame others for doing precisely what we—and any person of reasonable firmness—would have done in those circumstances. Excuses allow us to acknowledge that morality is sometimes overdemanding, asking too much resilience when one's life is threatened, too much information when there is no time for research, and too much impartiality when one's closest friends, one's family, and one's country are under threat. These demands may not be wrong; we should simply recognize that morality can be so exacting that we cannot blame people for not realizing its ideals. In recognition of this, I think the epistemic burden that potential combatants must meet to be excused is lowered by the latitude common sense offers for reasonable partiality.

Whether or not one's government has a just cause for fighting, wars often endanger those closest to us, and our country itself. Of course, this is not always true. Britons and U.S. citizens remain insulated, for example, from the effects of our wars in Iraq and Afghanistan. Yet it is

often enough true to be relevant; from the perspective of the Afghan people, for example, even if the invasion was justified, it has clearly wrought great suffering. Recent evidence suggests the Georgians provoked the Russians in 2008, and so were fighting unjustly, but the response was fatal for many Georgian combatants and noncombatants.⁴⁶ Sometimes, the only way to defend those one cares for against the predations of war will be to fight to protect them. This should be relevant to setting the epistemic burden for unjust combatants to be excused: when the costs of mistake could fall so heavily on those we care about, we should be granted a certain epistemic allowance.

The natural response, of course, is that if we get it wrong, we will be killing innocent people to protect those we love; yet few believe that even our most fundamental relationships can justify overriding negative duties not to kill innocent strangers. But this objection is misplaced: I am not arguing that reasonable partiality *justifies* intentional wrongdoing. Nor am I even arguing that it *excuses* combatants from guilt when they *knowingly* attack nonliable parties, to protect those they care about (although I think this may sometimes be true).⁴⁷ My contention is instead the much weaker claim that combatants can on these grounds be excused for *risking* wrongdoing. If they know their cause is unjust, then they are culpable if they fight. If, however, they are uncertain about the status of their cause, then I think reasonable partiality lowers the degree of credence their belief that their war is justified must meet, in order to afford a full excuse.

One might respond that, when our side lacks a just cause, the best way to protect our special relationships is to oppose the war. This will sometimes be true, and undoubtedly we ought to oppose obviously unjust wars for this reason. But we are assuming that the war is not obviously unjust—there is some uncertainty. Moreover, even if our side lacks a just cause, if the enemy is also fighting unjustly (McMahan thinks most wars are unjust on both sides), then working to secure our country's defeat may be a bad idea.

46. Tim Whewell, "What Really Happened in South Ossetia?" *BBC Online/Newsnight* (2008). <<http://news.bbc.co.uk/1/hi/programmes/newsnight/7722806.stm>>, Accessed April 11, 2009.

47. I argue for this point in Seth Lazar, "War and Associative Duties," D.Phil. dissertation (University of Oxford, 2009).

C. Factors That Raise the Epistemic Burden: Moral Risk

McMahan's most important move in the discussion of epistemic excuses is to argue that, if we fight, we risk greater wrongdoing than if we hold back, so we should only fight if we are quite certain that our cause is just (p. 184). He offers three arguments to this conclusion, which I discuss in turn.

If potential combatants fight an unjust war, they may intentionally kill nonliable people, and may contribute to the achievement of an unjust cause. If they avoid a war that proves just, they will let some innocents die, and fail to promote a just cause (p. 94). Many believe that intentions are relevant to permissibility, as is the difference between action and omission.⁴⁸ Thus, it is worse intentionally to kill someone, than unintentionally to allow him to die. McMahan argues that there is a comparable difference between intentionally contributing to an unjust cause, and unintentionally failing to contribute to a just cause (pp. 94, 141). The former is therefore morally riskier.

Yet, are the intentions of a combatant who unwittingly contributes to an unjust cause worse than those of one who unwittingly fails to contribute to a just cause? It does not seem likely, since in neither case does the agent intend this end, because he mistakenly believes that he is acting justifiably. Nor does the acts/omissions distinction seem relevant here: a combatant's contribution to his side's unjust cause depends on both actions and omissions, and someone who refuses to fight likewise must take actions to do so. Neither approach distinctively involves acting or omitting to act; both are composites of multiple actions/omissions.

Moreover, even those who believe mode of agency is relevant to permissibility agree that it is less relevant when specific duties are at stake. In particular, if I have a positive duty to help someone, and my failure to do so leads to her death, then my conduct is scarcely less wrong than if I actively killed her. People may have strong positive duties in wartime; failure to perform them can be morally very serious. Members of the military will ordinarily have contractual, role-based, and natural duties to fight just wars, the breach of which is a serious matter. In particular, our associative duties to protect those closest to us and our compatriots, grounded in the (different) value of those relationships, are an important

48. Others disagree; indeed, perhaps the following arguments suggest more fundamental problems with this distinction.

feature of commonsense morality.⁴⁹ Failure to fight a just war may mean breaching those duties. Whether one breaches them through inaction rather than action is neither here nor there.

One might again respond that our positive duties simply cannot override our negative duties not to kill nonliable people. But that misreads the argument: the claim is not that our positive duties override our negative duties, rather that, just as the risk of breaching negative duties if they fight raises the epistemic burden on combatants, the risk of breaching positive duties if they avoid fighting lowers that burden. Moreover, even if it were true that negative duties always trump positive duties (which I doubt), we would still need to know specifically which positive duties are in play, how many and how utter the duty-breaches will be, and what the probabilities are.⁵⁰ In the specific case, the positive duties may still prove more important.

This suggests a response to McMahan's second argument, that the costs of not fighting a just war are prudential, rather than moral (pp. 145–46).⁵¹ For individuals, the costs of not fighting are not only prudential, if such important positive duties are at stake. This is also true of failure to achieve a just cause: not fighting a just war of national defense may mean allowing our political community to be overrun; if it is a valuable community, then this is a great wrong. Not fighting just wars of humanitarian intervention implicitly condones the actions of genocidaires and marauders, engaged in "crimes that shock the moral conscience of humankind."⁵² These are serious moral costs.

Moreover, the moral risks of fighting will depend on specifics: not all unjust wars are equally morally serious. In particular, if we fight cautiously, with limited war aims, then success in an unjust cause may not be a moral disaster. Humanitarian interventions can be limited; if they prove mistaken, we can withdraw. Wars of national defense can stop once our borders are secure. In either case, if our cause subsequently

49. Lazar, "War and Associative Duties."

50. I argue that there is no reason, in principle, to think general negative duties always override positive associative duties, in Lazar, "Do Associative Duties Really Not Matter?" *Journal of Political Philosophy* 17 (2009): 90–101.

51. McMahan, "On the Moral Equality of Combatants," *Journal of Political Philosophy* 14 (2006): 377–93, at p. 390.

52. Walzer, "Arguing for Humanitarian Intervention," in *The New Killing Fields*, ed. Nicolaus Mills and Kira Brunner (New York: Basic Books, 2002), pp. 19–36.

proves unjust, we can pay reparations, or assist reconstruction in the society we wrongly fought.

Finally, McMahan argues that the risks of not fighting are further lowered, because if we actually do have a just cause, there will be no shortage of people ready to fight in its pursuit (pp. 99, 134, 141, 147). However, neither history nor theory supports this view. Recruiting people to risk their lives has never been easy: even the paradigmatic just war, World War II, required conscription.⁵³ We already fight fewer just humanitarian interventions than we should, Rwanda being the most notable omission. If potential combatants adopted McMahan's presumption against fighting, Kosovo and Sierra Leone might have been omitted as well. If everyone followed McMahan's advice, they would fight only wars that are obviously just. Any wars that are just, but not obviously so, would go unfought unless enough people reject McMahan's theory, so that the few conscientious refusers are counterbalanced by many others who, perhaps still fooled by MEC, are less cautious.

One might respond that this would not be a problem if everyone, in all countries, adopted McMahan's view, since just wars would not arise.⁵⁴ Yet this presupposes that there could be no misunderstandings between equally conscientious parties. Moreover, a theory of just war that works only when it is adopted either by a few individuals, or by everyone, is either self-defeating or too idealized for application to war. If we assumed universal adherence to morality, just war theory would be unnecessary; we could be pacifists, because there would never be any wrongs for war to redress. Just war theory is predicated on partial compliance.

McMahan, I conclude, sets the bar for epistemic excuse too high. He exaggerates the difference between the moral risks of fighting and not fighting, and underestimates the importance of uncertainty and reasonable partiality in lowering the epistemic burden on potential combatants. Many more unjust combatants are epistemically excused than he allows. Together with the preceding argument about causation, this should yield a significant number of unjust combatants who are only minimally responsible for wrongful threats. If the liability bar is set high, then many of these unjust combatants will not be liable to be killed, and

53. I owe this point to Cheyney Ryan.

54. Thanks to Jeff McMahan and David Rodin for this objection.

fighting wars justly will be in practice impossible, because of the information problems described above. McMahan is compelled, then, to set the liability bar low, so that these excused combatants all exceed it. This propels us, of course, into the total war objection.

McMahan might respond by conceding that many unjust combatants are not liable, but claiming that their deaths are unintended, and count as permissible collateral damage.⁵⁵ Suppose A kills B, thinking that B is liable to be killed. On this account, A has intentionally killed B only if B was in fact liable. If B turns out not to be liable, then his death is a foreseeable but unintended side effect of A's action.

There may be some complex issues at stake here, but this response is *prima facie* implausible. First, it is an acute case of what Neil Delaney, writing about the doctrine of double effect, calls "back-solving," which involves "looking at a set of scenarios (action plans), forming a judgment that one may be morally permissible while the others may not be morally permissible, then resolving corresponding effects into the intended and foreseen in such a way as to secure the prior judgment."⁵⁶ Many already view the idea of permissible collateral killing skeptically; this must be exacerbated by such a malleable account of intention.

Additionally, the proposed solution would conflict with McMahan's other views, such as his arguments against theories that "[make] mistake of fact a ground of moral justification rather than excuse."⁵⁷ *Viz*: the proposal would build A's mistake into the description of his intention, by asserting that he intends to kill B only if B is in fact liable. Because A was mistaken, B's death counts as collateral, not intended killing. As such, it can be more readily overridden by the good effects that A sought to achieve. Thus A's mistake makes his conduct more permissible, *contra* McMahan's other (and I think sounder) position.⁵⁸

Perhaps most seriously, though, this morally freighted account of intention clashes with common sense. A has aimed his weapon at B's

55. Thanks to Jeff McMahan and Victor Tadros for this suggestion.

56. Neil Francis Delaney, "Two Cheers for 'Closeness': Terror, Targeting and Double Effect," *Philosophical Studies* 137 (2006): 335–67, at p. 340.

57. McMahan, "Basis," p. 391.

58. McMahan earlier considered a similar response to this problem, conceding that "any justification . . . for attacking an army of Unjust Combatants, despite the presence of innocents among its members, will also provide a justification for attacking certain civilian populations, other things being equal." McMahan, "Innocence," p. 217.

head, and pulled the trigger, hoping to kill or disable him. On any commonsense understanding of intentions, A intends to kill B, and B's death cannot be passed off as an unintended consequence of A's action, just in case he turns out not to be liable. The contingent pacifist objection cannot be overcome by simply redescribing the intentions of just combatants.

IV. PROTECTING NONCOMBATANTS: NARROW PROPORTIONALITY

The contingent pacifist objection stands, then, unless the liability bar is set low. And if the liability bar is set low, that invites the total war objection. McMahan is clearly uncomfortable with this outcome, and wants to preserve as much noncombatant immunity as he can. He concedes that "many . . . civilians have been actively complicit in the waging of the war, and most of them share some responsibility for it" (p. 96), but nevertheless wants to argue that "the vast majority of unjust civilians are not [liable to intentional attack in war]" (p. 213). I think he is not entitled to this conclusion; if consistently applied, his theory of permissible killing radically undermines ordinary judgments about when noncombatants may permissibly be killed. I show this by rebutting his two main defenses for this view: the narrow proportionality and effectiveness arguments.

Although McMahan presents his account of narrow proportionality as rooted in widely held intuitions (e.g., pp. 159, 193), it is actually a revisionist addition to the theory of self-defense,⁵⁹ introduced to save noncombatants on the unjust side from the fate of unjust combatants. They are, McMahan argues, insufficiently responsible for it to be proportionate to kill them. However, this works only because he applies a double standard to evaluating their respective responsibilities.

At points in *Killing in War*, McMahan concedes that many noncombatants will be responsible for their country's war (e.g., p. 96), but where liability is concerned, he asserts the reverse (p. 225). Conversely, almost all unjust combatants are held not merely responsible, but even culpable. Their excuses are ruthlessly shredded, while noncombatants are not held to remotely the same standard. He dismisses the objection that

59. The conventional view insists that the defensive harm be proportionate to the threatened harm; it takes no account of responsibility.

combatants' causal contributions are small (pp. 39ff.), but baldly asserts that noncombatants are not causally implicated (p. 225).

Nor is the liability bar consistently set: for noncombatants, it is high, as McMahan argues that "in general it is necessary that a person bear a high degree of responsibility for a wrong in order to be liable to be killed as a means of preventing or correcting that wrong" (p. 234). For combatants, however, it is very low: mere agent-responsibility for a small contribution to a threat is sufficient. Indeed, even potential combatants who have as yet done nothing wrong can be liable: if country A is secretly plotting against country B, and B, aware of this threat, can only avoid it by attacking now, then B-combatants are entitled to intentionally kill A-combatants who were nonculpably ignorant of their government's unjust plan (pp. 183–84). If wholly blameless combatants who have not even contributed to a threat can be permissibly killed, why be so lenient on noncombatants who do contribute, and are often not wholly blameless?

Just cause is also applied inconsistently in the proportionality calculation: when arguing that minimally responsible unjust combatants are liable, the magnitude of the threatened harm—their side's unjust victory—renders killing proportionate (p. 197). Yet where noncombatants are concerned, the great importance of winning is not mentioned.

Applied without these double standards, McMahan's theory gives no reason to believe in a bright-line distinction between combatant and noncombatant responsibilities. Given the arguments of Sections II and III, it is more likely that, within each class, individuals will range from agent-responsible to fully culpable, from tiny causal contributions to decisive ones. With a low liability bar, then, attacks on noncombatants will be much more commonly permissible than McMahan allows. After all, provided the threat faced is sufficiently serious—which, in war, it should always be—the whole point of this model of self-defense is to enable small differences to make all the difference in the allocation of unavoidable harms. Narrow proportionality should not be a factor: if the lives of just combatants or just noncombatants are at stake, as well as the just cause, and these lives can be saved by killing unjust noncombatants, then however minimal their responsibility for the threat their state poses, it is enough to make them liable to be killed. They took risks, however small, which have now eventuated in an objectively unjustified threat, and it is fairer that they should bear the cost than just combatants

and just noncombatants who made no contribution at all. If we find this outcome implausible, we should reject the argument that underlies it: we cannot render it more plausible through a proportionality constraint with which it conflicts.

However, perhaps narrow proportionality might reduce the numbers of otherwise liable parties who may proportionately be killed.⁶⁰ This could at least protect noncombatants against massive indiscriminate attacks (though it should do the same for combatants). McMahan's prison-guard example is relevant here (pp. 23ff.). A is being unjustly held captive, protected by a number of minimally responsible guards. B can free him only by killing those guards. McMahan thinks that whether B may rescue A can depend on how many guards she must kill to do so. If there are enough guards, it may be disproportionate for B to kill any individual one of them, because the contribution made by killing each individual to rescuing A is too small to render killing him proportionate, given his degree of responsibility, even though, were he the only target, he would be liable to be killed.

I doubt that this response helps McMahan much, since it would also apply to combatants. More importantly, I think the proportionality calculation cannot plausibly start from the share of the overall harm that killing this specific individual averts. What matters is rather the magnitude of the whole harm, which it is necessary to kill this individual to avert. Consider a parallel case: C is the only guard, but A is kept in a labyrinth, from which it will be difficult to free him. Here too, killing C makes only a small contribution to the broader goal. But that is irrelevant to C's liability, since killing him is necessary to get into the labyrinth in the first place, and so to save A.

Additionally, if a guard's right to life is dependent on the size of his cohort, we need only raise a sufficiently large gang to ensure none of us become liable. Assuming it is conventionally proportionate to kill a guard in order to rescue an unjustly held prisoner—suppose he will be executed tomorrow, and there is no other means of rescue—we should turn to the basic model of defensive justice for guidance. Is it better to let A endure this cost, or to inflict it on his guards, who are each to some degree responsible? For each guard, we must ask whether he should suffer a harm, or A should be left to die. By hypothesis, there is a clear

60. McMahan, *Ethics of Killing*, p. 404.

moral asymmetry between each guard and A, so each assessment should tell in favor of defending A, and killing the guard. An increase in their numbers can make no difference to the comparative fairness of each of them bearing the cost, instead of A. Of course, perhaps exercising one's rights of self-defense could be too costly, all things considered, so we ought not to do it, but this has no bearing on the individual guards' liability.

Perhaps narrow proportionality could protect noncombatants, if it governed some other aspect of self-defense than the liability of the target. In *Killing in War*, McMahan proposes that the less responsible the just combatants' targets are for the threat they face, the more risks that just combatants must assume, to ensure minimizing the harm to those targets (pp. 192ff.). He offers an example from the first Gulf War: in the first scenario, allied forces confront the Iraqi republican guard; in the second scenario, they face a conscript battalion. The guards, assume, are more responsible than the conscripts for their part in the war. McMahan argues that the allies should take greater risks on themselves when fighting conscripts than when fighting the republican guard, if they can thereby reduce the conscripts' suffering. For example, they should try to capture prisoners, and encourage surrender, rather than attacking outright. This is supposed to be analogous to the *tackle* and *bottle* cases above: if a republican guard is about to steal my vase, I can use the bottle, but if it's a conscript, I have to tackle him. The same approach might mitigate the harms that noncombatants are liable to suffer. If their responsibility is low, perhaps just combatants ought to take greater risks on themselves when threatening noncombatants than when unjust combatants are their targets.

The first problem, again, is that if this works for noncombatants, then it must work also for the combatants who are responsible to the same low degree. Additionally, I think this response misapplies McMahan's theory of self-defense.⁶¹ Just combatants cannot, in war, make the same choices they could in the *tackle* case. They cannot simply accept a small harm to avoid harming their adversaries. Any additional risks that they take, in wartime, will be risks of being killed. Even a bullet through a leg or an arm could hit an artery, leading to death in minutes. Moreover,

61. We should indeed use different tactics against these two forces, but this is simply the requirement of minimal force: if the conscripts might surrender, we should avoid a fight.

these are only risks *ex ante*; *ex post*, and in fact, individual nonliable just combatants will have been killed in order that we may kill fewer non-combatants.⁶² We must choose, therefore, between allowing a wholly nonliable just combatant to die, and killing some noncombatants who are responsible for risky conduct that has eventuated in the unjust threat against us. There is a relevant moral asymmetry between them, and even if it is of “comparatively slight moral significance,” when the stakes are this high small differences are supposed to make all the difference.⁶³

V. EFFECTIVENESS

The protection of noncombatants, then, must depend on McMahan’s claim that targeting unthreatening civilians “generally cannot be an effective means of pursuing a just cause” (p. 225). I now address this final argument.

An attack is militarily effective if it contributes to victory. This is a weak standard, and intentional attacks on noncombatants will meet it far more than McMahan thinks. Although strategists agree that attacking noncombatants will not often determine overall success, it must be true that, if our weapons are destructive enough, we can gain a military advantage through indiscriminate attacks. If we target the economic, social, and political nerve centers of the adversary state, we could induce chaos, rendering them incapable of prosecuting the war.⁶⁴

Something stronger than effectiveness is obviously required: specifically, military necessity. Just as effectiveness is too weak a constraint, however, necessity might be too strong: strictly speaking, a tactic is militarily necessary only if it would be impossible to achieve success without it. But this would mean very few tactics are militarily necessary, if there are multiple routes to achieving victory.

62. When I choose *tackle* over *bottle* in the vase case, instead of one of us suffering an unendurably severe harm, we each suffer a lesser one. In that sense the harm is divided between us. When we speak of risks, it seems as if we can do the same: I accept a 30 percent chance of being killed, instead of a 10 percent chance, to give you a 50 percent rather than 10 percent chance of survival, say. But this is misleading, when our lives are at stake: if ten just combatants assume a 30 percent chance of being killed, then other things equal three of them will be killed. They have not endured a lesser harm, analogous to the bruised shoulder in *tackle*. Death is an indivisible harm.

63. McMahan, “Basis,” p. 394.

64. The atomic attacks on Japan, for example, were in one respect effective, as was the blockade of Germany in World War I.

On its own, therefore, necessity is no better than effectiveness: a further element is required. The tactic that is militarily necessary, on this account, achieves victory while causing the least suffering. But of course, McMahan does not care about all suffering equally: “harms to which people are liable do not count among the bad effects in any proportionality calculation” (p. 25). The necessary course, then, is the one that best contributes to victory while minimizing nonliable suffering.

This is the most favorable interpretation of McMahan’s effectiveness constraint. And yet, it still offers noncombatants little protection, because if they are liable then their suffering does not count against the justice of attacking them. It need not even be weighed. If we can save nonliable lives by attacking liable noncombatants, we ought to do so.

One might object, here, that some noncombatants, in particular, children, will never be liable. McMahan does think children can be morally responsible agents by at least the age of eight, so if they have voluntarily contributed in any way, then they can still be liable (p. 201). But there will be some who are genuinely not responsible for the threats their country poses. Perhaps that is the difference between attacking combatants and noncombatants: taking the latter course, you know some of your targets will not be liable at all.⁶⁵

Again, though, this offers noncombatants little protection. We could still permissibly attack noncombatant adults, so missile strikes on the government, the stock exchange, universities, factories and offices, bars and nightclubs, would be in principle the same as attacks on military targets. Of the 2,819 people who died in the September 11, 2001, attacks in the United States, only eight were children.⁶⁶ Moreover, on McMahan’s

65. An alternative argument (suggested by an Editor of *Philosophy & Public Affairs*) states that within any sample of combatants and noncombatants, the latter group will have fewer liable members, who will, moreover, be less responsible than the liable combatants, so we should target combatants rather than noncombatants where possible. I doubt this assumption, however, particularly if we only target adult noncombatants: frontline soldiers are at least as likely as the average noncombatant adult to be morally innocent. More importantly, although this might be a sensible approach, it would not be consistent with respecting the rights of the nonliable parties whom we intentionally attack. The fact that other courses of action would involve greater wrongdoing does not make the chosen course more consistent with the rights of its victims—at least, not if we apply McMahan’s objective standard of justification.

66. ‘CNN.com—September 11 Memorial’. <<http://www.cnn.com/SPECIALS/2001/memorial/lists/by-age>> Accessed April 1, 2010.

questionable understanding of foresight and intention, children killed in attacks on areas where children are at risk could count as collateral, not intentional, deaths (p. 229).

The question, then, is whether attacks on noncombatant adults will be militarily necessary often enough to make this implication of McMahan's account unsupportable. I think so. Suppose country A launches an aggressive war against country B. The leaders of B predict that in a conventional war, they will win at the cost of 20,000 just combatants' and just noncombatants' lives. Instead, they could launch targeted and massive attacks on the economic, political, and social institutions of A, predicted to kill 90,000 unjust noncombatants, including among them 72,000 adults, who are presumed liable, and 18,000 nonliable children. This second approach, assume, will ensure victory without any just combatants or just noncombatants dying. The lives of the 72,000 liable unjust noncombatants should not trouble the leaders of B, so they need weigh only the benefit of saving their compatriots' lives against the cost of foreseeably killing 18,000 children. The latter strategy, on McMahan's account, involves the least nonliable suffering, so B should presumably adopt it. The example is of course highly abstract, but the underlying reasoning could well apply in more standard military contexts.

Moreover, attacks on noncombatants are even more likely to be effective in unconventional and asymmetric warfare. The weaker party may have no other means of fighting an enemy with a preponderance of conventional power than attacking its civilian population. In these days of alienated warfare, where most of us are insulated from the costs of conflict, it is reasonable to think that taking the fight to the electorate will succeed.⁶⁷ Indeed, in recent research on the strategic logic of suicide bombing, Robert Pape is unequivocal about the success rate of deliberate terrorist attacks, most of which targeted noncombatants. Examining a set of thirteen suicide terrorist campaigns that were completed between 1980 and 2003, Pape argues that seven led to "significant policy changes by the target state toward the terrorists' major political goals."⁶⁸ As he observes: "even a 50 percent success rate is remarkable: international military and economic coercion generally works less than

67. The term 'alienated warfare' is taken from Cheyney Ryan, *The Chickenhawk Syndrome: War, Sacrifice, and Personal Responsibility* (London: Rowman and Littlefield, 2009).

68. Robert Pape, *Dying to Win* (New York: Random House, 2005), pp. 64–65.

a third of the time, and [success] is especially rare for groups with few other options.”⁶⁹

It is also true that deliberate attacks on civilian centers can sometimes be very effective against guerrilla forces, who often hide among noncombatants, trusting that they will not be attacked. In conventional wars and especially in asymmetric conflicts, then, it is easy to think of scenarios when intentionally attacking noncombatants would meet even a strict necessity constraint.

The necessity constraint is still weaker as regards collateral killing of liable noncombatants. Any noncombatants who are liable to be intentionally killed will also be liable to collateral killing. Their unintended suffering, therefore, does not count against any given tactic. Thus, just combatants may place an absolute priority on their lives over those of unjust noncombatants, and arguably even prioritize their lives over those of wholly innocent enemy noncombatants, because their own survival is, on McMahan’s account, tied to the possibility of their achieving the just cause. This would mean we should use ground troops, for example, only when it is absolutely necessary, adopting high altitude bombing missions however severe the noncombatant casualties, because that is the best way to reduce harm to our troops.⁷⁰ It would mean dropping ‘dumb’ bombs, rather than laser-guided weaponry that requires significant risks to be taken by the combatants in situ, pointing the lasers. Even if intentional attacks on noncombatants were not often militarily necessary, collateral damage is an unavoidable feature of almost any conflict, and McMahan’s approach would give far wider scope for permissible collateral damage than seems plausible.

VI. CONCLUSION

This article has argued that McMahan’s responsibility-based view of the ethics of killing in war faces a dilemma, borne out of the equally minimal responsibility of many combatants and noncombatants for the objectively unjustified threats posed by their belligerent state. Either we must

69. *Ibid.*, p. 65. Pape notes that terrorists learn strategic lessons from one another. They pursue these attacks because they are effective. Pape, *Dying to Win*, pp. 73ff.

70. On force protection, see Hamutal Shamash, “How Much Is Too Much? An Examination of the Principle of Jus in Bello Proportionality,” *Israel Defense Forces Law Review* 2 (2005–6): 103–48.

expand liability to include more noncombatants than can plausibly be permissible targets, or we contract it, rendering it impossible to win a war justly. Neither horn of this dilemma is attractive.

If a non-negligible number of unjust combatants are not liable to be killed in war, then we cannot fight wars justly. Modern warfare is predicated on the use of long-range artillery and aerial power; even if we could tell who was responsible and who was not, we could not discriminate between them as long as we used these methods. Even in close-quarters combat, to be effective soldiers must respond instinctively to fast-emerging threats.⁷¹ There is barely time to ensure their targets are hostile; assessments of their responsibility are plainly unfeasible. Even if they had time to think, there would be no way of acquiring the information needed to establish degrees of responsibility. We cannot know whether our targets are excused, and we cannot know the specific nature of their causal contribution. Just combatants cannot mete out harms in proportion to responsibility. War is not a distributive mechanism. Recalling a tense night spent awaiting a Viet Cong attack, journalist Michael Herr wrote:

At night in Khe Sanh, waiting there, thinking about all of them (40,000 some said), thinking that they might really try it, could keep you up. If they did, when they did, it might not matter that you were in the best bunker in the DMZ, wouldn't matter that you were young and had plans, that you were loved, that you were a non-combatant, an observer. Because if it came, it would be a bloodswarm of killing, and credentials would not be examined.⁷²

Uncertainty is not a contingent feature of war; it is endemic, and radical.⁷³ To say that we ought to kill only those who are liable to that fate is like saying that we ought to abort only fetuses that would otherwise grow up to be bad people. It is not merely difficult for combatants to know whether their enemies are liable, it is impossible—at least, if they are to fight at all. If we opt for this horn of the dilemma, we should conclude that although killing in war could hypothetically be just, it will in practice involve widespread and serious rights violations.

71. Grossman, *On Killing*; Lee, *Up Close and Personal*.

72. Michael Herr, *Dispatches* (London: Picador, 2004), p. 134.

73. Perhaps sufficiently radical to discredit any attempt to transfer principles that govern extramilitary interpersonal conflicts from the sphere of ordinary life to that of war.

McMahan concludes *Killing in War* with an extract from a letter by Osama bin Laden to the people of the United States, justifying the September 11, 2001, attacks (pp. 232–33). Although he tries to rebut bin Laden’s arguments, their similarity to his own is inescapable: U.S. non-combatants are permissible targets because they are responsible for the wars that their governments fight. They vote for those governments, pay the taxes that buy the weapons, produce, sustain, and support the combatants who do the fighting. McMahan responds that bin Laden’s argument is flawed in three ways: he does not have a just cause; responsibility must rise to a higher level to justify liability; his attacks on U.S. noncombatants have not been militarily effective. These ripostes are weak. The claim about responsibility thresholds is inconsistent with McMahan’s other arguments, according to which even a slight degree of moral responsibility is sufficient for liability. Moreover, if the liability bar is raised to protect noncombatants, it will also protect many combatants, returning us to the contingent pacifist objection. The effectiveness claim is equally suspect: when bin Laden chose this tactic, he had good reason to think it effective. The other suicide campaigns that he sought to emulate had achieved more than a 50 percent success rate—considerably more than conventional military coercion, which was anyway not an option against the most powerful army in the world. Finally, many would be less certain than McMahan that Al Qaeda, and the people it claimed to represent, lacked a legitimate grievance against the United States. Yet to debate these claims with bin Laden seems somehow to miss the point: to allow him his major premises, but deny the minor premises in the particular case. Such attacks on innocent noncombatants should be morally outrageous, in almost any context. Minimal moral responsibility is an inadequate basis for liability to be killed: a sudden and painful death is a profoundly disproportionate response to innocent inadvertence. Moreover, as well as being innocent, these noncombatants are defenseless and vulnerable. To attack them in this manner is dishonorable and cruel in the extreme.⁷⁴

Killing in War presents MEC with serious, and in my view insurmountable problems. Absent some novel defense, this thesis is now very difficult to sustain. But this success is counterbalanced by the strikingly

74. Larry May, *War Crimes and Just War* (Cambridge: Cambridge University Press, 2007).

revisionist implications of McMahan's account of the underlying morality of killing in war, which forces us into one of two unattractive positions, contingent pacifism, or near-total war. In this article, I have argued that his efforts to mitigate these controversial implications fail. The reader is left stranded: to reach plausible conclusions, Walzer deployed an implausible conception of our rights to life; McMahan's more rigorous account of those rights generates untenable conclusions. Absent new developments, it seems that the prospects for grounding the ethics of war in individual rights are poor: any theory of our rights to life that is sufficiently indiscriminate to work in the chaos of war is not discriminating enough to be a plausible theory of our rights to life. Perhaps by rejecting the ideal of the rights-respecting war altogether we might develop an alternative theory of justified warfare, which marries theoretical soundness with conclusions that we can more confidently support.