

Duty and Liability

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Introduction

It is sometimes permissible to kill a person to avert a threat that one faces. One reason why this might be so is that the person killed is liable to be killed to avert the threat. In his excellent book *Killing in War*¹ Jeff McMahan claims that a person is liable to be killed to avert a threat only if four conditions are fulfilled:

- 1) The threat, if realised, will wrongfully harm another.
- 2) The person is responsible for creating the threat.
- 3) Killing the person is necessary to avert the threat.
- 4) Killing the person is a proportionate response to the threat.

The fourth condition is complex. McMahan distinguishes between narrow proportionality and wide proportionality. Narrow proportionality involves a comparison between the harm that will be done to the person who is responsible for the threat and the harm threatened. It is permissible for me to kill a person to avert a lethal threat, and perhaps even to avert a serious but non-lethal threat. It is wrong for me to kill a person to prevent her from bruising me. That is so even if she is responsible for creating an objectively unjust threat of bruising. Wide proportionality involves balancing the harms that my defensive actions cause to others innocent people with further goods that they do, including the good of averting the threat. Furthermore, the relationship between necessity and proportionality needs careful elucidation. But the idea that conditions 3) and 4) provide valid parts of an account of liability is difficult to contest.

This is less obviously true of the first two components. McMahan's account indicates that responsibility for a threat of wrongful harm is a necessary and sufficient condition of liability. I will not contest the idea that defensive force can only be used to avert an objectively unjust threat. My aim is to show that the responsibility condition in McMahan's account is too strict both as part of an account of liability in general and as part of an account of liability to be killed. This will also involve giving a clearer account of the distinctive role that the idea of liability can play in a philosophical investigation into the permissibility of harming others. This provides important groundwork for a consideration of some of the central practical issues discussed in McMahan's book, such as the permissibility of killing those, such as some child soldiers, who threaten us but who are not responsible for the threats that they pose, as well as the permissibility of harming civilians in the course of war. I restrict myself to an all too brief exploration of one of these issues – the permissibility

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¹ (Oxford: OUP, 2009). Hereafter *KIW*.

of killing those civilians of a state that wages an unjust war who are not responsible for the war.

I. What is This Thing Called Liability?

As I have already indicated, the permission to kill a person who is liable to be killed is a subset of a more general class of permissions to kill. One way of addressing the question of liability, then, is by asking the following question: what are we trying to pick out in focusing on this subset?

McMahan develops an account of liability that is related to the loss of rights. A person is liable to be harmed for the sake of some goal, McMahan thinks, if he has lost his right not to be harmed for the sake of that goal. This is distinct from cases in which a person retains a right not to be harmed, but where that right is overridden. A right can sometimes be overridden in cases of side-effect harms. For example, suppose that those engaging in a just war can advance their cause substantially by bombing a munitions plant. If this is done, some civilians will be killed as a side-effect. If the killing of the civilians is proportionate given the significance of the goal, it is not wrong all things considered to kill the civilians. But this is because the civilians' rights have been overridden given the significance of the goal, and not because the civilians have lost their right not to be killed.

It is also distinct from cases in which a person has waived their right not to be harmed. For example, if I consent to being harmed by you, say in the course of a boxing match, I am not *liable* to be harmed. To say that I am liable to be harmed indicates that it is permissible to harm me without my consent. Where the permissibility of harming me depends on my consent, there is no question of liability.

Talk of the *loss* of a right to be harmed, however, may be misleading. There may be circumstances where it is permissible to harm me, and I have no right not to be harmed, but there is nothing that I have *lost*. This is so if there is nothing that I *once had* that I have lost. The focus on the *loss* of a right needs to be defended, and McMahan says nothing that indicates that liability to be harmed can occur only in cases where a person once had a right that they have now lost.

The idea that I have just questioned - that liability depends on the loss of a right - also encourages us to think that there is an important relationship between liability and *forfeit* of rights. McMahan suggests that a 'person's being liable to attack *just is* his having *forfeited* his right not to be attacked, in the circumstances'.² Forfeit of a right, McMahan is swift to suggest, does not mean that the person has lost the right with respect to any person and for the sake of any end. The forfeit of a right not to be attacked may be more specific than that: the forfeit of the right not to be attacked *in order to avert the threat that the person is responsible for creating*.

Thus McMahan avoids one objection to the idea that responsible attackers forfeit their rights: it would be wrong to kill responsible attackers for no reason, or for fun, or simply because killing them would do more good than harm in a way that bears no relation to the threat.³ For this reason it is misleading to say that responsible attackers have forfeited their right to life. But, as McMahan notes, that does not mean that they have not forfeited their right not to be attacked for a more particular purpose.

² *KIW* 10.

³ For this criticism of the idea of forfeit, see J J Thomson 'Self-Defense and Rights' in *Rights, Restitution, and Risk: Essays in Moral Theory* (Cambridge, Mass.: Harvard UP, 1986).

If this is the right view, we can see why an account of liability that is based on responsibility is attractive. For to forfeit something I need to do something. Plausibly, I can forfeit a right only through my responsible agency. Hence, this account of liability encourages us to focus on responsibility, and responsibility for the threat we face is the natural place to look.

In contrast with McMahan, I don't believe that the idea of liability is importantly connected to the idea of loss of a right, and so I don't think that it is a necessary condition of liability to be harmed that a person has forfeited their rights. Focus on the way in which liability is used in law encourages us to develop an alternative view.

Here are some examples where a person is liable to be harmed without their consent even though they have done nothing to forfeit their rights. One example is taxation. In the UK, from 2010, people who earn above £150000 per year must pay 50% income tax on their earnings. It is natural to say that those who earn above £150000 are liable to the higher rate of tax. And yet that is nothing to do with responsibility. If a person unforeseeably earned £150000, we would not now think it wrong to impose the higher rate of tax on them for that reason. Nor do we think that the person who earns over £150000 has forfeited their right not to pay 50% income tax on their earnings. If the tax rate of 50% on those who earn more than £150000 per year is just, those who earn more than £150000 are liable to pay it, both morally and legally.

Another case, more relevant to war, is conscription. Suppose that all citizens between the ages of 18 and 40 in a particular country may be conscripted on a random basis. Such a policy may, I believe, be just in some circumstances. I'll say more about why in a moment. My point here is that, assuming that this is just, it implies that all citizens between these ages are, both morally and legally, liable to be conscripted. Again, this has not because in turning 18 we forfeit our right not to be conscripted, in virtue of our responsible agency or in any other way. These examples imply that, both in morality and in law, the idea of liability is not as tightly connected either to responsibility, or to the forfeit of rights, as McMahan believes.

II. Enforceable Duties and Liability

What underpins these instances of liability? Here is a suggestion. When a person is liable to be harmed, in harming them we do not infringe a right that a person has. That may be because they have lost a right, or it may be because they never had the right in the first place. We lack a right to pay less than 50% on earnings over £150000 in the UK. Citizens between 18 and 40 lack a right not to be conscripted in the country in the earlier second example.

The most important way in which we can lack a right not to be harmed for the sake of some goal, I suggest, is if we have an enforceable duty to bear that harm for the sake of the goal. It makes little sense to say that I have an enforceable duty to bear a harm, and yet that I have a right not to be harmed. This implies that if my duty to bear harm is enforceable, others (perhaps not all others) may harm me without infringing my rights, and hence I am liable to be harmed.

In the cases considered above, the person who earns more than £150000 has a duty to pay 50% of her earnings in income tax. As she has an enforceable duty to pay, it is wrong to say that requiring her to pay 50% of her earnings infringes her rights. She is thus liable to pay 50%. The conscription case is slightly more complicated. A person is liable to be conscripted if she is selected through a fair procedure. If she is

so selected, she has an enforceable duty to serve, and hence she is liable to be conscripted. An 18 year old, in this case, is liable to be conscripted because she has a duty to serve if conscripted through a fair procedure. In both cases, because we cannot have both an enforceable duty to bear some burden and a right not to bear that burden, we lack a right not to bear the burden. And lacking the right not to be forced to bear the burden, we are liable to be made to bear it.

As McMahan notes, liability to suffer harm need not imply that the person can be harmed for any reason. Liability is normally more restricted than that. I may be liable to be harmed to some degree for some purposes but not for others. One way to understand why this might be so is that a person can have an enforceable duty to bear harm for some purposes but not for others. In the case of taxation, the person is liable to pay taxes only to serve some purposes and not others. The fact that a person is liable to pay 50% of her earnings through tax does not imply that *anyone* can take 50% of her earnings away as long as this does more good than harm. And it does not imply that these earnings can be taken away to pursue any purpose. A person may not be (morally) liable to pay 50% of her earnings through tax to support an unjust war, for example.

i) *Liability and the Duty to Rescue*

If I am right that a person is liable to be harmed for some goal if she has an enforceable duty to bear that harm for that goal, we already have some reason to doubt the responsibility view of liability. We may doubt it because even though it is true that responsibility is an important source of our enforceable duties, it is not the only source of such duties. Not all of our enforceable duties to avert a threat derive from our responsibility for the threat.

Consider a simple duty to rescue case:

Pond Rescue. A child is drowning in a pond. I am the only person who can rescue the child, who will otherwise die.

Whether I have a duty to rescue the child depends on the costs that I would incur were I to do so. People differ about the degree of cost that would vitiate the duty. Most people believe that if saving the child would cost me my life I need not save the child. If saving the child would only cost me my shirt I must save the child. But what if saving the child will cost me my little toe, or my finger, or my foot, or my leg, or all of my limbs? I'm not sure how much cost I must bear. Let us stipulate that I must save the child if it will cost me only my finger but I need not do so if it will cost me my foot.

It is controversial whether the duty to rescue is enforceable.⁴ I believe that it is. Suppose that I love my finger and care not about the child. It is permissible for you to threaten me. Suppose that I ignore your threats. However, the child could be rescued by throwing me into the pond. If you do this, the child will be able to clamber

⁴ Some think that such duties are enforceable only in virtue of state membership and not in the state of nature. This may have been Kant's view. See A Ripstein *Force and Freedom: Kant's Legal and Political Philosophy* (Cambridge, Mass.: Harvard UP, 2009).

to safety. I will lose a finger.⁵ In this case, I am harmed as a means to rescue the child. I believe that this is also permissible. As I have an enforceable duty to rescue the child, I have no right not to suffer this harm for the sake of the child, and hence I am liable to be harmed to rescue the child.

*ii) Liability Without Choice*⁶

McMahan may argue that, in this case, I make myself liable to be harmed to rescue the child by refusing to bear the harm myself for the sake of the child. I believe that we should say, rather, that I am liable to suffer the harm in virtue of my enforceable duty before I refuse to rescue the child. Let's see why this is the preferable view by exploring some variations on the case just considered.

Suppose that I am temporarily paralysed from the neck down, and the only way that the child will be rescued is by pushing me into the water. I can't rescue the child on my own. I need your help. You are able to do this. If you help me I will lose my finger, but will otherwise be unharmed. I have a duty to authorise you to push me into the water. In this case, like in the last case, it is permissible for you to push me into the water even if I don't authorize you to do so. And again, it might be argued, this is because I have forfeited my right not to be harmed to save the child by refusing to authorize you to push me in.

Some may argue that it is wrong for you to push me into the water in this case. Whilst you can compel me to rescue the child, or compel my body to rescue the child, you cannot compel me to authorize you to do anything. If authorization is required for it to be permissible for you to use my body you cannot use my body without authorization.

We might be misled here by the typical role that authorization has. Normally, authorization is required to make it permissible for one person to interfere with the interests of another person. For example, it might be permissible to perform an operation on me that will improve my health only if I authorize that to be done. In this case, though, authorization has a different role. In authorizing you to push my body I retain a degree of control over what happens to my body; the control that I would have were I not temporarily paralyzed from the neck down. I should prefer that my body be pushed into the pond with my authorization rather than without. For in that way I do my duty (albeit with your help) to rescue the child. This is just the same judgement that we make about *Pond Rescue*. It is better to rescue the child of my own free will than do be coerced into doing so.

But whilst it is preferable that you get my authorization to push me into the pond, my authorization is not plausibly required. *Seeking* my authorization is required. It not required because it is wrong to interfere with my interests without my consent. It is required because I should prefer to do my duty of my own free will rather than being forced to do it. If I don't do my duty of my own free will, though, it remains my duty. And as a life is at stake, that duty is surely enforceable. So if I am

⁵ Given that I have violated my duty to rescue the child, it may even be permissible for you to harm me to a greater degree than the loss of a finger if that is necessary. This could be justified on the grounds that I had an adequate opportunity to avoid being harmed – by doing my duty and rescuing the child. I will not consider this complication here.

⁶ In this section I draw on discussion in *The Ends of Harm: the Moral Foundations of Criminal Law* (Oxford: OUP, 2011) chs.6 and 11.

unwilling to authorize you to use my body to rescue the child you may use my body without my authorization.

Now consider a further variation. Suppose that rather than being paralyzed from the neck down I am unconscious. You cannot wake me up. The only way for you to rescue the child is to push me into the water. My face will be above water so I will survive. Again, the child will be able to clamber to safety but I will lose my finger. I believe that it is permissible for you to push me into the water.

We might distinguish this case from the previous case on the following grounds. In the previous case, were I not to authorize you to push me into the pond I would violate my duty to save the child of my own free will. I have an obligation to authorize you to push me into the pond and if I cannot do that you can force me to do what I was required to do. In this case, in contrast, there is no question of my doing anything wrong. Assume that 'ought' implies 'can'. It may be argued that it follows from this idea that I can do neither right nor wrong whilst unconscious. As there is nothing I can do whilst unconscious, there is nothing I ought to do.

It is not obvious that we lack duties whilst unconscious. Suppose that I set a threat in motion. I have a duty to avert the threat. Suppose now that I fall unconscious for a short while before the threat is realized. We may think that I retain the duty to avert the threat whilst unconscious. If that is true, the fact that I can't avert the threat *now* seems not to imply that I lack the duty to do so – the duty persists even whilst I cannot perform it.

This is controversial. So let's assume that I can have no duties whilst unconscious. Nevertheless, I believe that it is permissible to harm the person who is unconscious for the sake of a greater good to the same degree that they would have a duty to authorize us to do so in pursuit of that good were they able to do so.

The first thing to note is that it is certainly permissible to use an unconscious person's body as a means to *some* degree in *some* cases to avert a greater threat. Suppose that my child and I are in a car accident. We are both unconscious. If nothing is done I will make a full recovery but my child will die. The child can be saved but only by operating on me in a way that will cause me minor discomfort for a few hours when I wake up. It is obviously permissible to operate on me – but why?

One familiar way to resolve the question of what to do to, or with, a person's body where that person is unconscious is to consider what she would consent to were she able to do so. For example, in deciding whether to perform an operation on a person who is unconscious we ask what the person would want were they conscious. It may be wrong to perform a blood transfusion on an unconscious Jehovah's Witness even if it would enhance her well-being to do so.⁷

On this account, it is permissible to operate on me to save my child because I would consent to the operation were I able to. Where we are unable to determine whether a person consents to be harmed for the good, we use hypothetical consent. Hypothetical consent is usually used in circumstances where it is the interests of the unconscious person alone that are at stake. In considering a proposal to affect an unconscious person in a way that promotes one of her interests but sets back another we use hypothetical consent to determine what to do.

There are competing accounts why this should be so. Perhaps hypothetical consent is simply a way of determining what is most in her interests. Or perhaps it is the best way of respecting her autonomy. If the latter is true, we may sometimes

⁷ Perhaps even this judgement is not absolute: perhaps it is not wrong to do so if it will save her life.

decide to promote the less significant interest at the expense of the more significant interest on the grounds that this is what the person herself would choose.

Whatever the right view, though, there are some limits about the role that hypothetical consent can play in determining what can be done to (or with) a person's body when she is unconscious regardless of what she would consent to. I suspect that one kind of limit is that we cannot use the idea of hypothetical consent to impose a weighty burden on a person that she would have no duty to bear were she conscious. Imagine that using my body as a means could save the child of a stranger and this is the only way for the child to be saved. But using my body in this way would lead me to lose my foot. Suppose that I often go beyond the call of duty. Were I conscious, you conclude, I would save the child at the cost of my foot even though I am not required to do so. Would it then be permissible for you to use my body as a means to save the child? I'm not sure but I doubt it. As far as supererogatory acts go, actual authorization may be required. Hypothetical consent is insufficient.

Secondly, the fact that a person would consent for her body to be used wrongfully to harm another obviously does nothing to permit us to use her body in that way. For example, suppose that you wish to kill Harry. You could do so by hurling my unconscious body at Harry. Obviously, it is wrong to use me to kill Harry in this way, and the fact that I would consent to being used in that way makes no difference to its permissibility. Harming me, in this case, not only wrongs Harry, it wrongs me as well.

I also think that if a person *would not* consent to the use of their body to do something that they are required to do that does not make it wrong to use their body for that purpose. Suppose that I wouldn't authorize you to use my body to save the child at a cost of my finger were I able to do so. Does that prevent you from using my body as a means to save the child? I think not. The fact that, were I able to, I would violate an enforceable duty by refusing to authorize you to use my body cannot compel you not to use my body.

To see this, recall that in the variation where I am paralyzed, actual consent was not required to make the use of my body permissible. There is good reason to seek consent, so that the person has the opportunity to do her duty of her own free will. But where consent cannot be secured, the person may permissibly be used as a means. In this case, neither actual nor hypothetical consent can be secured for the use of my body. But if actual non-consent is insufficient to render the use of my body wrong, it is difficult to believe that hypothetical non-consent can make all the difference.

Of course, it is *better* if we act in a way that the person would hypothetically consent to, for in that way the use of the person's body is in conformity with what she would will. But in the absence of hypothetical consent, my body may nevertheless be used as a means to save the child. In other words, where a person is unconscious and hence incapable of authorizing us to use her body as a means to a good it is permissible to use her as a means to the extent that duty would require of her were she able to consent and no more.

We should conclude that the inability to authorize use of our bodies makes little difference to the permission to harm a person as a means. If a person would have a duty to allow her body to be used for some good end were she able to consent to its use, we are permitted to use her body as a means to that end regardless of whether she would consent were she able. If a person has no duty to allow her body to be used for some good end were she able to consent to its use, it would be wrong to use her body as a means to that end regardless of the fact that she would consent were she able.

Hence, the permissibility of using a person as a means does not depend on whether she is conscious.

If that is true, we should also conclude that a person is liable to be harmed to the extent of a loss of a finger in order to rescue a child who suffers from a lethal threat if imposing this cost is necessary to save the child. That is true whether or not the person is conscious. Clearly, an unconscious person who is in no way involved in creating the threat to the child cannot have forfeited her right not to be harmed to avert the threat. She simply *has* no right not to be harmed for the sake of the child. And that is because she would have a duty to rescue the child at this cost to herself were she able to do so. Her liability to be harmed is similar to a person's liability to pay tax.

Now, it might be argued that in the tax case, the person's liability to pay tax depends on her duty to pay the tax. In this case, in contrast, the unconscious person has no duty to rescue the child, for there is nothing that she can do. But the fact that a person who earns over £150000 is liable to pay 50% of her income in tax implies that she has no right to the money that she is required to pay. And it is permissible to extract the money from her if she is unable to pay herself, say because she has fallen into a coma. Similarly, in this case the duty that I would have to rescue the child at the loss of a finger renders me liable to the loss of the finger for the sake of the child, and that grounds the permission to use my body to rescue the child at the loss of a finger if I am unconscious.

III. Liability to be Killed

Whilst this argument reveals a deficiency in McMahan's general account of liability, he might argue that his responsibility account is a complete account of a person's liability to be killed. This, I believe, is also false. A person is sometimes liable to be killed to avert a threat that the person is not responsible for creating. And she may sometimes be liable to be killed even where she is not responsible for *any* threat.

Here are three kinds of case that demonstrate this. The first involves a threat to a very large number. Suppose that I am the only person who can save the rest of the human race from being killed but I can only do so at the cost of my life. In that case I believe that I have a duty to give up my life to save the rest of the human race. And if I am unwilling I am liable to be harmed as a means to save the rest of the human race.

A second kind of case involves the fair selection of a person to be killed where killing is a necessity. Suppose that a man-eating tiger is chasing five people. The tiger will kill them all if they stay together. Four of them will survive if one stops to fight the tiger. That person will certainly be killed but the tiger will be delayed and the remaining four will be able to escape. Now imagine that they quickly but fairly draw lots and Bertha is selected. In that case Bertha is liable to be killed. After lots have been drawn she has a duty to stop and fight the tiger, even though she will be harmed as a means to save the other four. And if she fails to do that the others may throw her to the tiger if that provides an alternative means by which they can escape. Again, this case shows that a person's duty to be killed, and hence her liability to be killed, can arise in the absence either of responsibility for a threat or of any choice to avert the threat.

It is worth emphasising that this result probably does not depend on Bertha's consenting to the process by which she was selected. Here are four considerations that

might be thought important in vindicating this conclusion. Firstly, she is no worse off than she would have been had no one been selected to be harmed as a means to save the others. Secondly, she has a stringent duty to save the lives of the four if she can do so at little cost. Thirdly, she has been selected fairly from the group. Fourthly, were she permitted to exclude herself from the fair system of selection she would inevitably benefit from the procedure agreed to by the others without bearing any cost.

It is worth emphasising the second condition here. It is sometimes objected to 'free-rider' accounts of political obligation that it is wrong to compel a person to contribute to a co-operative scheme simply because she will inevitably benefit from that scheme. But the fact that a person is a beneficiary of a scheme can make a difference to the costs we regard the person as bearing if she is compelled to contribute to the scheme. Suppose that I have an enforceable duty to promote the good of others if I can do so at minimal costs to myself. It may be permissible to coerce me to enter a co-operative scheme that interferes with my interests in some way if the scheme also benefits me. The fact that the scheme benefits me may help to offset the interference with my interests sufficiently to render the duty to co-operate enforceable.

This kind of reasoning, I believe, underpins the permissibility of conscription. When a soldier is conscripted she is forced to act as a means to protect the rest of us from harm. In some conditions this is permissible on the same kind of reasoning that we find in Bertha's case. If we lack an army we may all be killed. If conscription is used in that case, no person is worse off than she would have been had there been no conscription. When we force a conscript to defend us, we should compare the costs that she now bears with the costs that she would bear were there no system of conscription. If she would have been killed were it not for conscription, and there is no fairer method of selecting whom to defend us than conscription, she has a duty to serve if she is selected. Of course, where sufficient numbers consent to serve, conscription may be wrong. But if conscription makes us all at least as well off as we would be without it, it is not wrong to conscript soldiers.

Of course, it may well be unlikely that this condition is often satisfied. It is rare that the very soldiers conscripted will face certain death if there is no army to defend a territory. Perhaps conscription is also justified when each person is better off with respect to the risk of harm or death that they face *ex ante*. This is more controversial, though. Whether or not conscription is permissible in this case, it is clearly permissible under the strict conditions specified in the previous paragraph.

A third case involves circumstances in which a person has an enforceable duty to form and execute an agreement to be killed to avert a threat created by another person. Consider

Double Hit Man 2. Evelyn hires a hit man to kill Wayne. Fred also hires a hit man to kill Wayne. Both hit men arrive at the same time. Because of where they are standing, Wayne can only use Fred as a shield against Evelyn's hit man and Evelyn as a shield against Fred's hit man. He manages to do that, resulting in the deaths of Evelyn and Fred.

If a person were liable to be killed only to avert a threat that she is responsible for creating, it would be wrong for Wayne to use Evelyn and Fred to avert the threats that he faces. For each would be used as a shield to avert a threat created by the other. This is hard to believe.

Here is an argument why it is permissible for Wayne to save his life by using both Evelyn and Fred as shields. Evelyn and Fred have a duty to prevent Wayne being killed. If Evelyn cannot do that herself she has a duty to try to get someone else to do it for her. And the same thing goes for Fred. They could avert the threats that they have created by forming and executing an agreement to avert the threats that Wayne faces. As executing such an agreement would ensure that the threat that each is responsible for is averted, they have an obligation to do this. And if they do not do this, Wayne can do to them what they have an obligation to do. He can, therefore, use the two as shields to avert the threats that he faces even though, in doing this, he would harm each of them as a means to avert a threat that they are not responsible for.⁸

These three cases help to demonstrate that we should reject the responsibility view of the liability to be killed. Responsibility for a threat is undoubtedly important in setting a person's liability to be killed to avert the threat. But it is not the only way in which a duty to avert a threat at the cost of one's own life can arise.

IV. Collective Liability

I now want tentatively to explore an issue in the morality of war that this account may help to illuminate: the liability of civilians on the unjust side of a war. One familiar approach to this question involves partiality. Some argue that we have associative duties to our own citizens that can ground more powerful obligations to our own citizens than we have to citizens of other countries. If true, this may have implications for a range of questions in just war theory. For example, it may mean that in determining whether going to war is proportionate, as well as the proportionality of particular acts of war, a state permissibly weighs more heavily side-effect harms to its own civilians than the civilians of other countries.

This idea may be thought also to imply that those on the *unjust* side of a war have a permission to harm civilians on the just side of the war to defend their own civilians. On this view, the duty that citizens have to protect each other, which is more profound than the duty of protection that humans owe to each other simply in virtue of the fact of being human, can render contribution to the unjust cause permissible.⁹

That this last idea is false is a central claim of *Killing in War*, a claim that I also endorse. The fact that I have an associative duty towards you cannot render it permissible for me to contribute to your wrongful action in order that I save you from the consequences that your action would otherwise have. And it cannot permit me to contribute to your unjust action in order to protect others to whom I have an associative duty.

Consider the following case:

Paranoid Dad. I live with my Dad. He is paranoid about the neighbours. He thinks they are stockpiling weapons. One day, he goes to their house with his

⁸ See, further, V Tadros *The Ends of Harm: The Moral Foundations of Criminal Law* (Oxford: OUP, 2011), ch.8. In that book I discuss another case, *Double Hit Man*. I retain the label *Double Hit Man 2* here for the sake of continuity.

⁹ More plausible is the view that partiality can help to ground excuses. For discussion, see S Lazar 'The Responsibility Dilemma for *Killing in War: A Review Essay*' (2010) 38 *Philosophy and Public Affairs* 180, 197-8.

shotgun to kill them. They see him coming and are about to shoot him in self-defence. If they do not do this, he will kill them.

It would be wrong, in this case, for me to kill the neighbours to prevent them from killing Dad. It would also be wrong for me to help Dad. If anything, I must help the neighbours by preventing Dad from killing them. This is so, I believe, even if his being killed will seriously disadvantage me. It would be wrong for me to participate in an unjust killing in order to preserve my life. And it would be wrong for me to participate in it to preserve the lives of my brothers and sisters, who might become destitute if Dad is killed.¹⁰

I now want to consider a different, but related, question – ought we to prioritize the lives of civilians of the just side in a war over civilians of the unjust side? If so, this might help to explain the impression that partiality to one's own civilians is permitted. After all, many people will *think* that their side is the just side in a war, and so will think that partiality to one's own side corresponds with partiality to the just side.

One way to address this is to ask whether the state on the just side of the war is permitted to protect a certain number of its own innocent civilian citizens from death by killing, as a side-effect, the same number of innocent civilian citizens on the unjust side. Suppose, for example, that troops on the unjust side of the war pose a threat to one hundred innocent civilians on the just side. The troops on the unjust side may permissibly be killed to avert the threat. Now suppose that killing these troops will necessarily result in the deaths of one hundred innocent civilians on the unjust side as a side-effect, say because killing the troops will destroy the water supply which is necessary for their survival. Many people will believe that it is permissible to do this.

But if the civilians on the unjust side are not responsible for the war, how can this be the case? McMahan believes that collective liability may be possible, but only for members of the collective who joined voluntarily.¹¹ I wish to explore the possibility that voluntariness is not required: innocent civilians on the unjust side typically have a duty to avert the unjust threat that the innocent civilians on the just side lack simply through their causal contribution to the threat. In other words, citizens of a state may not be collectively *responsible* for an unjust threat, but they may nevertheless be collectively *liable* for averting it.

In this kind of case, we wish to avert a threat to one group, but in averting the threat we will harm another group of the same size to the same degree as a side-effect. Normally, it is wrong to do this. Consider:

Boulder. A boulder is about to fall on my head. If I do nothing I will be crushed. I have only one possibility of saving my life: I could divert the boulder off its track. But if I do that the boulder will kill you.

Some people believe that it is permissible for me to divert the boulder toward you. I am permitted, they think, to act on agent-relative considerations to prefer my own life to yours.¹² I disagree. The fact that I have particular preferences or duties that others do not share makes a greater difference in determining whether a person has a duty to

¹⁰ I first developed this case in response to a paper by Cheyney Ryan, to whom I owe thanks for discussion of it.

¹¹ *KIW* 209-10.

¹² See, for example, J Quong 'Killing in Self-Defence' (2009) 119 *Ethics* 507.

rescue than it does in determining whether it is permissible to harm others. This, I believe, vindicates the intuitive view that it is wrong to divert the threat in *Boulder*. We can call this ‘the priority of the status quo’. Other things equal, if we are to pose a threat to another person we must show that doing so does more good than harm. As that is not true in *Boulder* we should leave things as they are.¹³

Why, then, is the just state permitted to prefer the lives of its own citizens to the lives of the innocent civilians of the unjust state in the context of war? The answer, I believe, is that innocent civilians bear a greater duty to avert the threat that their state poses than the innocent civilians of the state that is attacked. The reason for this is that innocent civilians on the unjust side, at least adults who have contributed to society, have typically made a significant contribution to the existence and magnitude of the unjust threat. How do they make such a contribution? They do so simply by participating in the activities of the unjust state. Citizens act collectively to promote the wealth of their state, which is necessary to its state’s military might. The contribution that innocent civilians make to the military might of the state over the course of their lives is typically significant.

McMahan claims that the liability of the civilians on the unjust side to be harmed to avert the threat that the unjust side poses depends on the degree of their responsibility for the threat.¹⁴ If they have no reason to believe that their state will pose an unjust threat to others, they are not liable to be harmed to avert the threat. But this depends on the idea that the duties that we incur come into existence only through our responsible agency. I have already shown that to be false. There are other ways in which we can come to have duties.

One way that this may be so is simply by causally contributing to a threat. Consider the following example. I have been giving money to a charity for the past twenty years. Although I had no reason to suspect it, it turns out that the charity is a front for a criminal organization. The criminal organization has a plot to kill innocent civilians. In this kind of case, I believe, I have a more powerful duty to prevent the killing than a person who has not contributed to the bogus charity. The mere fact that I have made a contribution to the existence of the threat can ground some duty on my part to avert the threat. Although I lack responsibility for creation of the threat, I am involved in it in a way that others are not. Of course, I don’t have a duty to *give up my life* to avert the threat that the organization poses. My duty is much less extensive than that. I only claim that my duty is more stringent than that of a person who has contributed in no way to the threat.

But even if this judgement is false, there is a further claim that might be made about citizens of the unjust state. Not only do they causally contribute to the threat that the state poses, they typically benefit from the state that poses the threat. Imagine that I have done paid work for twenty years for the bogus charity, not having any reason to suspect that it is a front for the criminal organization. In that case, not only have I contributed to the existence of the threat, I have also benefited from the activity. In this case I may have an even more powerful obligation to ameliorate the threat that I have both contributed to and benefited from creating than the person who is not involved at all.

In other contexts, it is intuitive that these two facts are sufficient to generate more stringent duties to avert a threat. For example, many people believe that those countries that have benefited from their contribution to global warming, even if the

¹³ See, further, *The Ends of Harm* chs.9 and 11

¹⁴ He develops this idea in *KIW* ch.5.

contribution that they have made was at a time before we knew that global warming posed a threat, must bear a greater contribution to avert the threat of global warming than those that have made a lesser contribution and benefited less.

A similar idea might justify imposing economic sanctions on citizens of a country that commits human rights violations even if those citizens lack responsibility for those violations. Citizens that causally contribute to the might of the unjust state and benefit from it have a duty to prevent the wrongful actions of the state, and in virtue of that duty they are liable to be harmed to some degree as a means of altering its policies. We can say the same thing about the distribution of the burdens of reparations amongst citizens of a state following an unjust war.

How might this contribute to the permissibility of killing in war? It may alter the permissibility of killing citizens of an unjust state as a side-effect. Consider the following example:

Remote Control Plane. For many years, I have been working on a remote control plane for the government at great benefit to myself. I build the plane out of a high-density material called Zoolon. I have no reason to believe that Zoolon will interfere with the remote control. The plane is flying overhead and it goes out of control – Zoolon has interfered with the control due to some unavailable fact of chemistry. The plane is heading towards you and if you do nothing it will kill you. You can divert it with a shield, but if you do so it will fly into me and kill me.

In contrast with *Boulder*, I believe that it would be permissible for you to divert the plane towards me. Although I have no reason to believe that the plane poses a threat to others, I have causally contributed to the threat and I have benefited from that causal contribution. I now have a duty to avert the threat.

I have already indicated that these cases do not generate a liability to be killed to avert the threat. And we can see that there is no such liability from the fact that I need not jump in front of you to protect you from the plane, nor to divert the plane towards me. It follows that it would be wrong for you to pull me in front of you to use me as a shield to protect yourself from the plane. But the more minimal duty that I bear *can* make a difference to the permissibility of now diverting the plane away from yourself causing me to be harmed as a side effect. The fact that I am liable to be harmed to a greater degree than you to avert the threat can defeat the priority of the status quo that we established when considering *Boulder*.

For this reason, civilian casualties on the just side of the war may count more heavily in determining whether an act of war is proportionate than civilian casualties on the unjust side, even if the civilians on the unjust side are no more than causally responsible for contributing to an unjust threat. We should not say, as McMahan does, that the civilians are liable to be harmed as a side-effect.¹⁵ Rather we should say that the fact that they have duties does affect the permissibility of harming them as a side-effect beyond the harms they are liable to suffer.

Let me spell this out a bit more elaborately. Citizens have enforceable duties to avert the threats that result from the unjust war that their state perpetrates. They have these duties as a result of causally contributing to the threats and benefiting from the activities that give rise to the threats. These duties must be carried out even if citizens of the state must bear some cost to themselves. Although it is not plausible

¹⁵ *KIW* 219-20.

that they have a duty to avert these threats at the cost of their lives, they do have a duty to bear a greater cost than citizens of a neighbouring state that plays no role in the unjust war. Because these citizens need not act to avert the threats posed by the unjust state at the cost of their lives, it would be wrong to harm them as a means to avert these threats. A consequence is that they cannot be killed in order to terrorize other citizens even if this would be instrumental to preventing the unjust war from continuing.

However, the existence of the duties that they have does make a difference to proportionality judgements when they are harmed as a side-effect. One crude way to think about it is that the costs that these civilians have a duty to bear can be discounted when making proportionality judgements as a side-effect.¹⁶ There is a kind of collective responsibility on the unjust side, where each citizen can be expected to bear some of the costs of the war even if they are not morally responsible for war. And that has implications for the proportionality of killing civilians on the unjust side.

This, I believe, is the intuitive view. The fact that I am a civilian of a country that participates in an unjust war can create obligations on me that those in other countries lack regardless of direct responsibility for the war. The fact that I contribute to my state and benefit from it in return can ground a duty to correct some of its actions even if I lack responsibility for the conflict. And this can affect the permissibility of harming me.

Because it does not depend on responsibility, this conclusion applies equally to democratic and non-democratic states. Some people believe that citizens of democratic states, but not undemocratic states, are liable for the unjust wars that their states prosecute – what is sometimes known as the ‘bin Laden argument.’ But democracy, I believe, is not necessary to ground the liability of citizens of the unjust state. In contrast to bin Laden, I don’t believe that this liability (either of civilians of the democratic state or the undemocratic state) is sufficiently grave to make it permissible to kill civilians as a means to advance one’s cause. There are special constraints on harming others as a means.¹⁷ Civilians would be liable to be killed as a means to secure an end only if, through participation in the state, they incur a duty to pursue that end at the cost of their own lives. This is an implausibly stringent demand to make of almost any civilian of a state in an unjust war.¹⁸ Killing civilians of a country that poses an unjust threat through a terrorist attack uses those civilians as a means, and, in all but the most rare cases, is prohibited.

Matters are different when we consider harming civilians as a side-effect, or eliminating a threat that a person poses, typically as a soldier. In these cases civilians and soldiers are not harmed as a means in the morally significant sense that they are not used in the service of some end in a way that harms them. Harming them in these

¹⁶ For a similar analysis of the permissibility of harming non-responsible threats, see V Tadros *The Ends of Harm* (Oxford: OUP, 2011) ch.11.

¹⁷ McMahan considers bin Laden’s argument in *KIW* at 232-4. The distinction between manipulative and eliminative agency that I refer to below is, I believe, crucial to help McMahan avoid implausible implications for the liability of civilians – a challenge developed in S Lazar ‘The Responsibility Dilemma for *Killing in War: A Review Essay*’. He briefly considers the distinction at 170-3 and 226-7.

¹⁸ Perhaps if the responsibility is causally significant and the citizen is culpable, as in the example of executives of the United Fruit Company, who pressurized the US government into engaging in an unjust war in Guatemala (outlined in *KIW* 214), it may be permissible to kill the civilian as a means. See *KIW* 221-2.

ways may be permissible absent any duty that they would have to harm themselves to the same degree for the same purposes. But the less stringent duties that civilians bear in virtue of the contribution to and benefit from the state that poses the unjust threat is sufficient to make a difference to the permissibility of killing those civilians as a side-effect, and may make it permissible to favour citizens on the just side of the war.

These civilians, I should reiterate, are not liable to be killed. If I am right that liability goes with duty, we should not say that they are liable to be killed in any way, not intentionally as a means, nor eliminatively, or as a side-effect. It may be permissible to kill them in eliminatively or as a side effect, and their lesser liability may make a difference to the permissibility of killing them. But killing them nevertheless infringes their rights.

This conclusion has important implications. Were it true that the civilians of a country are liable to be killed to achieve a certain goal, we would expect it to be permissible to kill *any number* of those civilians for the sake of that goal. If one thousand culpable attackers attack me, for example, I may kill all of them to save my life. But surely it would be wrong to kill one thousand civilians as a side-effect to save a single life. The idea that they are not liable to be killed as a side effect can help us to see why this is the right conclusion to draw. Because these civilians are not liable to be killed, their lives still count in determining the number of lives that may be taken to save a single life. The fact that they are liable to be harmed in *some way* may make a difference to whether killing those civilians is proportionate. But their lives are nevertheless infringed if they are killed, and if the number that will need to be killed as a side effect for the sake of some goal is great enough it may be wrong to kill them.

Conclusion

Responsibility is undoubtedly a significant source of one's liabilities. That, I suggest, is because responsibility for something can ground duties with respect to that thing, and duties lie at the heart of liability. *Killing in War* provides a compelling account of the significance of responsibility to liability and its implications.

But I doubt that all duties arise through an exercise of responsible agency, and for this reason I suspect that *Killing in War* also provides an incomplete account of liability. Exploring other sources of the duties that we have encourages us to expand the range of circumstances in which a person's liability to be harmed, or even to be killed, can arise. These other sources of duties will have a broad range of implications for conduct during war. Sometimes I may be liable to be harmed, or even killed, even though I had no choice in the matter whatsoever.