

The Moral Equality of Combatants*

Christian Barry (ANU) and Lars Christie (Oslo)

(pre-proof draft)

The doctrine of the moral equality of combatants—we'll refer to it throughout this chapter as Equality—holds that combatants on either side of a war have equal moral status so long as they abide by certain norms governing how wars must be fought. Proponents of Equality distinguish sharply between the issue of whether the resort to war is justified and the issue of who may permissibly kill in war. There are constraints on what soldiers may do in war—they can become guilty of criminal offenses when they use unjust means in pursuing their war aims. However, that they are involved in an unjust war and even that they are fighting for an unjust cause is, as Walzer puts it, 'the king's business—a matter of state policy, not of individual volition'.¹ Their participation in the war is not something for which they can be held to account morally. The debates about Equality are closely related to other hotly contested issues, such as whether combatants on either side should have the same legal protections, and whether and how the moral distinction between combatants and non-combatants is justified.² In this chapter, we will set aside those debates to focus squarely on the moral justifications that can be offered for Equality, as well as the critiques of those justifications.

1. A Puzzle about Killing

Common morality affirms stringent constraints against intentional killing. Since killing occurs routinely during war—which we stipulatively define as armed conflict involving political communities—justifying war is notoriously difficult. At the same time, however,

* Many thanks to Seth Lazar for comments on an earlier draft of this chapter.

¹ Michael Walzer, *Just And Unjust Wars: A Moral Argument With Historical Illustrations*, 2nd edn (New York: Basic Books, 2000), 39.

² For an illuminating discussion of these connections, see Seth Lazar, 'The Responsibility Dilemma for Killing in War: A Review Essay,' *Philosophy & Public Affairs* 38 (2010): 180–213.

the killing that occurs in wars tends to be morally and legally assessed differently from that which occurs in non-war contexts. People who fight and kill in wars that (seem) manifestly (to) lack a just cause, or which are either disproportionate or unnecessary (we will refer to such people as unjust combatants), are not commonly regarded in the same manner as those who kill in non-war contexts without justification. Indeed, so long as unjust combatants abide by the constraints of *jus in bello*—justice in the fighting of war—they are not held legally accountable for the killing that they do and are not typically singled out for moral censure. At the same time, a just combatant fighting for a manifestly just cause (say national self-defense or humanitarian intervention) is provided no legal protection for her right to life, even if the war and means employed are proportionate. The value of just combatants' lives in war seems radically discounted compared to the lives of non-combatants—and indeed the universal value that we ordinarily attribute to human life.

In non-war contexts, there are extremely strict legal and moral constraints on killing. The notion of a moral equality of parties to a violent conflict in peacetime—between, say, an armed assailant and her victim or between a police officer and an armed criminal—is morally absurd and would have no place in any sane legal system. What then can explain the differential treatment of lethal conflicts in war and non-war contexts? Can such differential treatment by law and morality be justified?

2. Collectivist Approaches to Moral Equality

To defend the claim that there is moral discontinuity between killing in war and killing in non-war contexts, one needs to explain why there is such a discontinuity and what it consists in. One way of doing so argues that what makes killing in war special is that it is essentially collective. According to this collectivist line of argument, the difference between the use of violence in relatively peaceful domestic settings and in war lies not in the plain facts that stakes are higher in war or that a greater number of people are involved. Rather, the difference is that war involves violence employed on behalf of a collective, not on behalf of individuals. On this view a person's moral status, especially his rights and liabilities, can be affected by his membership in a collective, irrespective of his behavior. The idea is that individuals possess moral rights and privileges qua members of a collective that exceed those they possess considered as individuals. As we shall see, the collectivist position can be used to argue both for and against Equality. We'll begin by exploring collectivist arguments that seek to vindicate this doctrine.

a. Collectivist defenses of moral equality

The most influential modern collectivist defense of Equality can be found in Michael Walzer's work, and especially his *Just and Unjust Wars*.³ Walzer's premise is that all people begin with immunity against being deliberately attacked—a right against others that these others not attack them.⁴ Soldiers lose their immunity to attack because they have allowed themselves to be conscripted and thereby 'made dangerous'. War, according to Walzer, is 'a coercively collectivizing enterprise.... it overrides individuality, and it makes the kind of attention that we would like to pay to each person's moral standing impossible'.⁵

The doctrine of the moral equality of combatants, as presented by Walzer, is based on a conception of combatants as both responsible moral agents and innocent victims. They are innocent in that they have *been made* dangerous by their king or state. Consequently they cannot be blamed morally or held legally accountable for the harm they inflict on enemy combatants in war. If combatants were entirely innocent, however, it would be hard to see how they could lose their immunity to lethal harm. Even in cases of conscription, combatants have in some sense consented to become combatants and thereby traded in their immunity for a license to harm and kill enemy combatants. So, by Walzer's lights, they are also responsible because they have *allowed* themselves to become dangerous: '[A combatant] has been made into a dangerous man, and though his options may have been few, it is nevertheless accurate to say that he has allowed himself to be made into a dangerous man.'⁶ Yet, while responsible for becoming 'a dangerous man', a combatant is not held responsible for the justness of the cause for which he fights. This, according to Walzer, is because he is fighting on behalf of a morally significant political collective. Since the combatant is not fighting in his capacity as a private individual, but as a representative of a collective, moral responsibility for the cause he fights for should not be attached to him.

On Walzer's view there is no difference between soldiers fighting for a just cause in a justified war and those fighting for an unjust cause in an unjustified one, since each

³ Walzer, *Just And Unjust Wars*. See also Michael Walzer, 'Terrorism and Just War' *Philosophia* 34 (2006): 3–12; Michael Walzer, 'Response to McMahan's Paper,' *Philosophia* 34 (2006): 43–45.

⁴ They also have a right against being attacked non-deliberately (as a side-effect), but this right can be overridden more easily.

⁵ Walzer, 'Response to McMahan's Paper,' 43.

⁶ Walzer, *Just and Unjust Wars*, 145.

imposes the risk of severe harm on the other. Just and unjust combatants are morally symmetrical: each has a 'license to kill' one another which, according to Walzer, is 'the first and most important of their war rights'.⁷ A combatant gains this privilege by trading in her immunity to lethal harm. As Walzer puts it: 'You can't kill unless you are prepared to die.'⁸

Combatants are morally liable to attack, according to Walzer, in the sense that their moral rights to life are not violated if they are attacked by other combatants who fight in accordance with the rules of *jus in bello*. It's worth noting that Walzer's account, like most defenses of Equality, employs the concepts of immunity and liability to defensive harm somewhat differently from the critics of Equality. On the most general level, both sides of the debate take liability to attack to entail a loss of immunity against attack. However, Walzer holds that liability to be attacked does not entail the loss of a right to self-defense against attack. Critics of Equality, whose views we discuss at length below, disagree. They insist that one cannot have the right to defend oneself against harm to which one is liable. Immunity against being attacked and rights of self-defense are granted or lost together. For Walzer, a combatants' right to inflict harm is a privilege and not a claim right. Privileges, unlike claim rights, are not morally protected from outside interference. Hence, possession of such a privilege does not morally prevent a combatant from trying to thwart their opponent's exercise of his (symmetrical) privilege. One of the distinctive aspects of Walzer's version of Equality, then, is that it makes it possible to perfectly fulfil the requirements of *jus in bello* even if one is fighting an unjust war with an unjust cause.

Christopher Kutz has developed a somewhat different collectivist defense of Equality. He thinks that a collective can grant its members permission to kill: 'When individuals' wills are linked together in politics, this affects the normative valence of what they do individually as part of that politics, even to the point of rendering impunible what would otherwise be criminal.'⁹ He argues:

⁷ Ibid. 36.

⁸ Michael Walzer, *Arguing About War* (New Haven & London: Yale University Press, 2004), 101. See also Walzer, *Just and Unjust Wars*, 136: 'Simply by fighting, whatever their private hopes and intentions, they [soldiers] have lost their title to life and liberty, and they have lost it even though, unlike aggressor states, they have committed no crime.'

⁹ Christopher Kutz, 'The Difference Uniforms Make: Collective Violence in Criminal Law and War,' *Philosophy & Public Affairs* 33 (2005): 148–180 at 156.

the logic of collective action can make appropriate a limited scope for an essentially political permission to do violence, because when I do violence, I do it as a member of one group towards another. The privilege to kill as part of a collective is not a moral permission attaching to the individual soldier.¹⁰

The privilege is derived from combatants' 'individual commitments to the collective: their mutual orientation around each other as fellow agents in a collective project'.¹¹

Kutz limits the privilege to groups who pursue political goals, which he defines as 'aiming at creating (or restoring) a new collective ordering',¹² so his version of Equality is less categorical. According to Kutz, these groups must possess a certain degree of internal ordering, as well as a certain degree of success in achieving their aims. He notes that combatants on the unjust side may be innocently mistaken about the moral status of the cause for which they fight, pointing out that facts may emerge during or after a war, which either strengthen or weaken the conviction that the cause for which the war was fought is just.

In sum, collectivists aim to absolve agents of individual moral responsibility for participation in war on the ground that they are fighting on behalf of a political community, rather than in their private capacity. They also typically stress that individual soldiers are subject to duress and epistemic limitations. Only the first argument is distinctly collectivist; the second appeals to circumstances that mitigate the individual moral responsibility of combatants and can—as we will see—also be invoked by those who defend Equality on individualist grounds.

b. Collectivist critics of moral equality

The central challenge for defenders of Equality is to show how combatants' moral status is unaffected by the cause for which they fight. The challenge for collectivist critics of Equality, such as Saba Bazargan and Noam Zohar, is to explain why it is permissible for just combatants to target unjust combatants even when they are failing to contribute to their side's war effort, or when they are morally innocent for their contributions. Bazargan and Zohar use collectivist premises to justify the conviction that all unjust

¹⁰ Ibid. 173.

¹¹ Ibid. 176.

¹² Ibid.

combatants are liable to attack—an intuitive conclusion that individualist critics of Equality may be unable to support (more on this below).

Zohar shares Walzer's starting point. Non-pacifists, according to him, must explain how a person can come to lose his immunity to being attacked. On his view, it cannot be permissible to kill morally innocent threatening people in individual self-defense as a matter of individual morality. For Zohar, then, the main challenge becomes this: 'But if even the [unjust] enemy *soldiers* are mostly innocent, can there be any justification for killing them?'¹³

Zohar attempts to provide a positive answer to this question by adopting a collective perspective. He writes: 'The reality of international confrontation is not adequately described by reduction to individualistic terms. We are not only individuals facing other individuals but also a nation confronting another nation.'¹⁴ Zohar thus drives a wedge between individual and collective self-defense.

For defensive war, as for private self-defense, the moral sanction relies on a crucial tipping of the scales. But whereas in self-defense this requires a minimal measure of individual guilt, in warfare the issue is and must be weighed on the great collective scale.¹⁵

Zohar argues on this basis that unjust soldiers who are morally innocent can be killed because they are part of a collective which is pursuing an unjust cause:

Only viewing it as a collective aggressor can sanction the very killing of combatants, despite the impossibility of determining their individual guilt or innocence, for in fact we cannot act against the enemy as a collective without killing particular persons.¹⁶

The fact that combatants use violence in the pursuit of a collective cause does not, on his view, provide combatants with any moral protection. Rather, it strips them of protection they would have possessed were they acting on their own behalf.

Saba Bazargan also employs a collectivist perspective to attribute liability to all unjust combatants, while exempting just combatants from liability. He rejects Equality; but argues that individualist accounts of killing in war cannot support the claim that all

¹³ Noam J. Zohar, 'Collective War and Individualistic Ethics: Against the Constriction of 'Self-Defense', *Political Theory* 21 (1993): 606–622 at 607.

¹⁴ Ibid. 616.

¹⁵ Ibid. 617.

¹⁶ Ibid. 616–617.

unjust combatants are liable. Bazargan's concern is not that many of the unjust combatants are morally innocent, but that many of the unjust combatants do not pose threats. For him, the challenge is to explain how it can be permissible to kill combatants who are neither direct threats nor contribute to threats posed by their fellow soldiers. Bazargan's solution is to emphasize the cooperative nature of warfare. On his view, war is a cooperative project that 'consists of individuals who share participatory intentions'.¹⁷ A participatory intention, according to Bazargan, is an intention to act according to a role, the function of which is to contribute to a cooperative act: 'When individuals have participatory intentions with roles that have one and the same cooperative act as their objects, these individuals *share* participatory intentions.'¹⁸

On Bazargan's view, 'an ineffective participant in a cooperative project can be complicitously liable to be killed, provided that doing so averts substantially wrongful threats posed by her effective co-members in furtherance of the project's unjust aims'.¹⁹ Bazargan's account explains how one can become complicitously liable to be harmed to prevent a threat to which one does not actually causally contribute. As with accomplice liability in criminal law, he suggests, complicitous liability to attack attaches to fellow participants in a wrongful cooperative enterprise. Like Zohar, then, Bazargan employs the collectivist perspective to argue why a combatant who would not be liable considered individually becomes liable once he takes part in an army's pursuit of an unjust cause.

3. Individualist Approaches to Moral Equality

Just as Equality can be both defended and challenged from a collectivist perspective, so too can it be rejected and defended on individualist grounds. We will begin by looking at individualist critiques of Equality which have played a generative role in recent just war theorizing.

a. Individualist critics of moral equality

Jeff McMahan has been the most influential individualist critic of the moral equality doctrine. One strand of McMahan's critique is internal—he argues that Walzer's view

¹⁷ Saba Bazargan, 'Complicitous Liability in War,' *Philosophical Studies* 165 (2013): 177–195 at 184.

¹⁸ *Ibid.* 185.

¹⁹ *Ibid.* 182.

will not entail broad moral permission to kill combatants or blanket moral prohibition against intentionally killing non-combatants. On any ordinary understanding, some civilians—the cadet in a military academy who will soon be deployed for combat, the scientist whose work can be applied to significantly further the war effort—pose threats of severe harm to others. Soldiers deployed in ways unrelated to the fighting of war, on the other hand, are not dangerous to enemy combatants. Equality, however, is typically interpreted as treating the soldier, but not the cadet or the scientist, as liable to lethal force.²⁰ To justify this distinction, McMahan argues that Walzer must treat liability to attack as a function of membership in a group, rather than ground it in morally relevant traits that individual members of different groups (combatants and non-combatants) have as individuals.²¹ That is, he links his critique of Equality with a more general objection to collectivist approaches to killing.

A second strand of McMahan's critique is external. He challenges the idea that posing a threat of severe harm is sufficient to make a person liable to attack. In particular, McMahan argues that combatants who fight fairly in a just war of self-defense against an aggressing army have done nothing to make themselves liable to deliberate attack. Consequently, he considers it impossible in principle for unjust combatants fighting for an unjust cause to meet the requirements of *jus in bello*. After all, in all other interpersonal contexts a person does not become liable to lethal attack unless they have done something wrong. His denial of Equality is thus categorical.

McMahan employs the following analogy: if a murderer is in the process of killing a number of innocent people and the only way to stop the murderer is to kill him, then the police officer who opens fire does not thereby make himself morally liable to defensive action, and if the murderer in self-defense kills the officer, he will become responsible for one more wrongful death.²² Both in war and outside of it, it is morally wrong to kill unless the cause for which one kills is just.²³ The just combatant certainly poses the threat of severe harm to the unjust combatant, but she does not thereby make herself liable to attack. The unjust combatant who kills the just combatant does so in the service of an unjust cause.

²⁰ Jeff McMahan, *Killing in War* (Oxford: Oxford University Press, 2009), 205.

²¹ Ibid. 208.

²² Ibid. 14.

²³ Ibid. 6.

Not all combatants are legitimate targets of attack in war. Unless they fight by wrongful means, just combatants do nothing to make themselves morally liable to attack. They neither waive nor forfeit their right not to be attacked. They are not, therefore, legitimate targets.²⁴

Hence, the differential treatment of killing in war and in non-war contexts cannot be justified by recourse to Equality.²⁵

Individualists differ about what, precisely, makes someone liable to deliberate attack. For McMahan, a person can become liable to attack only if they are morally responsible for a threat of unjust harm.²⁶ A harm is unjust, according to McMahan, if it is 'one to which the victim is not liable and to which she has not consented'.²⁷ The requirement that liability must be tied to posing a threat of unjust harm distinguishes this account from Equality: unlike unjust combatants, just combatants who fight by just means are not morally responsible for threats of unjust harm. The requirement that those liable to attack be morally responsible for the threat of unjust harm also means that non-responsible threats—such as a person who against his will is fired at others from a cannon, is controlled like an automaton, is invincibly ignorant—are not liable to attack.²⁸ Responsible agency is necessary for liability.

Individualist critics of Equality therefore hold unjust combatants individually morally responsible, in some measure, for failing to abide by a duty not to fight in an unjust war. Defenders of Equality are, according to them, guilty of conflating permission and excuse.²⁹ McMahan, for instance, accepts that unjust combatants may be partially or even fully excused for the objectively unjust threat of harm that they pose—they often act under more or less extreme forms of duress,³⁰ or on false factual beliefs that make their conduct subjectively justified.³¹ But this does not mean that they are objectively justified for acting as they do. John's subjective justification for shooting Jocelyn, who he

²⁴ Ibid. 205.

²⁵ McMahan also rejects the view that posing a threat of harm (being the agent of the threat) is necessary for creating liability to attack, and thus does not endorse the blanket moral immunity (with the exceptions just noted) that Walzer grants to civilians. Ibid. 206–208.

²⁶ Fabre, by contrast, requires that their responsibility for and contribution to the threat be more substantial. Cécile Fabre, 'Guns, Food, and Liability to Attack in War,' *Ethics* 120 (2009): 36–63 at 62.

²⁷ Jeff McMahan, 'The Basis Of Moral Liability To Defensive Killing,' *Philosophical Issues* 15 (2005): 386–405 at 394.

²⁸ McMahan, *Killing in War*, 162–3, 165. This view seems shared by many prominent individualists.

²⁹ Ibid. 110.

³⁰ Ibid. 115–118, 162.

³¹ Ibid. 119–122, 163–166.

falsely believes is morally responsible for a severe threat to a large group of innocent people at a local shopping centre, does nothing to make Jocelyn lose her right against John that he not attack her. Excuses are relevant when considering proportionality, however. That unjust combatants are partially excused can limit the level of force and the tactics that can be used against them. Excuses are also relevant to the means that can be used to hold them accountable should they engage in unjustified killing.³²

McMahan and other individualist critics also argue that Equality, understood as a public doctrine governing killing in war, has nefarious consequences. The supposition that unjust combatants do no wrong when they fight in an unjust war helps facilitate the recruitment of combatants to fight in unjust wars. If combatants were to reject Equality, and instead to hold the view that they can fight justly only when they fight for a just cause, they would be less likely to fight in wars whose causes were apparently unjust, or whose causes were of questionable moral status. As a result, the incidence of unjust wars would be lower.³³ He writes:

Wars **have always been** initiated in the context of the general and largely unquestioned belief that the moral equality of combatants is true. If that background assumption were to change—if people generally believed that participation in unjust or morally unjustified war is wrong—that could make a significant practical difference to the practice of war.³⁴

Individualist critics of Equality provide a kind of 'error theory' for this doctrine, explaining how people have falsely taken it to be the same as or entailed by other, much more plausible, claims about unjust combatants.³⁵ For example, people may support Equality because they have confused the morality of war with the law of war.³⁶ There may be good reasons, these critics point out, to uphold the legal equality of combatants, not least because it is difficult to provide combatants with authoritative guidance about

³² Gerhard Øverland, 'Killing Soldiers,' *Ethics & International Affairs* 20 (2006): 455–475.

³³ McMahan, *Killing in War*, 3.

³⁴ Ibid. 6–7.

³⁵ Ibid. 105–122.

³⁶ Ibid. 108. See also Jeff McMahan, 'The Morality of War and the Law of War,' in David Rodin and Henry Shue (eds), *Just and Unjust Warriors: The Moral and Legal Status of Soldiers* (New York: Oxford University Press, 2008), 19–43.

whether the wars in which they fight are just or unjust. However, this does not entail the moral equality doctrine.³⁷

b. Individualist defenses of Equality

The preceding section indicated some forceful objections to Equality when defended on collectivist grounds. Several philosophers have defended Equality without committing to a collectivist position. In this section we'll examine their arguments.

Some have argued that combatants *consent* to be attacked by taking up arms. Thomas Hurka, for instance, adopts this position, arguing that 'by voluntarily entering military service, soldiers on both sides freely took on the status of soldiers and thereby freely accepted that they may permissibly be killed in the course of war'.³⁸ Hurka leaves open the possibility that degrees of voluntariness be taken into account. That is, combatants who are coerced into joining the army might be awarded a different status from that of volunteer soldiers. This possibility, however, does not alter the claim about the equal status of just and unjust combatants, since it applies equally to both. Hurka concludes that, insofar as a just and unjust combatant target each other, 'both act permissibly and neither's acts are wrong. In that important respect they are moral equals'.³⁹

Alternatively, one might follow David Estlund and claim that:

[when an] institutional process producing the commands is duly looking after the question whether the war is just, the soldier would be wrong to substitute his own private verdict and thwart the state's will ... when the state and its procedures are of the right kind the soldier's participation in an unjust war is sanitized precisely because he was following orders.⁴⁰

Note that these defenses of Equality are not categorical. They explain how moral equality could obtain between *some* unjust and just combatants.

³⁷ McMahan, *Killing in War*, 110. It is worth noting, however, that some critics have suggested that we might substantially reform the legal and institutional practices surrounding war in light of concerns about their moral basis.

³⁸ Thomas Hurka, 'Liability and Just Cause,' *Ethics & International Affairs* 21 (2007): 199–218 at 210.

³⁹ *Ibid.* 216.

⁴⁰ David Estlund, 'On Following Orders in an Unjust War,' *Journal of Political Philosophy* 15 (2007): 21–234 at 213.

Yitzhak Benbaji has recently developed a contractualist defense of Equality.⁴¹ Observing that members of domestic societies have a right not to be attacked by others, but also a power to waive such a right, either explicitly or through tacit acceptance, he writes:

By entering the ring, a boxer waives this right and in return gains a privilege to attack his rival... [T]he convention which covers boxing is considered by both sides to be fair and mutually beneficial. This is why we can safely presume that the boxers accept it. The redistribution of rights within the ring is not produced by explicit agreement. Rather, it is generated by tacit acceptance of the rules, which is indicated by the combatants entering the ring.⁴²

Benbaji's main idea is that the tacit acceptance of rules of practices which are deemed to be fair and mutually beneficial (by participants in that practice) is sufficient to justify those rules, even if the practice involves conduct that would otherwise be considered unjustified.

Another way of defending a non-categorical version of Equality is to emphasize the excuses (duress, ignorance, and so on) that many combatants might have for fighting for an unjust cause. Importantly, this way of defending Equality does not rest solely on the argument that unjust combatants are sometimes fully excused. As we've seen, McMahan also admits this.⁴³ The disagreement about the relevance of excuses to liability is a disagreement about whether or not culpability, or blame (we'll use the terms interchangeably), is necessary for liability to defensive harm. If it is necessary, then a full excuse will also ground exemption from liability. If culpability is not necessary for liability, then the mere fact that a person is fully excused does not suffice to exempt him from liability.

McMahan is clear that blame and liability can come apart when he writes, 'It may be that just and unjust combatants are equally undeserving of blame, but it does not follow

⁴¹ See especially Yitzhak Benbaji, 'The War Convention and the Moral Division of Labour,' *Philosophical Quarterly* 59 (2009): 593–617; Yitzhak Benbaji, 'A Defense of the Traditional War Convention,' *Ethics* 118 (2008): 464–495.

⁴² Benbaji, 'The War Convention and the Moral Division of Labour,' 598–599.

⁴³ See, for instance, Jeff McMahan, 'Just Cause for War,' *Ethics & International Affairs* 19 (2005): 1–21 at 7: 'most soldiers who fight without a just cause may have a variety of excuses that partially or even fully exculpate them.'

that they ... have the same moral status.⁴⁴ Supporting Equality by appealing to excuses relies on the more fundamental claim that some degree of culpability is necessary for liability. Although the view that culpability is relevant to liability (for instance affecting the proportionality constraint) is old, few contemporary authors defend the view that culpability is necessary for liability.⁴⁵ We shall return to it below.

4. Discussion

A major weakness of the collectivist defense of Equality, especially as Walzer formulates it, is its categorical nature. It is simply implausible to claim that combatants can never be held responsible for the cause they are fighting for. In fact, the implausible implication of this view seems to be recognized by Walzer himself, when he discusses General Eisenhower's refusal to accept a visit from a captured German general. Walzer quotes Eisenhower at length, to illustrate that Eisenhower blames the general, not for violating the laws of war, but for participating in the war in the first place.⁴⁶ Walzer is unable to bring himself to reject Eisenhower's reaction, expressing sympathy with it, despite its evident tension with Equality.

It seems clear, although Walzer does not explicitly admit this, that one cannot support both Eisenhower's very plausible attribution of blame to the German general and a categorical defense of Equality, on which combatants remain moral equals as long as they do not violate *in bello* rules. Moreover, on Walzer's position, it seems impossible to explain why deserting from an army that is waging an unjust war can ever be required or morally justified, except when the army violates *in bello* requirements. This categorical

⁴⁴ McMahan, *Killing in War*, 114. Compare also what McMahan writes in reply to Seth Lazar: 'Lazar argues ... that many or most unjust combatants are fully excused for any killing they do. But even if that were true, that would not exempt them from liability to defensive killing according to the Responsibility Account, which rejects the idea that culpability is necessary for liability to defensive action': Jeff McMahan, 'Who Is Morally Liable to Be Killed in War?' *Analysis* 71 (2011): 544–559 at 449.

⁴⁵ David Rodin, *War and Self-Defense* (Oxford: Clarendon Press, 2002), 70. Rodin thinks culpability is relevant for liability, but does not claim that it is necessary for it: David Rodin, 'Justifying Harm,' *Ethics* 122 (2011): 84. Jeff McMahan no longer thinks that culpable responsibility is necessary for liability: Jeff McMahan, 'Self-Defense and the Problem of the Innocent Attacker,' *Ethics* 104 (1994): 252–290. For a defense of the view that culpability is necessary for liability to defensive harm in the context of individual self-defense, see Kim Ferzan, 'Justifying Self-Defense,' *Law and Philosophy* 24 (2005): 711–749. Seth Lazar endorses a disjunctive view according to which an agent can become liable to defensive harm through either non-culpable responsibility for a 'causally substantial' contribution to an unjustified threat or culpable responsibility for a 'relatively slight causal contribution' to an unjustified threat: Seth Lazar, *Sparing Civilians* (Oxford: Oxford University Press, 2015), 94.

⁴⁶ Walzer, *Just and Unjust Wars*, 36.

form of Equality seems to imply that the only aspects a citizen ought to consider when deliberating whether to join the war effort would be whether the personal costs would exceed what she has a duty to bear for her fellow compatriots. This way of conceptualizing an individual's choice of whether or not to participate in a given war seems highly problematic.

Kutz's defense of Equality is less categorical, since he argues that it does not hold in wars which are outright criminal or unjust.⁴⁷ He maintains that there are restrictions on a combatant's privileges to engage in political violence as opposed to mere criminal violence. It is hard, however, to see how this supports Kutz's conclusion. Political and criminal goals are not mutually exclusive categories. Even on Kutz's own definitions of political goals—'creating or restoring a new collective ordering'—this should be clear. Collective orderings, too, can be outright criminal, as the examples of many political regimes past and present can attest.

Collectivists who reject Equality may also seem to defend an overdrawn conclusion. According to Zohar, *all* combatants on the unjust side are legitimate targets, simply in virtue of being an agent of the unjustly aggressing collective. Bazargan's view is slightly less categorical, since it holds that ineffective unjust combatants who are conscripted under severe duress are exempted from liability.

One important challenge for a collectivist approach is whether it can restrict the collective whose members should be considered liable in a plausible way. Does it only include combatants or, also, non-combatant members of the army? Should government officials and politicians be excluded from the collective that is liable to attack? And what about taxpayers and citizens? Zohar argues that only combatants should be regarded as legitimate targets, since 'combatants are those marked as participating in the collective war effort, whereas the rest of the enemy society retain their exclusive status as individual'.⁴⁸ Bazargan recognizes that a typical taxpaying civilian may turn out to contribute more to an unjust war than an ineffective combatant does, yet insists that only the ineffective combatants and not the taxpayers are liable to attack. The essential difference, according to Bazargan, is that the combatant's formal role is 'designed to contribute to a degree far greater than the typical civilian's'.⁴⁹

⁴⁷ McMahan, *Killing in War*, 175, 178.

⁴⁸ Zohar, 'Collective War and Individualistic Ethics,' 618.

⁴⁹ Bazargan, 'Complicitous Liability in War,' 189.

On these views, then, a person's liability may depend in some measure on the intentions of the political leaders or generals who decide who should be 'marked' as participating in the war effort (or, in Bazargan's case, who 'designs' the function of a combatant's formal role). One implausible implication of Zohar's account is that irregular fighters, who are not members of the armed forces and not 'marked' as participants in the collective war effort, seem to escape liability. On Bazargan's account too, an irregular and ineffective unjust combatant presumably would not be liable, whereas a regular ineffective unjust combatant would be, since only the latter fills a formal role designed to contribute toward the war's end. Both views seem to assume that a society can engage in unjust aggression and then unilaterally decide which of its members are legitimate targets and which are not. But, as Helen Frowe points out:

It would be very odd if those posing an unjust threat got to decide amongst themselves who was liable to be killed to avert that threat, making it impermissible for their victim to aim defensive force at some group members rather than others. Liability to defensive harm doesn't seem like something we get to allocate by agreement.⁵⁰

These collectivist approaches also have difficulty explaining why all members of an unjust army should be regarded as liable. Consider infiltrators or army members who deliberately sabotage their own side's war effort. During World War II, Werner Heisenberg was one of the scientists central to the German nuclear project. Heisenberg's real motivations have been a matter of debate, but some observers claim that Heisenberg and his team deliberately slowed down the work, to prevent Hitler from getting the nuclear bomb. Let us assume that this was true. One natural way of exempting Heisenberg and his team from liability in this scenario would be by reference to facts which distinguish them (their motivations and contribution to slowing the advance of German weaponized nuclear science) from other combatants in the army. Yet, on the accounts we have been considering, they would still be liable to attack, since they are still members of the unjust army, 'marked as participating in the collective war effort' and filling a formal role 'designed to contribute' toward the war effort. If, on the other hand, we exempt these people from liability, it's not clear why we shouldn't also assess the

⁵⁰ Helen Frowe, 'Non-Combatant Liability in War,' in Helen Frowe and Gerald Lang (eds), *How We Fight: Ethics in War* (New York: Oxford University Press, 2014), 179.

liability of other members within the army (and outside it) according to their individual contributions and intentions.

There are forceful objections to individualist defenses of Equality. Consider Hurka's claim that combatants consent to be attacked by taking up arms. Even if successful, this defense significantly limits the scope of Equality, since it would apply only to wars involving volunteer armies. It is unclear how it would apply when soldiers act under duress. In addition, it is not clear that just combatants do indeed consent, even when they are not conscripted. As McMahan has stressed, the fact that combatants assume risks does not mean that they agree to be attacked, any more than anyone choosing to walk through a dangerous neighborhood agrees to be attacked.⁵¹ The appeal to the role-based duties of unjust combatants, which require them to follow orders and attack on command, is also vulnerable, since it is hard to see how any such obligation could override very stringent negative obligations not to kill people when they have done nothing wrong.⁵²

Would a soldier's participation in an unjust war be sanitized because he was following orders, as David Estlund claims, so long as the state for which he fights and its procedures are of the right kind? It is very hard to see that the institutional processes leading to decisions to go to war have the epistemic value that Estlund's account would require. And Estlund's claim seems highly questionable—if an agent knows that following an order will involve committing a grave wrong, nothing in the institutional process producing the command will sanitize his conduct, even if the costs of disobeying it will at least partially excuse it.⁵³ Nor does the fact that unjust combatants may be coerced into fighting sanitize their conduct—as advocates of Equality recognize with respect to obeying the requirements of *jus in bello*, where the coercion imposed on soldiers to carry out commands that violate them is likely to be extreme.

Benbaji's appeal to tacit acceptance of rules of practice of the war convention, which are deemed to be fair and mutually beneficial (by participants in that practice) is also open to challenge. Critics of Equality care not only about what combatants in fact, tacitly or otherwise, consent to, but also what they *ought* to consent to. Even if we take

⁵¹ McMahan, *Killing in War*, 52.

⁵² Ibid. 70.

⁵³ For an extended discussion of Estlund on this point, see Gerhard Øverland and Christian Barry, 'Do Democratic Societies Have a Right to Do Wrong?' *Journal of Social Philosophy* 42 (2011): 111–131.

combatants' tacit acceptance as a starting point, this consent is clearly compromised by the duress under which it's typically given, since refusing these rules would not mean peace, but total and indiscriminate war. Assuming that the traditional war convention can indeed be considered fair and mutually beneficial by all combatants, it is far from clear that the analogy employed by Benbaji is successful in supporting Equality.

Boxers after all, must typically give explicit consent before entering the ring—they sign waivers, contracts, and so on—and would not be permitted by trainers or promoters to fight without having done so, for the simple reason that these people, along with the opponents, would otherwise become liable for injuries suffered in the ring. Even in informal sparring between boxers who have signed the relevant waivers, boxers must touch gloves and explicitly acknowledge to each other that they are ready to fight. And there is very good reason to insist on explicit consent in boxing. Given the potential harms of engaging in this activity, the fact that they give their consent is at least an imperfect indicator that the participants in the practice believe that they are not exposing themselves to *undue* risk of severe harm. Further, while the boxing model might seem plausible for wars involving two parties that both fight for unjust causes, McMahan points out that it seems much less plausible for wars in which just combatants fight against unjust combatants.⁵⁴ Insofar as the unjust combatants are guilty of aggression, then a more apt boxing analogy would be one in which the just combatant was having a picnic in the ring with his family and is attacked by the unjust combatant, or came upon the unjust combatant beating a custodial worker senseless in the middle of the ring but was able to run to the custodial worker's assistance.⁵⁵ In these cases the just combatant does not seem to have waived his right not to be attacked when he defends himself and others from the assaults of the unjust combatants—certainly merely entering the ring does not signify any such waiver.

Individualist critics of Equality face challenges of their own. McMahan's notion of non-culpable moral responsibility from which liability is derived is so minimal that no unjust combatant can ever plausibly escape liability.⁵⁶ Although McMahan sometimes

⁵⁴ McMahan, *Killing in War*, 57.

⁵⁵ This objection is developed in Uwe Steinhoff, 'Benbaji on Killing in War and "the War Convention"', *Philosophical Quarterly* 60 (240): 656–663.

⁵⁶ Seth Lazar has raised an important criticism of McMahan's account: it is unable to distinguish between combatants and non-combatants, since the many non-combatants will be equally or more morally responsible for the threat their country poses: Lazar, 'The Responsibility Dilemma for Killing in War'.

seems reluctant to endorse this categorical conclusion, allowing that there might be some non-responsible unjust combatants, it is hard to see how his theory justifies that reluctance.⁵⁷ On his account, the only way an agent can be non-responsible for posing unjust threats is if she is acting in a manner that does not foreseeably cause a risk of harm.

As an example of a non-responsible threat, McMahan provides a case where a villain has tampered with a cellphone in such a way that if its owner presses the 'send' button, he will detonate a bomb that will kill an innocent person. Even if the cellphone operator constitutes a threat of unjust harm to a non-liable person, he escapes liability, since it is not foreseeable that his action will cause unjust harm. But could unjust combatants ever be in an analogous position? Surely combatants are not unaware that they are engaged in activities that can cause harm. And, according to McMahan, any agent engaged in what she knows is a harmful activity must know that there is a chance she is mistaken about the facts and might end up causing unjust harm. So all unjust combatants, to varying degrees, would seem to be liable by virtue of the fact of their moral responsibility and the unjustness of their cause. McMahan places the threshold of moral responsibility low enough that even child soldiers fighting under duress are caught in the liability net if they fight for the unjust side.⁵⁸

It might be thought that McMahan's notion of non-culpable moral responsibility for an objectively unjustified threat is too narrow a basis for a moral asymmetry between an innocent aggressor who poses a wrongful threat and innocent people that they risk harming. At least some amount of culpability, as opposed to mere responsibility, might be thought necessary to make the agent who is responsible for the threat liable to lethal or even very significant force.⁵⁹ Recall that when one is liable to attack one cannot claim that one has been wronged when one is attacked, and one lacks a claim to compensation for damages thereby suffered. Yet it doesn't seem far-fetched to suppose that if John (who is innocent) must cut off the leg of Jocelyn (a non-culpable aggressor) in order to

Since the focus of this article is exclusively on the moral equality of combatants, we will not pursue this influential point here.

⁵⁷ 'Although the vast majority of unjust combatants are Partially Excused Threats, some are Culpable Threats, others are Excused or Innocent Threats, and a few may be Nonresponsible Threats. Apart from those who are Nonresponsible Threats, unjust combatants in all these categories are liable to defensive attack to one degree or another': McMahan, *Killing in War*, 189.

⁵⁸ Ibid. 202. Fabre criticizes this: see Fabre, 'Guns, Food, and Liability to Attack in War'.

⁵⁹ Ferzan, 'Justifying Self-Defense,' 711–749; Rodin, *War and Self-Defense*, 70–99; Seth Lazar, 'Responsibility, Risk, and Killing in Self-Defense,' *Ethics* 119 (2009): 699–728.

save his hand, then John should try to compensate Jocelyn for her loss in some way, even if we believe that John's defensive conduct was fully justified, all things considered. As McMahan himself notes, in criminal law full excuses typically negate liability and, insofar as an agent lacks culpability altogether, it is not obvious why she should nevertheless remain liable.⁶⁰

Consider an episode that occurred in New York in 1962 that gave rise to a legal case.⁶¹

Young came upon two middle-aged men beating and struggling with a youth. Reasonably believing the youth was being unlawfully assaulted, Young went to his rescue, pulling on or punching at the seeming assailants. They turned out to be plain-clothes detectives trying to make an arrest for disorderly conduct. One of them suffered a broken leg in the struggle.

The legal philosopher Kent Greenawalt claims, plausibly, that the behavior displayed by Young does not warrant criminal liability. It is not obvious that he should be considered morally liable to defensive harm either. If a third party, knowing all the facts of the situation, were to intervene, it is not clear why he should take there to be a moral asymmetry between the plain-clothes detectives and Young. It seems permissible to harm Young to some degree to prevent him from harming the detectives. But it is not clear that the third party could inflict more harm on Young than could permissibly be inflicted on either detective. One reason for exempting agents from liability when their actions inflict unjust harm is that such agents sometimes act in manner that is either strongly justified, required or supererogatory given the evidence available to them. As Greenawalt writes, 'Young is to be praised, not blamed, for what he did, and members of society would wish that others faced with similar situations requiring instant judgment would act as Young did.'⁶²

It seems odd that an agent who acts on what is, given her epistemic position, a moral requirement (or positively exceeds it) should become liable if their action turns out to cause wrongful harm. It is a further question, of course, how many unjust combatants should be exempted from liability due to their epistemic position. Perhaps a young Taliban soldier, whose family members were collaterally killed in a drone strike when he

⁶⁰ McMahan, *Killing in War*, 157.

⁶¹ *People v. Young* 183 NE 2d 319 (1962).

⁶² Kent Greenawalt, 'The Perplexing Borders of Justification and Excuse,' *Columbia Law Review* 84 (1984): 1897–1927 at 1919.

was a child, and who has been 'educated' in a school run by fanatics, would qualify as being justified in believing that he is morally required to defend his village from further attacks. Or consider an indoctrinated North Korean soldier, who in the event of a North Korean attack might be justified in believing that the North Korean side is actually acting in obligatory self-defense rather than aggression. Wherever one wants to draw the line, it seems clear that if one accepts that Young should be exempt from liability, then *some* unjust soldiers may also be exempt from liability.

Kutz raises this issue when he points out that the unjust side may be innocently mistaken about the justness of their cause (for instance, innocently but mistakenly thinking that a genocide is under way or a hostile country is amassing WMD).⁶³ Rodin considers Kutz's objection, but thinks it can be brushed aside:

The problem of ambiguous or emerging evidence ... can be unproblematically dealt with using standard moral and legal concepts, in particular the standard of reasonable belief and the concepts of objective and subjective justification. ... War leaders are held responsible for the decisions they make in light of the facts as they honestly and reasonably believed them to be. It is at the very least unclear why we should not hold soldiers responsible in the same way.⁶⁴

This doesn't really undermine Kutz's argument, however.⁶⁵ If unjust combatants and their leaders escape liability whenever they act on a reasonable belief that their cause is just, then a significant number of unjust combatants will presumably be non-liable. Accepting the analogy between moral liability to defensive harm and criminal liability is an important concession and severely undermines the categorical rejection of Equality, since people have to be at fault in order to be criminally liable.

The manner in which some individualists have rejected, categorically, the moral equality doctrine, depends on the assumption that (in sharp contrast to criminal liability) liability and blame can come apart. This view seems counterintuitive when agents are acting in a positively praiseworthy manner, as Young did in the case considered above. If we agree that agents such as Young ought to be exempt from liability, new questions arise as to how we might make an exception for praiseworthy agents, or whether this

⁶³ Kutz, 'The Difference Uniforms Make,' 175.

⁶⁴ David Rodin, 'The Moral Inequality of Soldiers: Why Jus in Bello Asymmetry Is Half Right,' in Rodin and Shue (eds) *Just and Unjust Warriors*, 67–68.

⁶⁵ Rodin's response is also puzzling given that, on his view, reasonable mistakes can exempt a person from criminal liability but not from moral liability to harm. See Rodin, 'Justifying Harm', 84.

ought to motivate a wholesale move to accounts on which an agent's liability is determined by the evidence that is available to them.

Jonathan Quong has argued that we should not exempt from liability agents who act with subjective justification. He argues that even in circumstances where the soldiers don't bear responsibility for their mistaken belief that their enemy is unjust, they can be liable.⁶⁶ He uses the following example to illustrate his point.

Duped Soldiers: A group of young soldiers is successfully fooled by a totalitarian regime into believing that the regime is good and just, and is under repeated attacks from their evil neighbors, the Gloops. The regime's misinformation campaign is subtle and absolutely convincing: the soldiers are justified in believing what they are told by the regime. Once the misinformation campaign is complete, these Duped Soldiers are given orders to attack and destroy a Gloop village on the border which, they are told, is really a Gloop terrorist camp plotting a major attack. In fact, everything the regime has said is a lie, and the Gloop village contains only innocent civilians. The Duped Soldiers prepare to shell the village and are about to (unknowingly) kill all the innocent civilians in it. A peacekeeping force from a neutral third country patrols the border and could avert the attack, but only by killing the Duped Soldiers.

Quong argues that it is implausible that the excused Duped Soldiers are exempt from liability simply because they are blameless for believing that they fight for the just side. He rejects the idea that the Duped Soldiers and the Gloops are equally non-labile to attack. If this were the case, he claims, then the peacekeepers have no grounds to attack the Duped Soldiers to prevent the attack.

At first blush, this might seem like the right conclusion. Note, however, that mistaken non-labile parties need not be thought to be protected from third-party intervention. Rather, the mistaken threats could be treated as on a par with the innocent victims. If the peacekeepers stop the attack by harming fewer Duped Soldiers than the number of Gloop civilians that would otherwise be killed in the wrongful attack, such an account would permit or even require peacekeepers to intervene. Nevertheless, it might

⁶⁶ Jonathan Quong, 'Rights against Harm', *Proceedings of the Aristotelian Society Supplementary Volume*, 89 (2015): 249–266.

seem intuitive that the peacekeepers should intervene even if they had to harm significantly more Duped Soldiers than the number of Gloop civilians who would otherwise be harmed. But destroying an entire village in order to take out a terrorist cell is something any soldier, regardless of their mistaken belief in their own just cause, should surely realize is wrong, since it would clearly violate reasonable principles of proportionality. More importantly, constructing the example so that the peacekeepers have the choice between saving innocent civilians or duped soldiers trades on a further commonly held view, that it is worse to harm defenseless and vulnerable civilians than soldiers—even if the soldiers are on the just side and are just as innocent as the civilians. This is, however, a separate discussion that does not relate to the debate over whether a complete excuse can exempt you from liability. If we alter Quong’s case so that there are two groups of combatants who oppose each other, where the unjust combatants are convincingly described as innocent (or even praiseworthy because they take on individual risk to reduce enemy casualties), the claim that unjust combatants are liable is considerably less intuitive.

5. Conclusion

The recent debate concerning the moral equality doctrine has taken Walzer’s collectivist and McMahan’s individualist positions as points of departure. This chapter has suggested, however, that the most forceful defense of at least a more limited form of the moral equality doctrine may be mounted from an individualist perspective.

The main challenge for collectivist defenses of Equality is to show how a group of individuals can somehow acquire the normative power to authorize a subset of its numbers to inflict unjust harm on individuals outside the group. The main challenge for the collectivist critics of Equality is why individuals who either do not contribute to the war effort or even deliberately subvert it may lose their protection against harm, simply because they are part of the army on the unjust side.

Individualist defenders of Equality, on the other hand, struggle to point out why defending oneself and others from a combatant on the unjust side can make one liable. Individualist critics of Equality typically argue that agents can be liable without being culpable. A challenge for this view, presented in the previous section, is that it fails to explain the intuitive verdict that agents who act in a way which, given their epistemic situation, is either required or praiseworthy ought not to be liable to attack if they turn out to be mistaken through no fault of their own. Insisting, as McMahan does, that

excuses *never* exempt morally responsible agents in such situations from liability may seem too harsh to many.

In our view, the strongest direct challenge to individualist views such as McMahan's comes from considering agents (like Young) who pose an objectively unjust threat while acting in a way that is justified, or indeed supererogatory, relative to their epistemic position. This objection does not take issue with McMahan's claim that excuses which arise from duress are insufficient to exempt an agent from liability to defensive harm. It does, however, point to a plausible and morally relevant distinction between excuses that arise from epistemically justified mistaken beliefs and excuses that arise from duress.

There are different ways to express this distinction. One is to say that excuses arising both from duress and from mistaken beliefs are fully exculpatory, but that they should be considered separately. In the case of duress, the agent knows that he is acting wrongly, but cannot be blamed for his conduct because acting rightly would require more than could be expected from a 'reasonable person'. In cases where agents act on a justified mistaken belief, the agent cannot even know, given his epistemic situation, that what he does is wrong. Another way is to say that excuses arising from duress, unlike those which arise from justified mistaken beliefs, are never fully exculpatory since the agents involved knowingly do wrong. The fact that we might be reluctant to blame someone who is coerced need not entail that they are not culpable.⁶⁷

In addition to the class of agents who act on the justified belief that they are acting in a supererogatory manner, it seems equally implausible that agents who act on what they reasonably take to be moral requirements should be considered liable if they cause harm to innocents through no fault of their own. Yet conceding this may not necessarily commit one to the view that culpability is necessary for liability. Critics of Equality may attempt to draw a line between different types of agents who act in an objectively unjust but blameless way. They may distinguish between those who are epistemically justified in believing their actions are either morally required or

⁶⁷ A person can be blameworthy, yet it might be impermissible for another to blame her if he would not have acted differently in the same situation. Whether it is appropriate for others to blame a blameworthy person may therefore depend on whether these others have moral standing to do so. It is not implausible to think that this is the best way of understanding cases of duress: Although the coerced agent who does wrong is blameworthy (i.e. culpable), others are not in a position to blame him since they probably would have done the same were they similarly situated.

supererogatory from those epistemically justified in believing that their act is morally permissible.

To us, this indicates a fruitful way forward for debates concerning Equality. The debate might then focus on the conditions under which combatants who are epistemically justified in their mistaken belief that their enemy lacks a just cause should be seen as acting on subjective justifications or requirements (like Young) or merely on a subjective permission.

In this chapter we have argued that views which categorically reject *or* support Equality are problematic, whether mounted from an individualist or collectivist position. In our view, the most plausible position is the individualist one that accepts that non-culpable combatants may be exempt from liability. At most, this would result in a limited defense of Equality, since this clearly would not hold for all unjust combatants. Moreover, it differs from the view that the defenders of Equality reviewed here have argued for, since it does not claim that unjust and just combatants may be equally liable or that both parties would have a licence to kill each other. To the contrary, our limited defense of Equality merely claims that in some instances, combatants on either side may be equally non-liable.⁶⁸ In such circumstances, waging a just war may be considerably harder to justify, since the intentional targeting of non-liable unjust combatants would constitute a grievous wrong.⁶⁹

⁶⁸ Although our view suggests that some degree of culpability is necessary for liability (with the exception of coerced agents), we have not addressed the further question of whether causal responsibility for an unjust threat should be seen as necessary for liability. If it is not, then a *just* combatant who is ignorant of the just cause of his side and who fights for reasons that are blameworthy could in principle become liable to preventive harm. We cannot explore this issue here, but for discussion, see Richard J. Arneson, 'Just Warfare Theory and Noncombatant Immunity,' *Cornell International Law Journal* 39 (2006): 663–668; Lars Christie, *Harming One to Save Another: Liability and Lethal Luck* (Oslo: Universitetet i Oslo, 2016).

⁶⁹ For discussion of how wars under these conditions can nonetheless be permissible, see Lazar, *Sparing Civilians*.