

Rights, Liability, and the Moral Equality of Combatants

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Abstract According to the dominant position in the just war tradition from Augustine to Anscombe and beyond, there is no “moral equality of combatants.” That is, on the traditional view the combatants participating in a justified war may kill their enemy combatants participating in an unjustified war—*but not vice versa* (barring certain qualifications). I shall argue here, however, that in the large number of wars (and in practically all modern wars) where the combatants on the justified side violate the rights of innocent people (“collateral damage”), these combatants are in fact liable to attack by the combatants on the unjustified side. I will support this view with a rights-based account of liability to attack and then defend it against a number of objections raised in particular by Jeff McMahan. The result is that the thesis of the moral equality of combatants holds good for a large range of armed conflicts while the opposing thesis is of very limited practical relevance.

Keywords Just cause · Liability to attack · McMahan, Jeff · Moral equality of combatants · Rights · Thomson, Judith Jarvis · War

1 Introduction

The dominant position in the just war tradition from Augustine to Aquinas to Grotius (cf. Reichberg 2008) and, even further, to Gertrude Elizabeth Margaret Anscombe and beyond has been that there is no “moral equality of combatants.” That is, on the traditional (but sporadically contested) view those combatants participating in a justified war may kill their enemy combatants participating in an unjustified war, but the combatants participating in an unjustified war may not kill

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their enemies on the justified side, at least not if they *know* or find it highly likely that their own war is unjustified (Augustine's view is more lenient, but does not amount to fully embracing the moral equality of combatants).

The philosopher who has probably done the most to attack the doctrine of the moral equality of combatants in recent times is Jeff McMahan.¹ According to him, the combatants on the “just” and the “unjust” side are not both liable to attack (McMahan 2004, 706), do not have both a liberty-right² to kill each other. Rather, the “unjust” combatants have *no* right to kill the “just” ones, and the “just” ones have a claim-right to kill the “unjust” ones (McMahan 2009, 64). This is why:

People don't lose moral rights by justifiably defending themselves or other innocent people against unjust attack; therefore, unless they lose rights for some reason other than acquiring combatant status, just combatants are innocent in the relevant sense. So, even when unjust combatants confine their attack to military targets, they kill innocent people. Most of us believe that it's morally wrong to kill innocent people even as a means of achieving a goal that's *just*. How, then, could it be permissible to kill innocent people as a means of achieving goals that are *unjust*?

McMahan thinks that arguments of this kind “conclusively demonstrate the moral *inequality* of combatants at the level of basic morality” (McMahan 2006, 379).

We should be clear about what this moral inequality means. It is not that the “just” soldiers are “nice,” and the “unjust” soldiers are not. Rather, the claim is that unjust soldiers, by deliberately targeting and killing just ones, are deliberately targeting and killing *innocent people*. And normally, of course, we think that intentionally killing innocent people (without their consent) who do not pose an unjust threat amounts to murder or manslaughter and is at any rate one of the most egregious moral crimes one can commit. If this is true, however, it would seem that soldiers would be required to very seriously rethink their obligations; and civilians who consider it their civic duty to support their troops would have to face the fact that doing so might mean nothing less than supporting murderers or manslaughterers. Thus, the issue at hand here is hardly trivial.

Is McMahan right? I think that *he is right in principle* (and that therefore Walzer is wrong); that is, I think it is not true that in *all* wars the combatants on both sides have the same liberty-right to kill enemy combatants, provided they abide by the traditional *jus in bello* restrictions. However, McMahan *greatly exaggerates the scope of his argument* (and so do others).³ For many, if not most modern wars it has

¹ Others include C. A. J. “Tony” Coady, David Rodin, Lionel K. McPherson, Gerhard Øverland, and myself.

² McMahan himself does not talk about liberty-rights. For my account, however, the distinction between claim-rights and liberty-rights is important. That a person A has a *liberty-right* towards another person B to do *x* means that she is under no duty towards B not to do *x*. If she has a *claim-right* towards B to do *x*, this means that B is under a duty towards her, A, not to interfere with her doing *x*. B is not under this duty if the person in question has only the liberty-right to do *x*. On the distinction between liberty-rights and permissions, see n. 15.

³ I have made this argument in Steinhoff (2007a, 95–97) and (Steinhoff 2008, 220–226). Jeff McMahan has responded to my criticism in McMahan (2008b, 227–244) and (McMahan 2009, 38–51).

little relevance, since in many, if not most modern wars “just” soldiers do kill innocent and non-threatening people or non-innocently contribute to their being killed.⁴ The military euphemism for this is “collateral damage”; I prefer the term “concomitant slaughter.” By participating in or non-innocently contributing to the killing of innocent and non-threatening people one wrongs these people (for innocent and non-threatening people have—and McMahan agrees—a *right* not to be killed), and someone who *wrongs* others and *violates*⁵ *their rights* cannot be *just*. Thus, the soldiers are at best justified, but that does not make them innocent in the relevant sense (namely in the sense of not wronging others). They remain liable to attack.

In developing this argument I will proceed as follows. In Sect. 2 I will clarify the historical background and show that, contrary to a widespread belief among present-day just war theorists, the moral *inequality* thesis is the traditional and orthodox one. In Sect. 3 I will briefly sketch an account of liability to self-defensive killing that is inspired by Judith Jarvis Thomson’s approach but revises it in ways that make it immune to certain criticisms that can be leveled against the original theory (3.1). I then apply this approach to war as a collective action (3.2).

In Sect. 4 I will deal with McMahan’s objections to the account proposed here. He argues, first, that it has counter-intuitive implications; and he claims, second, that justification *defeats* liability so that “just combatants” are not liable to be attacked by “unjust combatants.” I will argue, in response, that the claim that “unjust combatants” are liable to attack by “just combatants” but not vice versa is true by definitional *fiat* and thus irrelevant to the substantive question at issue (4.1); that it is not the account presented here but McMahan’s that comes with counter-intuitive implications (4.2 and 4.3); and, most importantly, that justification does *not* defeat liability (4.4).⁶

In Sect. 5 I counter McMahan’s claim that the best way for the participant in an unjustified war to protect his fellow citizens is to lay down his arms and that therefore he should do precisely that. I argue, first, that this claim, even if it were correct, would not undermine the point that both sides would have a liberty-right to kill each other: what *liberty-rights* you have towards a person P, and what you are *permitted* to do to P all things considered, are not the same. Second, McMahan is not correct: he ignores collective action problems and certain realities of war.

⁴ An additional reason why McMahan’s argument has little relevance for practice is that there are very few if any justified wars. On this point see Steinhoff (2007b) and (2012).

⁵ I distinguish, incidentally, between justified rights violations on the one hand and unjustified rights violations on the other by using the terms “justified rights violation” and “unjustified rights violation”. Thus, I refuse to follow those who call the former “infringement” and the latter “violation”. It does not make any difference for the victim, after all, and the distinction between “violation” and “infringement” might mistakenly suggest otherwise.

⁶ Incidentally, even if justification did defeat liability, this would not even matter. For an argument to that effect, see Steinhoff (2008, 223). McMahan’s elaborate reply to this argument can be found in (2008b, 236–244). For a no less elaborate response, see Steinhoff, “McMahan, Symmetrical Defense and the Moral Equality of Combatants,” unpublished ms.

2 The Moral Inequality Thesis in History: On Imagined and Real Orthodoxies

McMahan presents the thesis of the moral equality of combatants as the traditional one and his own account as revisionary. Yet he is mistaken about the just war tradition, and so are many other present-day just war theorists. In order not to let this mistake go uncorrected, let me clarify the historical facts.

First of all, when McMahan started to criticize the “orthodox view,” as he calls it, he never actually provided any textual evidence for his claim that the thesis of the moral equality of combatants is orthodox or traditional. To be sure, in those articles he (somewhat selectively) mentions a couple of twentieth century writers (McMahan 1994a, 256, fn. 7, and b, 194, fn. 3), but the question is precisely whether those authors really represent the tradition—which reaches *through* the centuries.

In fact, his main target has always been Michael Walzer’s theory; after all, Walzer coined the phrase “the moral equality of combatants” to begin with (Walzer 1977, 34–41).⁷ The irony, however, is that Walzer himself explicitly stated (in a passage that seems to have been widely overlooked by those who take him to represent “the tradition”) that his far-reaching thesis of the moral equality of combatants is not shared by traditional authors:

Catholic writers have long argued that [men] ought not to volunteer, ought not to serve at all, if they know the war to be unjust. (Walzer 1977, 39)

Indeed, these authors have claimed that under these circumstances it is sin to join the fray—while Walzer with his moral equality thesis denies that it is morally impermissible.

Recently McMahan has admitted that his previous reading of the tradition is mistaken and that Francisco de Vitoria and Francisco Suárez have “beaten [him] into print” by “more than half a millennium” (McMahan 2009, 237–238, n. 26; see also the text on p. 33 that McMahan’s note refers to). On these pages and elsewhere in the book he thus provides textual evidence to the effect that two central writers in the just war tradition *reject* the moral equality thesis; while he still does not offer quotes from any traditional authors who would actually *support* the moral equality thesis. Yet he simply continues to call the moral equality thesis the “traditional” one. Why?

Maybe he thinks that Suárez and Vitoria are the only of the older authors that have “beaten” him. But he is wrong. He has also clearly been beaten by, for example, Domingo de Soto, Melchor Cano, Luis de Molina und Thomas Cajetan.⁸ And, of course, by still a few centuries more, by Aquinas—whom Suárez and

⁷ “Hence the moral reality of war can be summed up in this way: when soldiers fight freely, choosing one another as enemies and designing their own battles, their war is not a crime; when they fight without freedom, their war is not their crime.” (Walzer 1977, 37).

⁸ De Soto, “Questio XL ‘De Bello,’” *Articulus Primus, Dubium Septimum* (120); Cano, “Questio XL ‘De Bello,’” *An Christianis sit licitum bella gerere, Secunda Quaestio* (152); Molina, “Questio XL ‘De Bello,’” *Articulus Primus, Disputatio Tercera*, 1–3 (273); Cajetan, “Summula, bellum,” *Bellum, quando dicatur iustum vel iniustum, licitum vel illicitum* (420). All these texts are to be found (in Latin and German) in Justenhoven and Stüben (2006); the page references refer to this edition. I have used the Latin designations to make it easier for the reader to find the relevant passages in the English (or X-ish)/Latin edition of her choice.

Vitoria, incidentally, interpret in precisely this way. To be sure, in STh II–II, q. 40 (“On War”), Aquinas does not address this issue clearly, but elsewhere he explicitly states that people “are bound not to obey ... the ungodly commands of tyrants” (Aquinas 2006, 195). That statement removes the excuse that Augustine once seems to have made available for certain combatants on the unjustified side and is thus hardly compatible with a general moral equality of combatants.

Finally, even Augustine himself, still a few centuries earlier, does not embrace a general equality of combatants. True, as just mentioned, he states in *Contra Faustum*, 22.75, that a soldier can innocently obey the command of an “ungodly king” (Augustine 1887, 301). (Incidentally, this is not the same as stating “an ungodly command”; besides, Augustine arguably had an ungodly *Christian* king in mind). Yet one of the reasons why even this does not amount to an endorsement of a general moral equality of combatants is that some wars might not be waged under the command of kings (or of their equivalents) on both sides, ungodly or not. Certain civil wars or slave revolts are an example. (It should also be noted that actually none of the authors mentioned in the last paragraph, with the possible exception of Aquinas, took Augustine to believe that combatants are permitted to fight in a war they know to be unjust).

Thus, once people understand the actual tradition of just war theory, it becomes very difficult to call the moral equality thesis “orthodox” without appearing to engage in false labeling. Yet Helen Frowe, for example, echoing McMahan, insists on this terminology. Again: why? She does seem to have realized that going back to Suárez and still further beyond him will not work. So instead, she goes only back to Grotius and claims that the “idea that ordinary citizens—combatants or otherwise—might be morally responsible for their country’s aggression was roundly rejected by Grotius,” and that what she calls “the orthodox view of just war theory ... has been the dominant view of how we should understand the relationship between *jus ad bellum* and *jus in bello* since Grotius” (Frowe 2011, 161 and 118). I do not know whence Frowe takes these ideas about Grotius.⁹ After all, Grotius says, completely in line with Suárez, Vitoria and the other older just war theorists already mentioned:

But if [free people as well as slaves and subjects] have Order given them to take up Arms, as is usual, then if it plainly appears that the War is unlawful, it is their Duty not to meddle in it. (Grotius 2005, 1167 [II.26.III.1])

Consequently, he also states:

Neither can I admit ... that even those who have given just Cause to take up Arms against them, may lawfully [he refers here to natural law, that is, to part of morality] defend themselves; ... [for] no Man [has] a Right to oppose Force to a just Attack, no more than a Criminal can plea a Right of defending himself against the publick Officers of Justice, who would apprehend him, by Order of the Magistrate ... (Grotius 2005, 417 [II.1.XVIII.1])

⁹ They are not from Grotius’s text, apparently. While she mentions him a few times, she never actually quotes him, nor is his book included in her bibliography. For a succinct interpretation of Grotius that supports mine, see Forde (1998). For in-depth analyses, see the contributions in Onuma (1993).

This is a clear argument for the moral inequality of combatants, no less clear than McMahan's argument, quoted above, that nearly 400 years later "conclusively demonstrate[s] the moral *inequality* of combatants at the level of basic morality" according to him (McMahan 2006, 379).

Grotius makes even the same qualification that McMahan does (Grotius 2005, 1181–1183 [II.26.VI]), and McMahan acknowledges this and quotes the pertinent statements from Grotius (McMahan 2009, 16–17). However, he does not provide the quote I just adduced, nor does he acknowledge that Grotius is a fervent partisan of the moral inequality of combatants. That is curious, for since McMahan says that Grotius is "arguably the greatest writer in the tradition of just war theory" (McMahan 2009, 16), one would think that McMahan would be eager to point out that he has him on his side. Of course, the downside might be that once you acknowledge that "arguably the greatest writer in the tradition of just war theory" embraces your allegedly unorthodox and revisionary moral inequality thesis, that thesis does not appear all that unorthodox and revisionary anymore.

The traditional inequality thesis survived into the twentieth century and was embraced, long before McMahan, by Elizabeth Anscombe. McMahan, however, claims that she is "inconsistent" (McMahan 2005a, all quotes in this paragraph are taken from fn. 17 of that article), pointing out that in one place she argues that the non-innocent people that can rightfully be attacked are those "engaged in an objectively unjust proceeding," while in another place she states that they are those who are causing harm. Presumably, the first idea would imply the moral inequality thesis while the second does not. In reply, first, let me point out that in light of the argument presented in the present article, namely that combatants on the justified side are *also* engaged in an unjust proceeding (namely, of harming innocent bystanders), the first statement of Anscombe's would not actually have the implication McMahan ascribes to it. Maybe it is because he is aware of this that he opts for charitably interpreting that first statement of Anscombe's as meaning "engaged in objectively *wrongful* action" (my emphasis). However, to be consistent himself, McMahan should then be equally charitable towards her second formulation, for example by reasonably interpreting "harming" as meaning "*unjustifiably* harming" here. (This is made all the more reasonable by the fact that Anscombe seems to be concerned here with the combatants on the German side in the Second World War, thus already assuming that these combatants are on an unjustified side. McMahan is, in my view, simply taking the quote out of context).

Second, to take this isolated slip in terminology on Anscombe's part as indicating her "inconsistency" in the substantive matter is like taking the fact that McMahan sometimes states that liability to defensive attack lies in moral responsibility for an *unjustified* threat and sometimes that it lies in moral responsibility for an *unjust* threat as indicating *his* inconsistency in the substantive matter. This would be unfair and somewhat strange because McMahan explicitly embraces the moral inequality thesis. But so does Anscombe, unequivocally stating, completely in line with the tradition: "Nor, if we know that a war is wrong, may we take part in it without sin,

however grievous it may seem to stand apart from our fellow countrymen” (Anscombe 1981, 73).¹⁰

Third, McMahan also fails to mention that Anscombe writes, just a few sentences after the quote about “harming” on which he hangs so much:

Nor is there ground for trying them [the combatants on the German side, it is safe to assume] on a criminal charge; not indeed, because a man has no personal responsibility for fighting, but because they were not the subjects of the state whose prisoners they are. (Anscombe 1981, 67)

The statement after “not indeed” is nothing less than an endorsement of the quite traditional moral inequality thesis combined with Grotius’s legal impunity thesis. Thus, the fact of the matter is that Anscombe is not more ambivalent about the moral inequality of combatants than is McMahan.

McMahan also claims that the moral equality thesis “informs the international law of war” (McMahan 2009, 3). Again he provides no evidence for this claim.¹¹ So how does he know? After all, McMahan himself acknowledges that the “law of war does not assert the *moral* equality of combatants but ... the *legal* equality of combatants” (McMahan 2009, 105). And in fact, he himself has argued that *for moral reasons* international law must not simply turn moral inequality into legal inequality (McMahan 2008a). So why is it not *this* idea that underlies the international law of war?

This question particularly suggests itself since Grotius was of the decided opinion, as McMahan indeed knows, that the law of nations has to differ from natural law and “is designed and accepted in order to serve certain purposes, including, in particular, moral purposes” (McMahan 2008a, 34). But since Grotius is not only “arguably the greatest writer in the tradition of just war theory” but also considered by many the founder of modern international law, it seems natural to assume that what actually underlies the modern laws of armed conflict is the Grotian combination of the moral inequality thesis with the legal impunity thesis. Thus, far from “revising” anything, McMahan is in essence repeating a view that Grotius already expressed 400 years ago and which seems to be embodied in modern international law.

Finally, it should be noted that while McMahan differs from Walzer with regard to one thesis, namely the moral equality thesis, his views about, for example, just cause, proportionality, and double effect are, aside from quibbles about details, comparatively conservative and not so much different from both Walzer’s and traditional opinions. He also has little to nothing to say about the just war criteria of

¹⁰ With due embarrassment I have to admit that in Steinhoff (2007a, 62) I correctly argued that her ideas would imply the moral inequality of combatants and incorrectly pondered that she might not have realized this. As the Anscombe quote just provided shows (which I had also overlooked, and which, incidentally, McMahan does not mention), she definitely did realize it.

¹¹ Frowe (2011, 124) follows McMahan here, too: both in making the claim and in not providing evidence for it.

prospects of success, last resort, and right intention. Thus, it would seem, one has to look elsewhere for a really revisionary and unorthodox account of just war theory.¹²

After thus having clarified the historical background, let us now turn to the substantive issues.

3 Liability to Attack: A Rights-Based Account

Why are even combatants in a justified war¹³ liable to attack, that is, why can they be attacked without thereby being wronged, without thereby having their rights violated? I have already answered this in the introduction, but let me make it clearer.

3.1 Liability to Attack in General

The account of liability to attack presented here is a revised version of Judith Jarvis Thomson's (1991) account (see also Steinhoff 2007a, 71–98, for present purposes esp. 81–94). I agree with Thomson that violating a person's rights makes you liable to attack. However, I disagree with her on two important points. First, in my view, rights violations are not the *only* thing that can make a person liable to attack. Second, I also disagree with Thomson as to what can count as a rights violation. In Thomson's view, even an innocent threat, for example an innocent man who is thrown by a villain from a cliff and now threatens to crush the person beneath, violates the rights of the person he threatens.

Many people have found this view of Thomson's counter-intuitive. It would seem that you can violate a person's rights only by *acts*. I tend to agree. However, I still think that the innocent falling man is liable to attack. Why?

On the account offered here people have a general right to defend themselves against unjust threats of all sorts (an *unjust threat* being one that does not have a right to pose the threat and has not been set in motion by someone who had a right to do so). That is, this right refers not only to threats posed by persons, but to all threats, including to those posed by inanimate objects. That there is such a right is

¹² The reader will not be surprised and might forgive me if I humbly recommend the account presented in *On the Ethics of War and Terrorism* and elsewhere: I provide a sustained argument against legitimate authority, argue for the possibility and permissibility of individual war, subsume proportionality completely under just cause, am very lenient with regard to right intention, reject last resort and prospects of success as necessary just war criteria, reject the principle of double effect, do not think that the *ius in bello* principles of discrimination and proportionality are independent, defend terrorism to a certain degree, and radically circumscribe the century-old orthodoxy of the moral inequality of combatants. Whatever else that account is, it is certainly not "orthodox."

¹³ When I mention a "justified war", I am referring to a war as a complex *action*, not as a historical *event*. The Second World War is a historical event, Britain's war against Germany an action, and Germany's war against Britain another action. See Steinhoff (2009a, 135–136). See also McMahan (2009, 5).

shown, for instance, by the injustice of a law that prohibits destroying a rock that threatens to crush me.¹⁴

While a rock does not have any rights, the falling man has. He has a right to life and a right to self-defense. He has no right to crush innocent people, however, and therefore he poses an unjust threat. Now if the rights of the two persons are not compatible in this situation—that is, if the innocent person below can only defend himself and save his life by vaporizing the unjust threat above with his ray gun—then, on the account presented here, the (claim-)rights in their collision can no longer be upheld as (claim-)rights (for as claim-rights they are not compatible) but instead become mere liberties (liberty-rights) (Steinhoff 2007a, 85–86 and 88–89¹⁵). While a *right*, understood as a claim right, implies that the person I hold the right against cannot interfere in my exercise of it without wronging me, a *liberty* (-right) held against a certain person only implies that I am not duty-bound towards that person not to exercise this liberty and thus implies that by exercising it I would not wrong her. It does *not* imply that the other person would wrong *me* if she tried to keep me from exercising my liberty. Thus, on my account, in this case both parties have lost their *claim*-rights to life *and* to self-defense but *retained* their *liberty*-rights to life and self-defense.

This account is perfectly consistent, Seth Lazar’s doubts notwithstanding. To wit, he states that “if one can only lose the claim right not to be killed by posing an unjust threat—i.e., a threat that violates another person’s claim right not to be killed—then it cannot be the case that two parties are each liable to be killed by the other, in virtue of the threat each poses to the other” (personal communication). However, the “i.e.”-part of this statement ignores both my actual use of “unjust threat” and the fact that I explicitly reject the view that one can lose one’s claim right to be killed only by violating another person’s rights.

Thus, the situation of the innocent threat and the (potential) innocent victim is a symmetrical defense case in which both parties are liable to attack. The fact that the falling man is morally innocent is not sufficient for him to retain his specific right to life in this situation: innocent people posing a threat to someone who is not responsible for initiating a threat to another innocent and non-threatening person do not have a right to life (at least not if killing them is the only way to stop them).¹⁶ And thus the innocent man below may try to vaporize the falling innocent man, but the falling innocent man may also try to prevent this by killing the innocent man below (the falling man might be armed).

¹⁴ McMahan (personal communication) notes against this example that the reason why it is permissible to destroy the rock is not that the rock is liable but that there is simply no moral objection to destroying it. However, I do not make any claim about the liability of rocks here. I claim—and my example shows that claim to be correct—that people have a general right (which in a situation of rights-clashes can be transformed into a specific liberty) to destroy objects that unjustly threaten to destroy them, whether those objects violate their rights or not.

¹⁵ There I sometimes used the term “permission” where I meant liberty-right. In fact, however, it is necessary to distinguish permissions from liberty-rights. For example, a person A might have a liberty-right against person B to kill B without being *permitted* to kill B. In other words, just as claim rights can sometimes be justifiably violated for the greater good, liberties, for the sake of the greater good, must sometimes not be exercised.

¹⁶ This distinguishes this symmetrical defense case from the asymmetrical soldier/civilian cases below.

3.2 Rights-Violations in War

So how do people on the “just” side of a war violate the rights of innocent people and thereby become liable to attack?

One obvious way of doing so is by personally killing or mutilating them, or by imposing upon them a significant risk of their being killed or mutilated.¹⁷ Many “just” soldiers clearly do exactly that by shooting and dropping bombs.

Many other “just” soldiers, however, do not *themselves* kill or mutilate innocent people or impose significant risks on those people. They only *participate* in or *contribute* to so doing. At least three types of participation or contribution need to be distinguished: (a) actual *participation* in an unjust (collective) attack or an unjust (collective) imposition of risk; (b) non-participatory guilty contribution; and (c) non-participatory innocent contribution.

Let me first give one example outside of the war context for each type. The Jackal wants to kill an innocent person. Alex has marked the target in some way, full well knowing that this is supposed to enable the Jackal to murder the innocent person. This is participation or assistance, and is also called such in most Western jurisdictions. Incidentally, it doesn’t matter whether this marking was actually necessary for the Jackal’s plan to succeed or not; that is, it does not matter whether Alex *causally* contributed.

Bob has sold the Jackal the rifle he needed for the task, full well knowing that the Jackal will try to murder an innocent person with it. This is non-participatory culpable contribution, in most Western jurisdictions also called aiding and abetting.¹⁸

Cecilia, a cook in a restaurant, has served the Jackal a meal, full well knowing that the Jackal will soon kill an innocent person (she has no means to call the police or to stop the Jackal in another way, but she would have been able to deny the Jackal the meal), and Cecilia’s son has sold the Jackal ammunition, not knowing that his customer will use it to kill an innocent person. These two cases are non-participatory innocent contribution. By law Cecilia and her son are considered innocent bystanders.

Under (most Western) law, Alex and Bob can be held liable for the Jackal’s attempt to murder the innocent person; Cecilia and her son, however, cannot.

Let me now give examples from the context of war. “Just” army A invades country B and kills “collaterally” many innocent people. Many soldiers do not themselves shoot or drop bombs on innocent people, but they help other soldiers in doing so, for example by maintaining the weaponry, supplying ammunition and marking targets during the war. They *participate* in collective actions (whether they actually *causally contribute* to any killing and mutilation or not) that, justified or not, are nevertheless *unjust* since they kill, mutilate or unjustly endanger innocent people. The participating soldiers are thus liable to attack. (Note, however, that I am not claiming here that *all* soldiers of army A participate in unjust collective acts. In

¹⁷ However, if this happens on the civilians’ own behalf, for example in a humanitarian intervention that endangers them while simultaneously trying to save them from genocide, this might not make the combatants liable to attack. For an argument to this effect, see McMahan (2010, 342–379).

¹⁸ For a legal account of complicity, see Smith (1991). For predominantly philosophical accounts, see Kutz (2000) and Miller (2001).

fact, I think that many soldiers, on *both* the justified and the unjustified side, might *not* be liable to attack).¹⁹

Entrepreneur E has delivered weaponry to army A before the war started (but not since then), full well knowing that it would be used for the unjust collective actions of the war. He would be liable to attack (if attacking him would help to diminish the danger, which is of course highly unlikely).

Farmer F delivers foodstuff to the army. He is a non-participatory innocent contributor and not liable to attack.²⁰ The same holds for the foreign entrepreneur EF, who before the war had delivered screws to the country of army A which are now used by that army in some of its weaponry.

This account of liability is, I submit, intuitively quite compelling, coherent and well-suited to the realities of law in Western jurisdictions, not least because it makes use of familiar distinctions used in those jurisdictions. Admittedly, those distinctions are not always clear cut; there are unclear cases and grey areas. Yet in many cases we are quite able to distinguish between actual *participation* in an act and guilty or non-guilty contribution. Case law and common sense morality (which do not necessarily make these distinctions *in these terms* but make them nonetheless) fare reasonably well in making these distinctions when it comes to the attribution of liability.

Thus, on the account presented here, combatants who participate in unjust collective actions that kill and mutilate innocent people or impose significant risks on them²¹ violate the rights of those innocent people and are therefore liable to attack even if they *justifiably* participate in those collective actions that (partly) constitute the war.

These combatants are therefore also not innocent in the relevant sense. McMahan (personal communication) disagrees and claims that if something is justified it cannot be culpable or non-innocent. However, in German the terms “guilt” and “culpability” are translated with *Schuld*, which in turn also means *debt*. Since, as we will see, justification does not defeat liability, a person who justifiably wrongs another person normally owes her compensation and is thus *indebted* to her. In contrast to McMahan (it would appear), I find nothing odd about the idea that one can incur guilt not only before the law or morality but also before another human

¹⁹ See also Lazar (2009) and (2010). Lazar, however, seems to accept McMahan’s account of liability to attack according to which one becomes liable to attack by being morally responsible for an objectively unjustified threat of harm. See for example McMahan (2009, 35). As we will see, however, that account is not correct. Lazar also seems to think that causal contribution is necessary for liability. That is also incorrect, as I have just argued.

²⁰ The idea that one has to distinguish people who aid “the soldier qua human being” from people who are “aiding the soldier qua soldier or fighting man,” to use Jeffrie G. Murphy’s (1973, 534) words, has always been quite popular, and rightly so. Cécile Fabre (2009) has recently argued that it is not correct that civilians who supply soldiers only with food are not liable to attack. I agree, since, as she correctly points out, *some* ways of supplying soldiers with food *are* helping them as soldiers. However, this only reinforces the distinction I have just endorsed instead of undermining it. Obviously, more would need to be said here (but not for present purposes).

²¹ Again, this needs to be somewhat qualified, as stated in n. 17. A further qualifier, as will become clear below, is that combatants who participate in a justified war are not liable to be attacked by *those* enemy soldiers (if any) who participated in the aggressive act that provoked the justified war in the first place.

being. I do find it odd, however, to think that violating another person's rights, whether justifiably or not, does not alter one's moral status. How can that be? Are rights so trivial? McMahan offers the possibility of perhaps feeling "remorse or agent-regret"; yet, feeling remorse if one is not somehow culpable or guilty of something is simply irrational; and "regret" does not become better by putting an "agent" before it. I can also regret that *another* person violates somebody's right; but if I do it myself more than regret seems appropriate, namely indeed a feeling of remorse. If this is to be rational, it has to correspond to guilt. McMahan might be inclined to claim that all such feelings of remorse are irrational, but such a claim would seem implausible and certainly unsubstantiated. Be that as it may, in the end this might be partly a quibble about words. For McMahan justification is by definition sufficient for innocence. My concept of innocence is different. Leaving aside excuses, justification is sufficient for innocence only in conjunction with *justice*. Thus, again, combatants who participate in unjust collective actions that kill and mutilate innocent people or impose significant risks on them are non-innocent and hence liable to attack.

4 Reply to Objections

4.1 Why the Proposition that "Just Combatants" and "Unjust Combatants" Do Not Have the Same Liberty-Right to Kill Each Other is Analytical and of No Practical Relevance

McMahan claims that justification *defeats* liability so that "just combatants" are not liable to be attacked by "unjust combatants." However, that claim is true by definitional *fiat* and hence irrelevant for the substantive question at issue.

McMahan gives the following definitions:

As I understand it, a just cause is an aim that satisfies two conditions: (1) that it may permissibly be pursued by means of war, and (2) that the reason why this is so is at least in part that those against whom the war is fought have made themselves morally *liable* to military attack. With this notion as background, we can now distinguish between "just combatants," who fight in a just war, and "unjust combatants," who fight in a war that lacks a just cause. (McMahan 2009, 5)

Given these stipulations, however, the thesis of the unequal liberty-rights of just and unjust combatants to kill each other or of their unequal liability to attack is not what many people take it to be, namely a synthetic moral truth (or a synthetic moral falsehood) but rather an analytically true sentence.

Why? Well, for example, we can formulate the thesis as follows (of course, there are various possible formulations, but they make no difference to my argument here, as long as they keep true to McMahan's claims and definitions):

The moral inequality of combatants: Unjust combatants are liable to military attack by the just combatants they fight against, while just combatants are not liable to military attack by the unjust combatants they fight against.

And then we can proceed as follows: First we substitute, as McMahan's definitions allow, "combatants who fight in a war that lacks a just cause" for "unjust combatants" and "combatants who fight in a just war" for "just combatants." In a second step we substitute, as McMahan's definitions also allow, "combatants who fight in a war in which those the war is fought against have made themselves morally liable to military attack" for "combatants who fight in a just war" and "combatants who fight in a war in which those the war is fought against have not made themselves liable to military attack" for "combatants who fight in a war that lacks a just cause." We will then have transformed the thesis of the moral inequality of combatants into this logically equivalent thesis (I have added UC for "unjust combatants" and JC for "just combatants" to make it slightly easier to understand):

Combatants (UC) who fight in a war in which those (JC) the war is fought against have not made themselves liable to military attack are liable to military attack by the combatants (JC) they fight against and who fight in a war in which those (UC) the war is fought against have made themselves morally liable to military attack by the combatants (JC) they fight against, while combatants (JC) who fight in a war in which those (UC) the war is fought against have made themselves morally liable to military attack are not liable to military attack by the combatants (UC) they (JC) fight against and who (UC) fight in war in which those (JC) the war is fought against have not made themselves liable to military attack.

While this thesis, being analytical, is true, it is also irrelevant, for given how McMahan defines "unjust combatants" and given that justification does not defeat liability, there simply are no unjust combatants.

For how could there be a war that lacks a just cause in McMahan's sense? After all, for a war to *have* a just cause it need not be fought *for* that just cause—to claim the contrary would be to confuse the criterion of just cause with that of right intention. To be sure, McMahan might already be doing that to a certain extent since he states that a just cause is an *aim*, and arguably something can only be an aim if somebody did, does or will actually aim at it. However, the fact remains that there can *be* the aim or just cause *x* (*somebody* can have that aim) without the alleged legitimate authority or without all those (or even any of those) fighting the war having that aim.

Therefore, of course, in every war there *is* a just cause (provided justification does not defeat liability; I argue below that it does not), for example the just cause to defend certain innocent people, in particular one's own innocent civilians, against being killed or maimed by the enemy combatants.

Frowe struggles "to see this as a *just cause* when the need for defence arises from my own impermissible action" (personal communication). However, first, McMahan's definition is entirely compatible with considering this as a just cause, and it is McMahan's definition I am discussing. Second, while the *first* aggressive soldiers have acted impermissibly, it is simply question-begging to claim that their comrades who *later* join the fray act impermissibly, too. One must not tar all combatants on the unjustified side with the same brush. There are *different* unjustified soldiers, not an amorphous mass called "the unjust combatants." Besides, one must not ignore

collective action problems. An individual combatant joining the fray later cannot reasonably be said to have provoked the justified war, nor can he reasonably be said to be able to stop it by simply surrendering. (See on this also Sect. 5 below).

In addition, there is also the just cause of fighting *excessive* violence; *or* the just cause of hindering the enemy from reaching certain grossly unjust goals (you can have that aim even if the enemy does not have unjust goals himself in the first place); *or* the just cause of saving innocent people in another country from brutal suppression, etc. Any such cause (and there are a lot more) is certainly one “that satisfies two conditions: (1) that it may permissibly be pursued by means of war, and (2) that the reason why this is so is at least in part that those against who the war is fought have made themselves morally *liable* to military attack.” If those the war is being fought against violate the rights of innocent people, they are liable to attack (provided justification does not defeat liability). Incidentally, many combatants who fight in an unjustified war, for that matter, actually will be fighting *for* a just cause.

Conversely, in every war, including the justified or “just” wars, there *is* also an unjust cause, for example (again, there are many more) the unjust cause of killing or maiming large numbers of innocent people on the other side. The objection²² that this is not a cause but a side-effect is mistaken. A cause, in McMahan’s account, is an *aim*, and hence something you can want to achieve with a war, and of course people can participate in or support a war because they want certain innocent people to get killed or mutilated. This happens, for example, in extermination wars, but of course people can have this aim in other wars too. Maybe McMahan would like to claim that the aims of the combatants have to be distinguished from the aims of the war. But it is *his* task to do this in his definition of “just cause.” So far he has not. Besides, wars cannot literally have aims, only persons can. And this fact makes it very difficult to avoid the point of this paragraph.

And many combatants on the justified side will actually be fighting *for* unjust causes—and even if they are not, they still objectively *contribute* to an unjust cause. Thus, we again have a moral equality of combatants: there are just and unjust causes and contributions and intentions on both sides. An *unjust* combatant in McMahan’s sense, however—that is, a combatant who fights in a war that *lacks* a just cause—is nowhere to be found.

4.2 On Making Too Many People Liable to be Killed

Let us leave now the “just combatants” and “unjust combatants” behind and return to the liability of combatants in a justified war. On the account of liability presented above, somebody’s violating another person’s right is sufficient (but not, due to symmetrical defense cases, necessary) to generate the right to necessary and proportionate (or not grossly disproportionate) self- or other-defense.²³ Since innocents who are not posing an unjust threat are not liable to attack or to being threatened by attack, initiating or sustaining such threats to them is unjust. By

²² Raised by Cécile Fabre, Helen Frowe and Jeff McMahan (personal communications).

²³ To this extent I follow Judith Jarvis Thomson.

initiating or sustaining such threats, by participating in activities that initiate or sustain such threats, and, of course, by actually killing and maiming innocents one would wrong them (and McMahan agrees). Therefore, in all those wars in which combatants on the justified side are responsible for violating the rights of innocents (namely by using their weapons in the relevant manner or threatening to do so, for instance, or by protecting the flanks and rear of their killing comrades, or, quite generally, by participating in a collective action that poses unjust threats to innocents), they are liable to attack. It follows that the soldiers on the unjustified side do not wrong combatants on the justified side when they kill them and thereby protect innocent bystanders against an unjust threat. Moreover, there is no reason why such attacks against just combatants could not be proportionate, given what proportionality means in defense cases (see Steinhoff 2008, 224–225).

McMahan, however, tries to undermine this argument by refuting two assumptions he attributes to me:

In summary, Steinhoff's argument presupposes (1) that just combatants can be liable to defensive attack by virtue of posing a threat of wrongful harm to innocent people, even if the action by which they do so is morally justified, and (2) that just combatants pose a threat in the sense relevant to liability not only when their action puts innocent people at immediate or imminent risk of wrongful harm, but continuously throughout the period in which they are at war. (McMahan 2008b, 229)

Let me first point out that my argument does not presuppose the second assumption at all. As I already stated in Sect. 3.2, I think that many soldiers on *both* the justified and the unjustified side are not liable to attack. In any case, in order to defend the moral equality of combatants (for most wars) in the sense discussed here, namely in the sense of an equal liberty to kill the enemy combatant, it suffices to be agnostic on the question whether just combatants are always liable to attack in war. To establish equality it would be enough to show that if they are not, the unjust combatants are not either.²⁴ If *both* (or roughly the same percentage on both sides) are not liable to attack, they have again an *equal* liberty-right to kill each other (equality might consist here, of course, in none of them having a liberty-right to kill the other). (In fact, even if the percentages were very different, nonetheless *any* combatant on the unjustified side who has a liberty-right to kill combatants on the justified one limits the scope of the general thesis of the moral inequality of combatants).

McMahan further specifies my alleged second assumption as follows:

Precisely stated, this is the assumption that in a war that exposes innocent people to some risk of wrongful harm, all just combatants count, for the

²⁴ McMahan (2009, 41) now recognizes this: "In principle unjust combatants might also be liable only when the threat they pose passes a threshold of seriousness, so that they might not be liable to attack while asleep, or when stationed at bases remote from fighting. If so, we would still have a version of the moral equality of combatants: one that treats just and unjust combatants as liable to attack, though only when the threat they pose to innocent people passes a certain threshold of seriousness." Seth Lazar (2009) elaborates on this.

purpose of assigning liability, as posing a continuous threat to the innocent, simply by virtue of the fact that their belligerent activities might, at some point, actively endanger innocent people.

And he then tries to turn the alleged counterintuitive implications of this against me:

Assuming that it has application outside the context of war, it implies, for example, that all drivers are liable to preventive killing on the ground that the activity in which they are engaged poses a lethal threat to innocent people. (McMahan 2008b, 230)

This maneuver by McMahan is unsuccessful, since I do not make the “precisely stated” assumption. My assumption, rather, is that people who participate in an unjust (collective) attack or an unjust (collective) imposition of risk, and people who guiltily contribute to such things, are liable to attack. By just driving around with your car, however, you do *not* participate in an unjust (collective) attack or an unjust (collective) imposition of risk (yes, you impose *some* risk, but below a certain threshold the imposition of risk is not unjust), and you do not guiltily contribute to such things either.

Thus, the account of liability I rely on does not have the counter-intuitive implications McMahan wants to ascribe to it. His own account, on the other hand, does have very counter-intuitive implications. Let me explain why: While McMahan thinks that the ordinary driver is not liable to attack if all goes well, things change “if the probability that she will otherwise kill the pedestrian gets high enough (for example, if, as a result of mechanical failure, her car is veering uncontrollably toward him).” She will then “become liable to defensive killing. Her liability derives from her earlier choice to drive, made in the awareness of the risks she would impose, together with bad luck” (McMahan 2008b, 231).

Note, however, that contrary to what McMahan seems to assume (remember that the example is given in the context of a discussion of *threats*) the driver does not pose a threat at all. In the example, she has *lost control* over the car. In fact, she could be removed from the scene (Scottie might beam her up), and this would not make any difference to the pedestrian at all. The *car* is posing the threat now, not the driver.

I have come across the objection that this is like saying that it is the bullet, not the soldier, who is the threat. Indeed, it is, but only with respect to circumstances where the bullet has already left the barrel and the soldier will not attack any further. Thus, with respect to such circumstances it is also saying the right thing. Under circumstances where the soldier will continue fighting, however, *he* is the threat. So is the driver if, after missing the hiker, he tries to run him over again. But this is not the situation we are facing in McMahan’s example.

Thus, the driver is at best a culpable cause in McMahan terms (see McMahan 1994a, 258).²⁵ Thus if she is a taxi driver, she has the same moral status as a certain tired hiker standing next to the pedestrian, for this hiker called the taxi that is now lethally veering towards the pedestrian; and McMahan, after all, wrote immediately following the last quotation: “So voluntary engagement in an activity known to

²⁵ I write “at best.” McMahan would actually regard her an innocent cause.

impose a risk of wrongful harm, even if the *ex ante* risk is very low, is a basis of liability to defensive action if the probability of wrongful harm becomes unexpectedly high” (McMahan 2008b, 231). Yet, if driving is an activity known to impose a risk of wrongful harm, so is calling a taxi (and thereby making someone engage in the activity of driving). Consequently, on McMahan’s account the tired hiker (and what about the persons who built the car, the mechanic who maintained it, the man at the gas station who filled the gas tank?) would be liable to attack and the pedestrian could justly throw him in front of the taxi if this would save his, the pedestrian’s, life. This is, I submit, utterly counter-intuitive.²⁶ Many more counter-intuitive examples could easily be offered. (To mention just one in the context of war: You worked last year in a Guatemalan screw factory, full well knowing that these screws can be used in weapons. Gaddafi does use some of the screws you produced for this purpose. It seems that on McMahan’s account you now are liable to attack by the Libyan freedom fighters if blowing you up in your living room in Guatemala brought them a military advantage of some sort. McMahan’s account of liability is far too permissive).

Ironically, McMahan provides one himself:

Suppose that the only way you can prevent yourself from being killed by a culpable attacker is to kill his mother. If you do kill her, can you then claim that she was liable to be killed because, as a morally responsible agent, she voluntarily chose to engage in an activity (having a child) that had a tiny probability of resulting in an unjust threat and that this made her responsible for the threat you faced from her son? Obviously not. But it is less obvious what the right explanation is of why the mother is not liable. (McMahan 2005b, 396)

This example, like my previous one of the tired hiker, is flatly a refutation of McMahan’s account of liability to defensive attack.

McMahan’s vague assurance that the “causal connections” are not “of the right sort for the transmission of moral responsibility” (McMahan 2005b, 396) can hardly count as an answer to the request for an explanation.

Contrary to what McMahan thinks, however, the explanation of why the mother is not liable *is* obvious: the mother is not liable to your defensive attack *because she does not violate your rights* (nor does she pose an unjust threat to you). She is not *participating* in the attack on you and she did not *culpably* contribute to the attack (she did not bear the child full well knowing that it would kill you, and even if she did know that, what was she supposed to do—kill it on spot?).²⁷ This is the answer of the rights-based account of liability, and it is a very plausible answer—one also shared by law and common sense, I submit.

I conclude that McMahan’s account of liability to defensive killing is mistaken. It is *not* correct that voluntary engagement in an activity known to impose a risk of

²⁶ McMahan admits that this is both implied by his account and counter-intuitive (personal communication). He also thinks that intervening action plays a decisive role. I think it indeed does, but factoring intervening action in will in my view force McMahan to give up his account of liability. The rights-based account, on the other hand, has of course acknowledged all along that intervening action is important.

²⁷ See above, Sect. 3.1.

wrongful harm, even if the *ex ante* risk is very low, is a basis of liability to defensive action if the probability of wrongful harm becomes unexpectedly high.

4.3 Persons Who are Liable to Attack may Sometimes Defend Themselves

I just discussed one of McMahan's attempts to burden me with certain unpalatable implications of a certain assumption he attributes to me. That attempt failed, as we saw, because I simply do not make that assumption. McMahan makes another similar attempt:

If Steinhoff were right and just combatants who foreseeably but unintentionally threaten innocent civilians thereby make themselves liable to attack not only by the civilians but also by third parties, these cases would instead be asymmetrical in a way that seems highly implausible. If just combatants are liable to attack by unjust combatants in these cases, and if there is no right of defense against an attack to which one is liable, then just combatants have no right of self-defense against unjust combatants. Yet if they *were* to attempt to defend themselves, the unjust combatants *would* have a right of defense against them. (McMahan 2008b, 241)

Fortunately for me, I do not accept that “there is no right of defense against an attack to which one is liable” (if “right” here means, as it obviously does, “liberty-right”). Incidentally, in defining liability McMahan said that if “the person to be killed has acted in such a way that to kill him would neither wrong him nor violate his rights, even if he has not consented to be killed or to be subjected to the risk of being killed ..., I will say that the person is *liable* to be killed” (McMahan 2005b, 386). Nothing in this definition implies that people who are liable to attack may not defend themselves. On the rights-based account, an innocent victim (remember that my concept of innocence does not apply to responsible agents who actively pose unjust threats) does *not* wrong an innocent unjust threat by attacking this threat if doing so is proportionate and his only means to defend himself against the threat. *Nor* does the innocent unjust threat wrong the innocent victim if she tries to defend herself against the victim's self-defense, provided that the measures she uses are proportionate and “necessary.”²⁸ Thus, on the rights-based account they are *both* liable to attack and counter-attack by the other (Steinhoff 2007a, 88–89).

Recently, however, McMahan has dramatically changed his definition of liability. He *now* claims:

What it means for a person to be liable to attack is that there's a substantial *moral asymmetry* between him and those who might attack him. He has no right not to be attacked, and is therefore not wronged by being attacked, while the attackers *retain their right* not to be attacked.²⁹

²⁸ For a discussion of the fact that the “necessity” requirement is not to be taken too literally, see Steinhoff (2009b, 41–43).

²⁹ Jeff McMahan, “Self-Defense Against Justified Threats,” unpublished lecture notes, on file with author, p. 5.

McMahan is begging the important and controversial question here as to whether liability really involves a moral asymmetry. In any case, one cannot decide a philosophical debate by definitional fiat.

The following remark of McMahan's comes closer to being an argument:

Some have claimed that the bomber forfeits only his right not to be attacked but retains his right of self-defense. I doubt that that's coherent.³⁰

I *know* that this is incoherent—if, that is, at least one of the rights mentioned is supposed to be a *claim-right*. In that case, however, it is also certainly not a claim I make. My claim about the symmetrical defense cases at issue (as already explained above with the example of the falling man and his potential victim) is that both parties have lost their *claim-rights* to life *and* to self-defense but *retained* their *liberty-rights* to life and self-defense. There is nothing incoherent about that.

Thus, the account of liability and symmetrical defense cases presented here is perfectly coherent, while McMahan's new definition of "liability" is ad hoc (he does not really explain why he suddenly changes the definition and gives no argument why we should accept the new one) and question-begging (it simply *stipulates* that liability implies asymmetry).

Even if we accepted it, however, that would still be irrelevant for the question of the equal liberty-rights of combatants to kill each other, because McMahan's stipulative definition only implies that there cannot be symmetric liability to attack but not that there cannot be symmetrical liberty-rights to attack (unless McMahan wants to redefine the concept of a liberty-right, too).

Finally, let me briefly discuss the following example McMahan recently challenged me with (the choice of names is mine).³¹

Suppose Anthony unjustly attacks Barbara and her two innocent friends. Barbara is about to defend herself by throwing a grenade, the only defensive option she has under the circumstances. This defensive action, however, would also kill an innocent bystander, thus wronging him.

Would not Barbara thus become liable to attack, on my account, so that *now* Anthony can actually kill Barbara justly?

No, she does not become *liable* to attack *by Anthony* (which, however, does not mean that Anthony cannot *permissibly* attack her; it only means that he would wrong her if he attacked her). After all, *Anthony*, not Barbara, initiated the unjust attack (as do the *first* attacking soldiers, whether they are participants in an unjustified war or a justified one, so my concession here does not weaken my claim as to the severe limitations of the moral inequality of combatants³²), he forced Barbara to choose between the lives of herself and her two friends on the one hand and the life of an unjust attacker and an innocent bystander on the other. He had no

³⁰ See note 29.

³¹ See his comments on my talk at the "War and Self-Defence" conference in Sheffield.

³² Incidentally, even if the first attacking soldiers on the unjustified side are not moral equals to the defending soldiers, this does not change the fact that the *other* soldiers on the unjustified side are (if their enemies endanger innocent people on the unjustified side), which sets extremely severe limits to the generalizing thesis of the moral inequality of combatants.

liberty-right (and, of course, no claim-right) against her to attack her in the first place, and therefore he cannot now have a liberty-right against her to violently interfere with her self-defense against the unjust attack.³³ If he does, he is violating her claim-right to life and to self-defense against him. (The structure here is that of self-defense against unjustly provoked self-defense).

Barbara, however, would become liable to attack by some *other* people, namely by those specially related to the innocent bystander. And even Anthony would still be *permitted* to kill (albeit *unjustly*) Barbara if this would be the lesser evil or even if it would merely be justified under necessity,³⁴ for example if the side-effects of Barbara's self-defense would be too severe (perhaps she would kill several innocent bystanders). In other words, that a person Y is *liable* to be killed by another person X does not yet mean that X can *justifiably* kill Y; and that Y is not liable to be killed by X does not yet mean that X cannot justifiably kill Y. Liability is not the all-decisive factor for permissible killing (see also Sect. 5).³⁵

4.4 Justification Does Not Defeat Liability

McMahan claims that justification defeats liability, and that therefore justified soldiers cannot be liable to attack. As far as the moral (in)equality of combatants is concerned, this is a question-begging argument, for it only “establishes” the inequality of combatants on the assumption that combatants on the unjustified (collective) side cannot, individually, justifiably participate in the war. However, that is not only far from obvious—individual participation in an unjustified collective act can clearly very often be justified—but it is also precisely the controversial issue. Thus, even if justification defeated liability, this would not be sufficient to undermine the thesis of the moral equality of combatants.

Yet I will not follow up on this issue here.³⁶ Instead, I will now argue that justification does not defeat liability. To set the scene, allow me to first point out that McMahan is well aware of the fact that his claim that combatants in a justified war are not liable to attack might intuitively be much less convincing than a defender of his position would wish. He says:

The claim that justification defeats liability may seem more compelling in the case of justified acts that are morally required. If so, and if acts of war by just combatants that kill innocent people as a side effect are optional rather than required, this would weaken the case for the claim that those who engage in such acts do not thereby become liable. ... I believe that there are wars that countries are morally required to fight ... And there may be others that, while morally optional, are nevertheless justified in the strong sense that they are not only permissible but also impartially better than any alternative—that is, there

³³ See my remarks in the last paragraph of Sect. 3.1 and the note 16.

³⁴ Necessity justifications and lesser evil justifications are not the same; the former are far less demanding. However, I cannot and need not go into this here.

³⁵ Mapel (2009) emphasizes that McMahan's own account of permissible self-defense seems ultimately not really to rely on “liability.”

³⁶ I do so elsewhere, see n. 6.

is no alternative act that would be morally better or even equally good. (McMahan 2008b, 234–235).

This, it seems, is nothing less than the admission that in all normal wars, even in normal “just” wars, the “case for the claim that those who engage in such acts do not thereby become liable” is “weakened.” But with this admission the case for the claim that McMahan’s thesis of the inequality of combatants has great practical significance is also weakened, and very much so. How many wars are there that countries are morally *required* to fight? Is there any such *real* war? Maybe (though even that is not entirely clear, for a variety of reasons) Great Britain was required to fight *a* war against Germany, but it was certainly not required to wage the indiscriminate war it *actually* waged (Anscombe 1981, 72–81, esp. 73). And that actual war, quite obviously, was also not “impartially better than any alternative.” Besides, the issue here is not the war as a whole but the justification of the individual, allegedly just combatants. Has there ever been *any* act by just combatants that has been impartially better than any alternative? How likely is that? More likely than the same happening on the other side? And how does one find out? If “just” soldiers are only then not liable to attack when all their acts of killing or contributing to killing innocents are “impartially better than any alternative,” the “inequality of combatants” has for all intents and purposes gone overboard.

Moreover, the claim that justification defeats liability to defensive killing is ad hoc, anyway. McMahan denies this by pointing to the fact that criminal liability is defeated by justification. He is right, of course, but that is irrelevant. The issue was and is not liability to punishment, but liability to defensive killing, as he himself acknowledges (McMahan 2008b, 234) (which makes it odd that he discusses criminal liability at all).

He also mentions tort law and explains that strict liability is “the only kind of liability in either criminal or tort law that is not defeasible by a justification, and it governs only a very limited domain of the law of torts” (McMahan 2008b, 233). However, this statement is a tautology. Strict liability is *defined* as liability that is not defeasible by a justification or an excuse. The more interesting question to ask, therefore, is whether in tort law justification always defeats liability. The existence of strict liability shows that it does not – which proves my point.

Moreover, whether the domain of strict liability is “limited” or not, the fact remains that it is exactly the domain under discussion here. In fact, only a few lines before he banished strict liability to a very limited domain, McMahan discussed “Joel Feinberg’s case of the hiker in a snowstorm who, in order to avoid freezing to death, breaks into an unoccupied cabin and makes a fire by burning some furniture. He infringes the owner’s rights and owes the owner compensation, but the owner would have no moral right of defense against the trespasser” (McMahan 2008b, 233). Now, this example shows that justification (the hiker was justified according to McMahan) does not defeat liability.

McMahan, however, offers this example to undermine another objection: in the case where, for instance, “just” combatants bomb and kill innocent bystanders in the course of a proportionate attack on a military target, the “just” combatants would (from a moral point of view) *ex post* have to pay compensation to the victims

of their attack, while the potential victims, if they harm the attackers through defensive action, would not have to pay compensation to *them*. This, I think, shows that there is a crucial difference between the two parties – there is certainly no symmetry.

Yet, McMahan objects to this that “one cannot infer that a person is liable to defensive action *ex ante* from his being liable to pay compensation *ex post*” (McMahan 2008b, 233). That is correct; one cannot infer this without a further premise (and one does not have to). However, in tort law the fact that A has to pay compensation to B means that A has *wronged* B. Thus, the fact—if it is a fact, and I think it is—that the innocent victims of the bombers can demand compensation for the mutilations and losses they have suffered from the bombers while the bombers cannot demand compensation for the losses and harms they have suffered due to the defensive action of the innocents, shows that a moral asymmetry is at play here. The bombers have wronged the innocents, and not vice versa. Seeing that McMahan thinks that even differences of “comparatively slight moral significance” can make all the difference in who is liable to be killed (McMahan 2005b, 394), it is unclear why this should not be the case here—especially since the difference is not slight at all.

In that context, let us revisit Feinberg’s example. McMahan claims that the owner would have no moral right of defense against the trespasser. Well, leaving aside the moral question for a second: from a legal point of view it is actually not that clear that the owner does not have a right of defense against the trespasser (Christie 1999, 1008). Moreover, if the backpacker by his actions threatens the *life* of the owner (maybe the owner cannot survive without the furniture), the owner definitely has the legal and moral right to defend himself – with lethal violence, if need be. And the backpacker *would under those circumstances not be allowed to use lethal countermeasures in turn against the self-defense of the owner*. That is the legal situation at least in US law (which is the law to which McMahan refers). I think it is also the correct stance from a moral point of view.

What we are dealing with here is a case of so-called private *necessity*. This is important since McMahan now explicitly argues that the justification of the tactical bomber is a *necessity justification* (and of course it is).³⁷ However, in law the necessity justification definitely does *not* defeat liability.

In law, the defense of private necessity allows a person to damage or destroy or to trespass another’s property in the course of self-help efforts that are reasonably necessary to save the actor’s clearly more valuable property and/or his or her own life (Sugarman 2006, 5–6). However, most US statutes do not allow this legal defense in cases where the self-helper threatens the *life* of another person. In such cases, the self-helper becomes liable to attack. Nevertheless, following the Model Penal Code, the statutes of some other US states seem to allow deliberately killing an innocent and non-threatening person in order to save many others. Still, this same Model Penal Code makes clear that this privilege “does not abolish or impair any remedy for such conduct that is available in any civil action,”³⁸ which means, as

³⁷ McMahan, “Self-Defense Against Justified Threats,” p. 2.

³⁸ *Official Model Code*, Sect. 3.1, as quoted in Christie (1999, 1026).

George C. Christie (1999, 1026) points out, that a person killing another innocent person out of necessity “would be liable in tort for substantial damages in a wrongful death action brought by [the victim’s] next of kin.” It seems, however, that if the potential victim killed the self-helper, such a wrongful death action could not, for good legal reasons, be brought against the potential victim (Christie 1999, 1034–1039). As Christie (1999, 1039) further notes: “If any of the parties would be free from tort liability, it would be the [innocent potential victim of a “necessary” attack]. I cannot conceive of any American court holding an innocent person liable in tort for shooting another person to prevent that other person from killing him.”

Frowe, however, objects that if we are discussing “unjust combatants” the proper analogy would be a different one, and states that she cannot conceive of a court finding *you* liable for the death of one person by diverting the trolley away from two hundred towards the one when I tied all those people to the track and set the trolley in motion (personal communication). In response, let me note, first, that when we discuss “just” combatants the proper analogy is not to diverting existing threats (like trolleys already set in motion by someone else) but to initiating completely new ones (like dropping bombs). And I can very well imagine a court finding you liable for wrongful killing if you blow up one hundred innocent people when this is the only way to keep me from killing one thousand. Second, Frowe *again* tars all “unjust combatants” with the same brush (see my discussion of this above). Some of them have *not* tied the innocent people to the track but joined the fray later. And the question is whether *they* would be held liable if they kill you in order to defend themselves or people to whom they have special responsibilities from your attack.

Thus, US tort law takes it to be the case, and very reasonably so, that a person who kills another innocent person out of necessity *wrongs* this innocent person, while the innocent person killing the attacker does *not* wrong the attacker. But this then *means*, both on McMahan’s previous definition of liability to be killed as well as on his current one, that the first person must be legally liable to be killed, while the second is not. After all, in defining liability McMahan once explained that if “the person to be killed has acted in such a way that to kill him would neither wrong him nor violate his rights, even if he has not consented to be killed or to be subjected to the risk of being killed ... I will say that the person is liable to be killed” (McMahan 2005b, 386), and now says, to repeat:

What it means for a person to be liable to attack is that there’s a substantial *moral asymmetry* between him and those who might attack him. He has no right not to be attacked, and is therefore not wronged by being attacked, while the attackers *retain their right* not to be attacked.³⁹

This is the situation in US law as it concerns attacking an innocent person out of necessity: the attacker is liable, the innocent person is not. Thus, when it comes to the question whether US tort law and US self-defense and necessity statutes

³⁹ McMahan, “Self-Defense Against Justified Threats,” p. 5.

consider justification to defeat liability against self-defensive killing in cases of attempted homicide—and these are the cases we are talking about when the issue is war—US tort law and US self-defense and necessity statutes clearly support my position. This is so not least of all because it is also a morally very plausible position.

Incidentally, McMahan not only has the law against him, but, it seems, his earlier self as well:

Of course, a moral asymmetry remains between the Innocent Threat or Attacker and the Innocent Victim: for an Innocent Threat or Attacker is, by definition, morally responsible for the threat he poses, and may also be at fault (though excused) for that threat. And these considerations are relevant to how the inevitable misfortune ought to be distributed as a matter of justice. (McMahan 2003, 412)

Indeed, they are. Therefore it is somewhat surprising that McMahan *now* suddenly states that in “a conflict between those who act at the behest of morality and those who are wholly innocent and act in self-preservation [again, the correct expression is “self-defense”], justice is silent” (McMahan 2008b, 243).

One might be tempted to object here that there is nothing *ad hoc* or surprising about this. After all, in the indented quote McMahan discusses *innocent* attackers or threats while in the last quote he obviously refers to *justified* attackers. Yet, the problem is that contrary to what McMahan suggests, only those who are *morally required* to attack “act at the behest of morality” and not those who are merely *justified* in attacking.⁴⁰ A combatant can be justified in engaging in a certain attack even if all things considered it would have been morally better to do something else (maybe dedicate the same amount of energy and money and resources to Oxfam). If even under those circumstances he attacks anyway, then however justified he might be he is still morally responsible for the morally suboptimal choice of posing an unjust threat. The innocent bystander, however, is completely free of such responsibility. And these considerations, I think, are indeed relevant to how the inevitable misfortune ought to be distributed as a matter of justice.

I conclude that McMahan’s claim that justification defeats liability in the legal cases relevant for the present discussion is wrong. In addition, his claim that justification morally defeats liability is and remains *ad hoc* and implausible.

5 Liability, Permissibility and Strategies of Other-Defense

I have argued elsewhere that while combatants in an unjustified war *collectively* could perhaps best protect their civilian population by ceasing to fight, no individual such combatant can stop the war on his own.⁴¹ I therefore suggested that in most circumstances the best way for each combatant to defend innocent bystanders on his

⁴⁰ See also again the first paragraphs of Sect (4.4) until “gone overboard.”

⁴¹ This point also answers to corresponding objections made to me (in personal communications) by Helen Frowe, Seth Lazar and Daniel Statman.

side is to continue to fight (Steinhoff 2008, 222). McMahan responds that even if this were true, it would not be “obvious what an individual unjust combatant ought to do ... since there seem to be instances in which people ought not to participate in some activity even if it will be worse for some innocent people if they do not” (McMahan 2008b, 243). Yes, there might be such activities, but McMahan certainly has not shown that all unjustified wars are such activities. To simply assume they are is to beg the question. (And incidentally, could not “just” wars also be such activities?—pacifists say they are).

McMahan also says that my suggestion is “not obviously true” (McMahan 2008b, 243). That might be so, but his counter-claim is not obviously true either:

... since it seems that unjust combatants ought not simply to fight on one occasion after another without considering whether this has the effect of prolonging the war in a way that is counterproductive, and since it seems that they ought not to aim at victory, perhaps what they should aim for is the early defeat of their own side. This may be the option that would best protect their own civilians from injury and death caused by the military action of just combatants. (McMahan 2008b, 244).

Let me note first that even if the strategy McMahan describes were counter-productive, this would not change the fact that the combatants in a justified war who threaten innocent bystanders are liable to attack. As I noted before: that someone is liable to be killed does not necessarily mean that he can be killed *permissibly*; and that someone is not liable to be killed does not mean that he *cannot* be killed *permissibly*.⁴²

Consider the village sentinels who face a threat by a certain sect living in the jungle who want to sacrifice (justifiably, let us assume—maybe otherwise huge numbers of other children would be tortured to death by extraterrestrial villains) two children of the village each year. It is well known among the village people that resisting the intrusions of the sect will only make them come back again and again, killing more than just two children in the course of the different ensuing battles. It might be counter-productive not to hand over the two children at once and to allow the sect-members to cut their throats, but that does not change the fact that the throat-cutters would still be liable to attack. If the sentinels resisted the intrusion they might thereby do a bad job (I am actually not entirely sure about this, but will leave this point open here), they might perhaps even thereby wrong those additional village members who will be killed in future raids (but this would obviously also depend on which strategy the civilians prefer) or act otherwise impermissibly, but they definitely *do not wrong the intruding throat-cutters*. Similarly, the soldiers on the unjustified side do not wrong the soldiers on the other side by killing them on one occasion after another in defense of their own civilians. The soldiers on the justified side remain liable to attack, and thus the soldiers on the unjustified side have a liberty-right against them to kill them.

⁴² Although McMahan realizes this fact, he does not pay sufficient attention to it. While his book is called *Killing in War*, it actually deals for the most part only with *Liability to Be Killed in War*.

Second, whether or not combatants who participate in an unjustified war may aim at victory depends on how they conceptualize victory. If they conceptualize it as the achievement of an unjust cause, perhaps they must not aim at it—but the same would be true for the combatants on the justified side. However, they certainly may aim at it if they take victory to be the other side's ceasing to kill innocent civilians.

Third, by laying down their arms, soldiers on the unjustified side might actually *promote* unjust goals. For example, if the just side confronts an enemy who easily gives up, they might think: "This war is really easy. If it had been more difficult, it would have been prudent not to press for the achievement of certain unjust goals in addition to our just ones because our tough enemies would have made that very difficult; but now it seems there is no real problem here ..." Indeed, in many wars the combatants on the unjustified side are entirely justified in distrusting the avowed just intentions of the "just" side and in acting accordingly. By fighting on, they might contribute to the other side's justified war remaining justified.

Fourth, that a justified war is fought in a proportionate way by the combatants waging it does not mean that the havoc they wreak cannot be further minimized. McMahan, however, claims:

Acting to defend *some* innocent people on one occasion after another is counterproductive if the larger effect is to continue to prolong the war indefinitely, thereby repeatedly sustaining the threat to other members of the civilian population who have so far survived. (McMahan 2008b, 243).

For many situations, this is simply wrong. A boxer might also end a fight more quickly by standing still and lowering his guard, but ending a fight quickly and ending it without brain damage are not the same thing. Similarly, the soldiers on the unjustified side do not automatically have to trust that the soldiers on the justified side will not exploit weaknesses in the cover to wreak even more destruction.⁴³

The facts that (a) soldiers on the justified side who kill innocents are liable to attack, (b) soldiers on the unjustified side will in many circumstances be entirely justified in distrusting the just side and in acting accordingly, and (c) soldiers participating in an unjustified war will in many circumstances be able to reduce the harm done to their own population by fighting back, show that McMahan's generalization that unjust combatants must not attack soldiers fighting in a just war (unless they commit war crimes) is mistaken.

6 Concluding Remarks

As I have said already in the introduction, the claim that *all* combatants who abide by *ius in bello* restrictions have an equal liberty-right to kill each other is wrong. There are *some* wars in which even those combatants who abide by *ius in bello* restrictions do *not* have an equal liberty right to kill each other. Nevertheless, the

⁴³ They might also fight on to achieve a decent *post bellum* settlement. I thank James Pattison for this point.

argument presented in this paper shows that the moral equality of combatants ends up holding true of many more wars than allowed for by McMahan's general thesis about the moral inequality of combatants. In addition, and on a more theoretical point, it also has to be emphasized that the obsession with "liability" obscures the fact that whom you may kill in war and why is not reducible to the question of who is liable to attack and who is not.⁴⁴

In any case, whether or not soldiers are allowed to participate in an unjustified war cannot be decided without a closer look at the details and circumstances of the specific unjust war in question. While there is no *general* permission to fight in unjustified wars, in some unjustified wars you can fight permissibly and, as long as you abide by *ius in bello* restrictions, you can do so without wronging enemy combatants. However, in modern wars you will always wrong innocent bystanders; but so will the combatants on the justified side—who therefore cannot be *just*.⁴⁵

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⁴⁴ I answer the question as to who may be killed in war and why by reference to four different principles which all have to be taken into account. See Steinhoff (2007a, Ch. 4).

⁴⁵ I thank the participants of the conference "War and Self-Defence" at the University of Sheffield (25th–27th August 2010) for comments on a presentation of a related paper. I owe special thanks to Yvonne Chiu, Ned Dobos, Cécile Fabre, Helen Frowe, Bernhard Koch, Seth Lazar, Michael Neu, Gerhard Øverland, James Pattison, Andrés Rosler, Daniel Statman and, in particular, Jeff McMahan for elaborate and enormously helpful written comments.

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