

REVIEW ARTICLE (a slightly shortened version of this article will appear in the March 2011 issue of *International Affairs*)

A Challenge to the Reigning Theory of the Just War*

Killing in War. By Jeff McMahan. Oxford: Oxford University Press. 2009. 250pp.
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Introduction

Killing or maiming people is, according to any morally sane person, ordinarily among the very worst things we can do. The widespread and stringent constraint against intentional killing is based not only on the ill effects of this conduct to the targets of this violence, but also on the suffering this violence causes to the victim's families and those close them, as well as the damages to the broader communities to which they belong. Damaging severely the infrastructure and environment on which people depend for their livelihoods, and thereby enabling death and severe deprivation among them is also, ordinarily, an extremely bad thing to do. Since these seriously morally regrettable outcomes occur routinely during war—armed conflict between political communities—justifying war is very difficult. That it is hard to justify war is a commonplace, yet wars occur with remarkable frequency. How might this be explained? Perhaps it is because people—especially those with the power to decide to engage in war—disregard morality and act instead for purely self-interested reasons. Or, it may be because those who do not disregard morality tend, often unconsciously, to interpret and apply their moral values in ways that will not threaten (and will instead serve) their own interests. The propensity to engage in unjustified war may also be due to the fact that people act without thinking, reason lazily about what to do, engage in motivated reasoning, and are prone to weakness of will. All of these proposed explanations for the prevalence of unjustified wars are probably partially correct. But these explanations may be complemented by a further explanation for the prevalence of unjustified wars: that the moral principles that have ordinarily been invoked in deciding whether resort to war is justified, or of various tactics that might be justifiably employed in war, are seriously flawed. This idea is disturbing— it is horrible to think that people routinely kill and maim other people who cannot

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justifiably be attacked, while all the while thinking that killing them is permitted and may even be morally required.

One tradition in moral thinking about armed conflict—pacifism—maintains that it is impossible to justify war, at least under ordinary human circumstances. Because it forbids war altogether, and because few people affirm pacifism, it is surely not likely that pacifism has engendered unjustified war. Some so-called political realists have apparently maintained that we are morally justified in disregarding moral considerations altogether in the conduct of international politics, and ought to focus instead on single-minded pursuit of the national interest. Unlike pacifism, this kind of crude political realism does seem to have some currency among ordinary people and policymakers, and may well have contributed to a great deal of unjustified killing in war. Another tradition in moral thinking about war—Just War Theory—maintains that resorting to war can be justified, provided that certain conditions are satisfied, the most important of which is that the cause for which the war is fought is just.¹ Unlike pacifism, Just War Theory is widely affirmed, and unlike political realism, many of its elements have even been codified in the laws of war. Because there are many variants of just theory, and because this doctrine has changed often during its long history, I will refer to this theory as it has typically been understood in recent times as the Reigning Theory. In his concise and inventive new book, *Killing in War*², Jeff McMahan provides a penetrating critique of the Reigning Theory. McMahan argues not only that the Reigning Theory lacks a plausible moral basis (and should therefore be rejected as a *fundamental* moral criterion for assessing war) but that the Reigning Theory is flawed in ways that seem likely to lead even its sincere adherents to engage in morally unjustified killing (and thus is not the type of *public* moral criterion we would want ordinary people, soldiers, and statesmen to appeal to in deciding whether to resort to war, and how to fight them.)

Although much of *Killing in War* is devoted to a critique of the Reigning Theory, its fundamental aim is constructive: to propose an alternative account of the morality of armed conflict, focussing in particular on a conception of liability to attack, and to indicate ways of incorporating more plausible moral views about armed conflict into policy. He argues that his own account is a sounder fundamental moral criterion and a superior public moral criterion since its widespread adoption would help prevent a great deal of unjustified killing without engendering other comparably bad outcomes. In this essay, I discuss this important and timely book, some of the

¹ For a summary of these conditions, see Brian Orend “War”, *The Stanford Encyclopedia of Philosophy* (Fall 2008 Edition), Edward N. Zalta (ed.), URL = <http://plato.stanford.edu/archives/fall2008/entries/war/>.

² All in-text page references are to this work.

critical attention it has received, and some the implications of these debates for practice.³

The Reigning Theory of Liability

The Reigning Theory, which has been given its most comprehensive recent expression in Michael Walzer's *Just and Unjust Wars*⁴, provides an account of two sorts of moral requirements—when resort to war is justified (usually referred to by its Latin name as the requirements of *jus ad bellum*), and what means can justifiably be used in war (usually referred to by its Latin name as the requirements of *jus in bello*). Walzer begins from the premise—shared by McMahan and most other moral theorists of war—that all people begin with immunity against being deliberately attacked—a right against others that these others not attack them.⁵ The problem of war, on Walzer's account, is “not to describe how immunity is gained, but how it is lost.”⁶ Following McMahan, we can refer to someone that has lost his or her immunity against being attacked as being *liable* to deliberate attack (pp.8-10.)⁷ It does not of course follow from the fact that a person is liable to attack that attacking her is the right thing to do. Attacking a person who is liable may be the wrong thing to do since the use of force may involve additional costs to the attacker or to third parties that make it impermissible to attack that person. Being liable to attack means only that the liable agent's rights would not be violated if they were attacked—they could not claim that they had been wronged by being attacked (p.8). Even this is put too crudely. Different agents can become liable to different *levels* of force, depending on different morally relevant characteristics that they possess or lack. People become liable, that is, to different types of attack at different times by different people (cf.p.10). When someone has been killed or injured, it makes a difference whether or not they were liable to these outcomes. If they were not liable, then even if these harms were justified, they have nevertheless been wronged and would ordinarily have a claim to some form of compensation. This would not be the case if these people were liable to the harms. An account of justified killing must explain how people can

³ Others have also recently challenged central tenets of the Reigning Theory. Noteworthy contributions include David Rodin, *War & Self-Defense* (Oxford: Oxford University Press, 2002) and Tony Coady, *Morality and Political Violence* (Cambridge: Cambridge University Press, 2002).

⁴ Michael Walzer, *Just And Unjust Wars: A Moral Argument With Historical Illustrations*, 2nd edition (New York: Basic Books, 2000)

⁵ They also have a right against being attacked non-deliberately (as a side-effect) but this right can be overridden more easily.

⁶ *Just and Unjust Wars*, p.145n

⁷ Unless otherwise noted, I will refer to liability to deliberate attack simply as liability to attack.

lose their rights against deliberate attack and become liable, and also the conditions under which these rights against deliberate attack can be overridden.⁸

According to the Reigning Theory, soldiers engaged in conflict and a certain class of civilians—those who work in munitions factories or are otherwise “currently engaged in the business of war”—have lost their immunity against being attacked, and so are liable to attack. Because ordinary civilians have not been “made dangerous”, and are not currently posing a threat, they are (correspondingly) not liable to attack. The Reigning Theory thus affirms both blanket permissions to attack combatants while war is in progress and blanket prohibitions against killing ordinary civilians.

What principles ground this account of the liabilities of civilians and soldiers? According to the Reigning Theory, soldiers have lost their immunity to attack because they have either voluntarily joined or allowed themselves to be conscripted and have thereby been “made dangerous”—they pose a risk of severe harm to others and this is the ground of their liability to attack. In this respect, the Reigning Theory maintains that 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 poses the risk of severe harm on the other. Conflict between just and unjust combatants is, all else being equal, a case of morally symmetrical self-defense. On the Reigning Theory, the justification for killing in war is really individual self- and other-defense by the combatants themselves. This is Walzer’s thesis of the moral equality of soldiers.⁹ This thesis maintains that all soldiers are equal: they have an equal “license to kill”, which according to Walzer is “the first and most important of their war rights.”¹⁰ The Reigning Theory severs the issue of whether the resort to war is justified from the issue of who may permissibly kill in war. There are still 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, but that they are involved in an unjust war and even that they are fighting for an unjust cause is “the king’s business—a matter of state policy, not of individual volition”¹¹, and thus not something for which they can be held to account morally. One of the distinctive aspects of the Reigning Theory, then, is the manner in which it relates the requirements of *jus ad bellum* and *jus in bello*. In particular, it is possible to fulfil perfectly the requirements of *jus in bello* even if one is fighting an unjust war with an unjust cause.

⁸ *Just and Unjust Wars*, p.43

⁹ I will follow McMahan in referring to this doctrine as the moral equality of combatants.

¹⁰ *Just and Unjust Wars*, p.36

¹¹ *Just and Unjust Wars*, p.39

McMahan raises two types of objections to the Reigning Theory's account of liability. First, he thinks that the doctrine of the moral equality of combatants cannot be given a plausible moral basis. One strand of this critique is internal—McMahan argues that the account of liability affirmed by the Reigning Theory will not entail (as its proponents suppose) the blanket moral permission to kill combatants or the blanket moral prohibition against 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 further significantly the war effort—pose threats of severe harm to others. Soldiers who'll be deployed for the foreseeable future in ways unrelated to the fighting of war, on the other hand, do not pose such threats. The Reigning Theory, however, considers the soldier but not the cadet or the scientist to be liable to lethal force (p.205). For this reason, McMahan argues that Walzer's theory effectively treats liability to attack as a function of *membership* in a group, rather than on morally relevant traits that individual members of different groups (combatants and non-combatants) have as individuals (p.208). A second, more philosophically ambitious strand of McMahan's critique is external, challenging the very idea that posing a threat severe harm is sufficient to establish liability to attack. In particular, McMahan argues that it cannot reasonably be maintained that a combatant that fights fairly in a just war of self-defense against an aggressing army has made himself liable to deliberate attack. For this reason, he thinks that it is 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. The just combatant has done nothing that is morally wrong so long as he fights by rightful means to secure the just cause of defending himself and others from wrongful aggression. 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 him is to kill him, then the police officer who starts to shoot at him does not thereby make himself morally liable to defensive action, and if the murderer kills the policeman in self-defense, he will become responsible for one more wrongful death (p.14). In both war and ordinary interpersonal contexts, it is morally wrong to kill unless the cause for which one kills is just (p.6). For this reason, while the just combatant certainly poses a threat of severe harm to the unjust combatant, 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. "Not all combatants are legitimate targets of attack and 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." (p.205)

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 the Reigning Theory grants to civilians.¹² Civilians can make themselves liable to attack by being ‘culpable causes’ of unjustified aggression (pp.206-8). Civilians can have high degrees of responsibility (through both their acts *and* their omissions, pp.214-6) for unjust wars or ongoing conflicts—McMahan provides the example of the role that executives from the United Fruit Company played in the forcible overthrow of the democratically elected Guatemalan government in 1954, and the role of Israeli settlers in the Occupied Territories (pp.222-3) in the conflict with the Palestinians—and it seems implausible that those who are prospective victims of this unjust war cannot take defensive action to prevent these culpable causes from knowingly enabling severe and objectively unjustified harm to them. This is not to say that under ordinary circumstances it will be permissible to target civilians. Indeed, McMahan argues that such attacks will almost never be justified in practice, both because they will very rarely be effective, and more importantly because it will be nearly impossible to discriminate between the very few civilians who have a great deal of responsibility for the threats of war, and the vast majority of civilians who bear little or no responsibility for them (pp.225, 231).¹³

McMahan also argues that the doctrine of the moral equality of combatants is flawed as a public use criterion of liability to attack in war. Indeed, he argues that the widely held supposition that when they fight in an unjust war unjust combatants do no wrong facilitates the recruitment of combatants to fight in unjust wars. If combatants were to reject the moral equality doctrine, and instead to hold the view that they can only fight justly when they fight for a just cause, they would be less likely to fight in wars whose causes were either obviously unjust, or when the moral status of the cause is questionable. As a result, the incidence of unjust wars would be lower (3). He writes, “Wars are now and 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” (pp.6-7).

There are two main strategies for trying to vindicate the Reigning Theory from McMahan’s critique. The first is to argue that war is morally discontinuous from other forms of interpersonal relations, and that because of this one cannot employ

¹² See also, “The Ethics of Killing in War”, p.719

¹³ I discuss McMahan’s treatment of this issue in more detail below.

McMahan's argument strategies to show that soldiers fighting for a just cause with just means are not liable to attack. I agree with McMahan (pp.15, 36, 209) that this strategy is pretty obviously hopeless, and that war differs from other interpersonal contexts only in that it often involves a great deal more empirical complexity (p.156), so I won't discuss it here.¹⁴ A potentially more promising route for defending the Reigning Theory is to argue that McMahan has failed to take adequately into account facts about the relationships of unjust combatants to the wars they fight which are relevant to the moral status of their fighting, and it is with these sorts of arguments that he is primarily preoccupied in this book.

For example, one might argue (as Walzer himself has) that just combatants *consent* to be attacked by taking up arms. But it is far from clear that just combatants do any such thing. As McMahan points out, the fact that they consent to assuming risk does not mean that they agreed to be attacked, any more than anyone choosing to walk through a dangerous neighborhood agrees to be attacked (p.52). Or, one might appeal to the role-based duties of unjust combatants, which require them to follow orders and attack on command. But again, it is hard to see how any such obligation could override their stringent negative obligation not to kill people who have done nothing wrong (p.74). Alternatively, one might follow David Estlund and claim that when “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.”¹⁵ However, as McMahan points out it is very hard to see that the institutional processes leading to decisions to go to war have the epistemic value that this account would require. And Estlund’s intuition seems in any case to be off the mark—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.¹⁶ Nor does the fact that unjust combatants may be coerced into fighting sanitize their conduct—as the Reigning Theory itself recognizes 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 *particularly* acute.

Another strategy—which McMahan discusses only quite briefly—has been employed by Yitzak Benbaji in his recent work. Benbaji attempts a hypothetical

¹⁴ McMahan himself does not focus so much on this challenge.

¹⁵ David Estlund, “On Following Orders in an Unjust War,” *Journal of Political Philosophy* 15, (2007): 213-234, at p.213.

¹⁶ For a critique of Estlund’s argument, see Christian Barry and Gerhard Øverland, “Do Democratic Societies have a Right to do Wrong?,” *Journal of Social Philosophy*, forthcoming.

contractualist defense of the moral equality doctrine.¹⁷ Benbaji observes “natural moral rights, as construed in the Western political tradition, are exchangeable. Members of domestic societies have a right not to be attacked by others. By entering the ring, a boxer waives this right and in return gains a right privilege to attack his rival... (i.e., before the match) the 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.”¹⁸ Benbaji’s main idea is that the tacit acceptance of rules practices which are deemed to be fair and mutually beneficial (by participants in that practice) is sufficient to make the rules of that practice justified, even if the practice seems to involve conduct that would otherwise be considered unjustified. But even 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 the moral equality doctrine. First, boxers typically must give *explicit* consent before entering the ring—they sign waivers and 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 their 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. Second, while the boxing model might seem plausible for wars involving two parties that both fight for unjust causes, McMahan correctly points out that it seems much less plausible for wars in which just combatants fight against unjust combatants (p.57). Insofar as the unjust combatants are unjustifiably attacking a political community in a war whose aims are unjust, then a more apt analogy would be one in which a person was having a picnic in the boxing ring with his family and is attacked by an unjust aggressor, or came upon an unjust aggressor beating a custodial worker senseless in the middle of the boxing ring but was able to enter the ring to help protect him. In these cases is it hard to argue that the person engaging in self or other defense has waived his right not to

¹⁷ See especially Yitzhak Benbaji, “The War Convention and the Moral Division of Labour” *Philosophical Quarterly* 59, (2009):593-617 and “A Defense of the Traditional War Convention”, *Ethics* 118, (2008): 464-495

¹⁸ Benbaji, “The War Convention”, pp. 598-9

be attacked when he engages with the aggressor. And certainly his mere entering of the ring does not signify any such waiver of his rights against attack.¹⁹

McMahan recognizes that it would be puzzling for a doctrine that seems on its face to be so morally implausible to have been so widely accepted. For this reason, he provides a kind of "error theory" of the moral equality doctrine, explaining how people have falsely taken it to be the same as or entailed by other, much more plausible claims about unjust combatants (pp.105-122). For example, people may support the moral equality doctrine because they have confused the morality of war with the law of war (p.108). While McMahan believes that the law of war must in the long term be brought into closer conformity with the morality of war (p.107), he concedes that there are good reasons to uphold the legal equality of combatants, not least because it is difficult to provide combatants with authoritative guidance about whether the wars in which they fight a just or unjust. Under such circumstances, a doctrine that would grant just combatants additional privileges might lead to more unjustified killing (pp.108-9). In any case, neither the legal equality of combatants nor the expediency of affirming the moral equality of combatants entails that the moral equality doctrine is true (p.110).

McMahan also argues that writers who have supported the moral equality doctrine are guilty of conflating permission and excuse (p.110). McMahan is quite sympathetic to the claim that unjust combatants are ordinarily partially *excused* for the objectively unjust threat of harm that they pose—they often act under more or less extreme forms of duress (pp.115 -118, 162), or act on false factual beliefs that make their conduct subjectively justified (pp.119-122, 163-166). But this does not mean that they are *justified* for acting as they do. John's subjective justification for shooting Sue, who he falsely believes to be morally responsible for a severe threat to a large group of innocent people at a local shopping centre, does nothing to make Sue lose her right against John that he not attack her. It is important to distinguish (in war and elsewhere) questions concerning an agent's *conduct*—which can be right or wrong, and better or worse in varying degrees—and an agent's *character*—which can exhibit virtues and vices in varying degrees. People of generally good character often act wrongly, just as those of generally weak character often act rightly. As we shall see, on McMahan's view the extent of an agent's liability to attack depends both to the moral quality of their conduct and of their character. That unjust combatants are partially excused, for example, can make a real difference to the level of force and the

¹⁹ I've discovered that this argument is also made in [Uwe Steinhoff "Benbaji on Killing in War and 'the War Convention'"](#). *The Philosophical Quarterly* 60/24 (2010):616-623.

tactics that can be used against them, and also to the means that can be used to hold them accountable for their unjustified killing.

An Alternative Approach to Liability to Killing in War

On McMahan's own responsibility-based account, a person can become liable to attack only if they are morally responsible for a threat of objectively unjustified (wrongful) harm. To be a threat of wrongful harm means that the harm that one threatens to impose on another cannot be justified (because this person is not liable to it and because there are no strong countervailing considerations that justify overriding their right in this instance (p.42). McMahan's account is complex, and his discussion of it is likely to be the most difficult part of *Killing in War* for those unfamiliar with the literature on self-defense. The basic meaning of his position, however, can be understood by contrasting it with rival accounts of liability. The requirement that liability must be tied to posing an objectively unjust threat of harm distinguishes this account from the Reigning Theory: just combatants who fight by just means are not morally responsible for objectively unjust threats (and so are not liable to attack), while some civilians on the unjust side are morally responsible for such threats (and thus may be liable to attack). The requirement that those liable to attack be morally responsible for the threat of wrongful harm also means that *nonresponsible* threats—such as a person who thrown against others against his will, is controlled like an automaton, is invincibly ignorant (pp.162-3, 165)—are not liable to attack. Responsible agency is a necessary condition for liability to attack, and it comes in degrees even among innocent people. An innocent driver who takes all reasonable precaution but who for no fault of her own is about to run over an innocent person is liable to defense action by that person to a greater degree than someone who voluntarily engages in a permissible activity that poses a risk of harm to an innocent person through a highly unlikely causal process that could not plausibly have been foreseen by the person imposing the risk, or when the risk-imposing activity was not only permissible but for which the agent had a positive moral reason (pp.166-7). The risk that in the driving case would result in injury was the type of risk that quite foreseeably attaches to the activity of driving.²⁰ This is important for McMahan: taking up arms is obviously the sort of thing that poses foreseeable risks of severe harm, and this means that even unjust combatants who are excused threats can be

²⁰ There is an interesting partial analogue to this notion of liability in law, the so-called "risk rule" that limits the liability of an agent for harms resulting from his conduct to those harms the risk of which made his conduct 'tortious' (e.g. in transgression of a tort.) See Robert E. Keeton, *Legal Cause in the Law of Torts* (Columbus: Ohio State University Press, 1963), pp.9-13

liable to attack. McMahan rejects the view (which he once held and which some earlier just war thinkers and contemporary theorists have also maintained) that to be liable the agent that is morally responsible for the threat must also be *culpable* for that threat. Agents are culpable threats to the extent that they lack both a justification and excuse for the threats of wrongful harm that they are responsible for (p.159). In the case imagined in the previous section, John is not culpable for the threat he poses to Sue, but he is morally responsible for it and it is wrongful. A soldier may be liable to attack on McMahan's view if he is morally responsible for an objectively unjustified threat even if he is "innocent" in the sense that he could not reasonably be expected to know—perhaps he has been given information by a reliable source that attacking some person is required to avert an unjust threat posed by that person— that he is the agent of an objectively unjustified threat. Although culpability is not *necessary* for liability to attack, however, it is an important factor in determining what counts as a *proportionate* response to the wrongful threats for which combatants are responsible (pp.18-23). This is particularly relevant when just combatants can in some way distribute the harm or the risks of harm between themselves and unjust combatants. They may, for example, be justified in assuming much less risk of suffering harm themselves while imposing much greater risk of harm on the unjust combatants when the unjust combatants can plausibly be thought to be culpable for the wrongful threat of harm for which they are responsible (pp.160-1).

McMahan's arguments against the Reigning Theory are convincing. And the account of liability he develops also strikes me as a clear improvement on that offered by the Reigning Theory. I am unsure, however, that McMahan's account is entirely correct, or that it can simultaneously be defended against those who argue that culpability for wrongful threats should be a necessary condition for liability and those who argue that merely contributing to a threat can be sufficient to make a person liable to defensive action.²¹ McMahan's position may appear to be a shaky compromise between two positions, and therefore vulnerable to attack on two fronts. For example, it might be thought that mere 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.²² Recall that when one is liable to attack one cannot claim that

²¹ This is not a subject on which I have a settled view.

²² As has been argued by several writers on self-defense, including Kimberley Kessler Ferzan "Justifying Self-Defense" *Law and Philosophy* 24 (2005): 711–749, Noam Zohar "Collective War and Individualistic Ethics: Against the Conscriptio of 'Self-Defense'" *Political Theory* 21 (1993): 606–622, David Rodin *War and Self-Defense* (Oxford: Clarendon Press 2002), at pp. 70–99

one has been wronged when one is attacked, or be owed 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 Sue (who is an innocent aggressor) in order to save his hand then John should try in some way to compensate Sue for her loss, even if we believe that John's defensive conduct was fully justified, all things considered. As McMahan himself notes (p.157), in the law excuses typically negate liability, and insofar as an agent lacks culpability altogether it is not obvious why they should nevertheless remain liable. Arguably, those so-called innocent threats that seem most liable to defensive force, such as the driver who takes all reasonable precautions, are at least partially culpable—in deciding to drive rather than take other forms of transport they decided to willingly impose additional risk of harm on others to avoid some inconvenience to themselves. This distinguishes these drivers from those who impose risks but who have positive moral reasons for acting as they do (p.167). One good feature of accounts of liability to attack that require culpability is that they emphasize something that obviously has moral significance: culpable agents intend, foresee or at least should foresee that their conduct will make them responsible for wrongful threats of harm.

Alternatively, one might argue against his view that contributing to wrongful threats of harm can be sufficient to create liability to attack even in the absence of moral responsibility for the threat. Intuitively, even nonresponsible contributors to harm may be liable to defensive actions that could be not taken against innocent bystanders. If John is thrown at Sue because it is falsely thought that she poses a wrongful threat, then Sue can intuitively impose more cost on John to prevent his body from injuring her than she could impose on Bill, who happens to be standing nearby but could be thrust in front of John to block him from reaching her.²³ Further, there is something a bit puzzling about the idea that there is a morally quite significant distinction between harms to which agents contribute and harms that they allow to occur or fail to prevent (an idea that McMahan himself relies at certain points throughout his book) but that contribution to harm is not in itself morally significant. On McMahan's view, contributions to wrongful threats appear to serve as "boosting factors" to liability to attack—increasing the amount of force that can permissibly be employed against agents who are morally responsible for threats—but cannot in itself be a ground of liability in the absence of moral responsibility. Intuitively, at least, the significance of contribution to wrongful threats appears to depend on the *manner* in which agents contribute to them. When people become *agents* of threats by initiating

²³ I owe this observation to Gerhard Øverland, who discusses this issue at length in his article "Dividing Harm", *Journal of Moral Philosophy*, forthcoming.

or sustaining continuous causal processes that will lead to severe harm they seem to be liable to defensive force to a greater degree than agents who contribute to threats without being the agents of threats by enabling them, all else being equal.

Implications

While McMahan's book succeeds admirably in its aims, and while it would be unreasonable for it to cover all aspects of the problem of killing in war, it might have been stronger still had it engaged in greater detail with the issue of liability to non-deliberate attack—persons who are killed without being directly targeted, such as people who live nearby some military target. McMahan makes clear that he believes rights not to be attacked as a foreseeable side-effect of deliberately attacking other targets is weaker and more easily overridden than rights against being deliberately attacked. Without a better sense of the specific meaning and moral importance of such rights, however, his overall account of the morality of war will remain incomplete and its practical implications somewhat opaque. The more stringent the right against being killed as a side-effect, the more likely his view will lead to the conclusion that few if any wars are justified under current circumstances. It worth examining what general implications his view might have.²⁴ In an interesting recent paper, Seth Lazar argues that McMahan is guilty of the same kind of error that he attributes to the Reigning Theory. He argues that McMahan's own account of liability does not support his substantive conclusions about the agents who are actually liable in wars that are likely to occur.²⁵ In particular, Lazar argues that there is no basis on which McMahan can safely claim that most unjust combatants are liable to attack (pp.184-5) but that most unjust noncombatants (civilians who are members of the community that is conducting an unjust war) are not (pp.225, 231). McMahan is, according to him, too sanguine about killing unjust combatants, and too quick to rule out the possibility of killing noncombatants on the unjust side. Lazar reasons that it is likely that there are going to be some noncombatants on the unjust side who are morally responsible for the wrongful threats of harm, and some that are not morally responsible for these threats, and that this will also be true of unjust combatants as well—members of each group (combatants and noncombatants) are likely to be morally responsible for this threat of harm in varying degrees. He argues that there is no way to distinguish the contributions made by combatants to the objectively unjustified threat of harm from those made by noncombatants. Very few in either group are likely to make any more

²⁴ Because of limitations of space I cannot mention some of his interesting proposals, such as extending selective conscientious refusal to all active duty soldiers (p.97)

²⁵ "The Responsibility Dilemma for Killing in War: A Review Essay," *Philosophy & Public Affairs* 38, (2010):180-213.

than (or a less than) small, non-necessary contributions to these threats.²⁶ Most importantly, it will be difficult and indeed impossible under ordinary circumstances, to determine the extents to which different members of these groups are liable to the imposition of certain harms. To attack members of either group, therefore, requires a willingness to run the moral risk of exposing individuals to types of harm to which they are not liable. For this reason, it is alleged that McMahan must adopt one or another horn of a dilemma: either he must affirm a willingness to run the significant moral risk of killing people who are not liable to attack—in which case it will be permissible to target unjust combatants but also noncombatants—or he will instead refuse to run such risks—in which case it will not be permissible to attack unjust noncombatants, but neither will it be justified to attack unjust combatants.²⁷ Grasping the first horn—which Lazar claims is what McMahan does implicitly when he discusses how combatants should reason about moral risk when considering the targeting of civilians, adopting a strong presumption against killing unless they have high and warranted credence that those they target are liable—will effectively entail “contingent pacifism”, while grasping the second one—which Lazar claims is what McMahan does implicitly when he discusses how combatants should reason when considering the killing of unjust combatants, adopting a much weaker presumption against killing in the absence of high warranted credence that those they target are liable —will effectively entail “total war.”²⁸

In addition, Lazar argues that if McMahan’s account of liability were to become widely adopted and endorsed, it will minimize certain moral risks—by hypothesis it will reduce the risk of fighting unjustified wars—but it will do so at the cost of increasing other moral risks—the likelihood that some just wars will not be fought.²⁹ If this charge were true, it might be argued that McMahan’s view would not be a good public moral criterion for just war.

I believe that McMahan can offer some effective replies to these criticisms, even if some these might require him to develop his view in a slightly different way and emphasizing the moral significance of the different types of contribution that agents who are morally responsible for wrongful threats can make to these threats. In particular, it appears that Lazar overlooks the fact that on McMahan’s view moral responsibility for wrongful threats comes in degrees even among non-culpable agents, and that agents can contribute to threats in different ways of varying moral significance. The non-culpable citizen who ‘contributes’ to their country’s war effort

²⁶ “The Responsibility Dilemma for Killing in War,” pp. 190, 192-3

²⁷ “The Responsibility Dilemma for Killing in War,” pp.187, 205

²⁸ Similar criticisms are made in Larry May, “Contingent Pacifism and the Moral Risks of Participation in War” (unpublished ms cited by permission of author).

²⁹ “The Responsibility Dilemma for Killing in War,” p.201

by paying taxes does so in quite a different way than the non-culpable combatant who takes up arms. There are many risks that the combatant willingly poses merely by taking up arms that the taxpayer does not willingly pose. An ordinary combatant knows (or at least should know) that however justified he thinks his conduct may be there is some risk that he may wrongfully and intentionally kill another person by initiating continuous causal processes—firing a gun, planting a landmine—that lead to that person’s death. The taxpayer, on the other hand, knows (or at least should know) that however justified he thinks his conduct may be there is some risk that he may wrongfully enable another person to be killed by contributing to the tax base of his country. To be sure, both the combatant and the non-combatant make small and non-necessary contributions to the *war effort*, but only the combatant risks making a quite significant and necessary contribution to the wrongful death of particular people—he risks killing these people intentionally. This is true of even of those combatants who are at present detailed to tasks that do not involved their direct taking up of arms. Because the types of contribution to wrongful harm associated with paying taxes and taking up arms are distinct, those who become combatants (like those who choose to drive rather than cycling or using public transport) must recognize that their willingness to risk making such contributions to wrongful harm may make them liable to defensive action that they would otherwise be immune from should these risks materialize (p.167). This does not mean that combatants are always more liable than non-combatants to the use of force, but that all else being equal they are liable to higher levels of defensive force because the *manner* in which they risk contributing to wrongful threats—they risk being agents of the threat by intentionally or sustaining a causal process that results in another person’s wrongful death—is quite different.³⁰ It is true that on McMahan’s view being the agent of a threat is not necessary for liability. But there is no reason why he cannot distinguish between different ways of contributing to threats and maintain that these differences are morally significant. Intuitively, those who contribute to wrongful threats by becoming agents of threats are more liable (all else being equal) than those who contribute to wrongful threats by enabling them, and both of these types of contributors to wrongful threats are more liable than those who have failed to prevent them. Since it is plausible to treat individual unjust combatants to be more likely to act as agents of wrongful threats than it is to treat civilians (who typically enable or merely fail to prevent threats) in this manner, just combatants assume lesser moral risk in

³⁰ Lazar expresses skepticism about the possibility of measuring *degrees* of causal contribution. One can share this skepticism, however, but regard different *types* of causal contribution as distinct and of differing moral relevance. For discussion, see Christian Barry and Gerhard Øverland, “The Feasible Alternatives Thesis: Kicking Away the Livelihoods of the Global Poor”, *Philosophy, Politics & Economics*, forthcoming.

deliberately killing unjust combatants than they would assume in deliberately killing civilians on the unjust side.

It is certainly true that, were McMahan's criterion of liability to become widely accepted just wars might not be fought. This could potentially be a cost of accepting it. Under present circumstances, however, it stretches credibility to suppose that these potential costs of not fighting just wars would outweigh the benefits of refraining from fighting unjust wars. The costs and benefits of any particular public criterion of liability depend not only on the likelihood that the criterion will pick out one or another target as liable, but also on the willingness of different agents to engage in the use of force against targets they believe to be liable. Some wars that are recognizably just will not be fought *regardless* of the criterion of liability adopted, for the simple reason that people are insufficiently motivated to use force to pursue the just causes involved. Moreover, the moral costs of unjust wars to an agent who might fight in them include the wrongful killing of many innocent people, while the moral costs to the agent of just wars which he does not participate in include failures to prevent the wrongful deaths of innocent people. While Lazar is certainly correct that failure to prevent death of those to whom we have strong associative duties is a serious moral cost³¹, it is not plausible that we should so willingly risk wrongfully killing innocent people to save innocent people to whom we have such special duties, especially when many of the innocent people we risk killing do not pose or even contribute to wrongful threats. The most significant moral risks, in our world at least, are that political leaders will fight unjust wars that they mistakenly believed to be just, or which they know to be unjust but nevertheless choose to fight. Any public moral criterion that would require soldiers and others pause before fighting in war would under these conditions be a real moral advance—and McMahan's responsibility-based criterion would do precisely this, and that is one of the things that makes his book of such great potential practical value.

³¹ "The Responsibility Dilemma for Killing in War," p. 205