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1 SETH LAZAR

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

5 I. INTRODUCTION

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

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25 Henry Shue. Thanks also to the reviewers at *Philosophy & Public Affairs*, whose
26 suggestions and objections were invaluable. Finally, Jeff McMahan has been both
27 extraordinarily generous with his time, and an inspiration. For all that this article is a
28 critique of his work, *Killing in War* is the high-water mark of just war theory since *Just*
29 *and Unjust Wars*.

30 1. John Rawls, *A Theory of Justice, Rev. Ed.* (Oxford: Oxford University Press, 1999), §4.

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

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

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

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

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32 4. For example, Tony Coady, *Morality and Political Violence* (Cambridge: Cambridge
33 University Press, 2008); David Rodin, *War and Self-Defense* (Oxford: Clarendon Press,
34 2002); Jeff McMahan, "The Ethics of Killing in War," *Ethics* 114 (2004): 693–732.

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

37 6. E.g., "Innocence, Self-Defense and Killing in War," *Journal of Political Philosophy*
38 2 (1994): 193–221.

39 7. *Ibid.*, p. 211.

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

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

34 On its own terms McMahan's critique of MEC is in my view
35 persuasive, and I do not seek to resurrect that principle in this
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37 8. Rodin, p. 164.

38 9. McMahan is clearly aware of this (pp. 108–09).

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

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

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

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

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30 10. Other scholars are less pessimistic. See, for example, Yitzhak Benbaji, "A Defense of
31 the Traditional War Convention," *Ethics* 118 (2008): 464–95; Patrick Emerton and Toby
32 Handfield, "Order and Affray: Defensive Privileges in Warfare," *Philosophy & Public Affairs*
33 37 (2009): 382–414.

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

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

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

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

13 Whether one poses the threat oneself is neither sufficient nor neces-
14 sary for moral responsibility (pp. 154ff.). It is insufficient, because some-
15 times the threat may not be attributable to one's voluntary agency, if, for
16 example, one has been used as a projectile. It is unnecessary, because
17 one can be morally responsible for a threat that someone else poses,
18 because of having facilitated that threat.

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

29 Moral responsibility for an objectively unjustified threat grounds
30 liability to lethal attack as follows: B faces a threat X to his life, which he
31 can only avert by killing A. There is a presumption against killing A,
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33 13. Jeff McMahan, *The Ethics of Killing: Problems at the Margins of Life* (Oxford: Oxford
34 University Press, 2002), p. 401.

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

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

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

13 Minimal moral responsibility is sufficient for liability to be killed (pp.
14 34, 197, 227).¹⁸ McMahan concedes, however, that this is prima facie dis-
15 proportionate: one would ordinarily inflict such a harsh fate on only the
16 culpable.¹⁹ He resolves this concern with an innovative take on propor-
17 tionality in self-defence, arguing that liability comes in degrees, such
18 that the more responsible B is for an unjustified threat, the more liable he
19 is. Defensive harm should be "narrowly proportionate" to his degree of
20 responsibility (pp. 18–23, 156).²⁰

21 So: A is trying to steal a precious vase that belongs to B (pp. 156).²¹ B
22 has four ways to defend her property right: *bottle*, *tackle*, *kick*, and *grab*.
23 *Bottle* involves breaking a bottle over A's head, and will certainly
24 succeed, without B suffering harm. *Tackle* involves rugby-tackling A. It
25 will also certainly succeed, but will harm A less, and leave B bruised. *Kick*
26 involves kicking A in the shins. It is less likely to succeed, but will harm A
27 the least and will not harm B. In *grab*, B lunges to grab the vase before A
28 gets it, foreseeably knocking over a bottle next to the vase. The bottle falls
29 on A's head, with the same force as in *bottle*.
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31 16. *Killing in War* does not do much to justify this view (e.g., p. 44), nor is the underlying
32 principle of fairness much explored.

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

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

35 19. See Seth Lazar, "Responsibility, Risk, and Killing in Self-Defense," *Ethics* 119
36 (2009): 699–728.

37 20. See also McMahan's "Just Cause for War," *Ethics & International Affairs* 19 (2005):
38 1–21, at p. 11; "Basis," pp. 394–95; *Ethics of Killing*, pp. 403–05; and "Killing in War," p. 724.

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

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

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

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

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

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

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

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

37 24. McMahan, *Ethics of Killing*, pp. 403–04.

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

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

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

17 However, whatever the successes of McMahan's critique of MEC, they
18 come at a price. His alternative theory of killing in war may have impli-
19 cations that most would reject. The first danger—the contingent pacifist
20 objection—is that it may deny even just combatants the right to use
21 lethal force. If liability presupposes responsibility for an objectively
22 unjustified threat, and if some unjust combatants are not sufficiently
23 responsible to be liable, then just combatants must discriminate
24 between those who are and are not sufficiently responsible. To do this,
25 they must know at least their adversaries' personal histories, the context
26 of their decision to fight, their connection to a particular threat, their
27 capacity for responsible agency, their beliefs and intentions, and that
28 their own cause is just. In close-quarters combat, soldiers must often
29 make snap judgments in fast-developing scenarios, based on minimal
30 reconnaissance. Merely determining that an apparent adversary poses a
31 threat can be difficult; to know more than appearances tell is near impos-
32 sible. This is even more evident for aerial and artillery bombardment:
33 pilots and gunners target coordinates, not individuals. However else we
34 restrain the conduct of war, we could never make it less anonymous and
35 impersonal. If just combat requires discrimination between enemy
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37 ²⁶ In his "War as Self-Defense," *Ethics & International Affairs* 18 (2004): 75–80; and
38 "Killing in War," p. 725.

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

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

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

26 The total war objection has also forced McMahan to adapt his theory.
27 In particular, *Killing in War* develops two responses: first, it appeals to
28 narrow proportionality, arguing that most noncombatants are insuffi-
29 ciently responsible for liability to lethal force to be a narrowly propor-
30 tionate response. Some, in particular children, are not responsible at all
31 (p. 225). We must therefore presume that they are all impermissible
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33 27. In 1994, he rejected “the view that absence of agency in the causation of harm
34 defeats responsibility and therefore liability in a way that absence of culpability cannot.”
35 See his “Self-Defense and the Problem of the Innocent Attacker,” *Ethics* 104 (1994): pp.
36 252–90, p. 265 n. 22.

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

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

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

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

30
31 II. CAUSATION, AND THE RESPONSIBILITY OF UNJUST COMBATANTS

32 One of McMahan's key objections against Walzer is that, if our theory of
33 killing in war is supposed to pay attention to individual rights, it should
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35 29. See also McMahan's "Killing in War," pp. 727–28 and "The Morality of War and the
36 Law of War," in *Just and Unjust Warriors*, ed. David Rodin and Henry Shue (Oxford: Oxford
37 University Press, 2008), pp. 19–43, 38.

38 30. But see Lazar, "Responsibility."

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

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

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

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

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

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

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

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

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

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

37 34. Grossman, *On Killing*.

38 35. Thanks to Klem Ryan for suggesting this.

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

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

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

13 The broader point, however, is that if small, unnecessary contribu-
14 tions, some of which one makes only by being in a particular space, are
15 sufficient for liability to be killed, then many more noncombatants than
16 is plausible will be pulled into the liability net. Many noncombatants
17 also make small, individually unnecessary contributions to their side's
18 ability to wage the war: both directly and indirectly. Direct contributions
19 include paying taxes that fund the war, supplying military necessities,
20 voting, supporting the war, giving it legitimacy, so attracting further
21 support from others, and bringing up and motivating the sons and
22 daughters who do the fighting. Indirect contributions include the ways
23 they have built the state's capacity over previous years, giving it the
24 strength and support to concentrate on war, and contributions they have
25 made to the fighting capacities of specific combatants: the math teacher,
26 for example, who imparts skills to a student, later necessary to his role as
27 a gunner; the mother who brings up a strong, lethal son. Even children
28 might make relevant contributions, by motivating their parents to fight.³⁸
29 Insofar as they are morally responsible agents—which McMahan thinks
30 they can be (p. 201)—and their actions are voluntary, with foreseeable
31 implications, they too can be agent-responsible for a small contribution
32 to the war effort. In the modern state, almost everyone contributes to the
33 capacity of our government to act—all the more so in democracies.
34 Though our contributions are individually small and unnecessary, that
35

36 37. Lazar, "Responsibility."

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

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

3
4 III. EPISTEMIC EXCUSES

5 A. *Uncertainty*

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

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

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

35
36 39. McMahan, "Innocence," p. 204.

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

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

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

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

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

37
38 41. Consider the recent war in Georgia, or the ongoing conflict in the Middle East.

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

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

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

29 The debate between McMahan and Walzer suggests two further
30 points. If McMahan is right about the widespread acceptance of MEC,
31 this itself must surely excuse many unjust combatants.⁴⁴ If combatants
32 were indeed equally entitled to fight, irrespective of their cause, there
33

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

36 43. Again, witness Georgia 2008.

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

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

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

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

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

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

1 However, if it is harder to fight wars justly, this should strengthen our
2 opposition to fighting at all—this is the central thrust of the contingent
3 pacifist objection. We have, then, an interesting paradox: (1) It is impos-
4 sible to discriminate between liable and nonliable combatants, because
5 of the lack of information endemic to warfare; (2) Many combatants are
6 not liable to be killed, because they are not sufficiently responsible for
7 the threats that they pose; (3) Anybody who chooses to kill, knowing both
8 1 and 2, chooses to kill indiscriminately; (4) Anybody who chooses to kill
9 indiscriminately is maximally morally responsible for the threats that he
10 poses, and so liable to be killed; (5) It is therefore easy to discriminate
11 between liable and nonliable combatants. The conclusion, 5, contradicts
12 1, and 4 contradicts 2. The implications of this paradox lie beyond the
13 scope of this essay, but it is clear that if this additional complexity does
14 not provide further grounds for excuse, it should certainly ground pity
15 for combatants, should they have to apply such convoluted reasoning in
16 the heat of battle.

17
18 *B. Reasonable Partiality*

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

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

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

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

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

34 46. Tim Whewell, "What Really Happened in South Ossetia?" *BBC Online/Newsnight*
35 (2008). <http://news.bbc.co.uk/1/hi/programmes/newsnight/7722806.stm>, accessed
36 4/11/2009.

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

1 *C. Factors that Raise the Epistemic Burden: Moral Risk*

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

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

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

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

36
37 ⁴⁸ Others disagree; indeed, perhaps the following arguments suggest more fundamen-
38 tal problems with this distinction.

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

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

15 This suggests a response to McMahan's second argument, that the
16 costs of not fighting a just war are prudential, rather than moral (pp.
17 145–46).⁵¹ For individuals, the costs of not fighting are not only pruden-
18 tial, if such important positive duties are at stake. This is also true of
19 failure to achieve a just cause: not fighting a just war of national defense
20 may mean allowing our political community to be overrun; if it is a
21 valuable community, then this is a great wrong. Not fighting just wars of
22 humanitarian intervention implicitly condones the actions of genocid-
23 aires and marauders, engaged in "crimes that shock the moral con-
24 science of humankind."⁵² These are serious moral costs.

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

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32 49. Lazar, "War and Associative Duties,"

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

36 51. McMahan, "On the Moral Equality of Combatants," *Journal of Political Philosophy*
37 14 (2006): 377–93, at p. 390.

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

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

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

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

27 McMahan, I conclude, sets the bar for epistemic excuse too high. He
28 exaggerates the difference between the moral risks of fighting and not
29 fighting, and underestimates the importance of uncertainty and reason-
30 able partiality in lowering the epistemic burden on potential combat-
31 ants. Many more unjust combatants are epistemically excused than he
32 allows. Together with the preceding argument about causation, this
33 should yield a significant number of unjust combatants who are only
34 minimally responsible for wrongful threats. If the liability bar is set high,
35 then many of these unjust combatants will not be liable to be killed, and
36

37 53. I owe this point to Cheyney Ryan.

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

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

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

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

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

29 Perhaps most seriously, though, this morally freighted account of
30 intention clashes with common sense. A has aimed his weapon at B's
31

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

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

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

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

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

7
8 IV. PROTECTING NONCOMBATANTS: NARROW PROPORTIONALITY

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

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

29 At points in *Killing in War*, McMahan concedes that many noncom-
30 batants will be responsible for their country's war (e.g., p. 96), but where
31 liability is concerned, he asserts the reverse (p. 225). Conversely, almost
32 all unjust combatants are held not merely responsible, but even cul-
33 pable. Their excuses are ruthlessly shredded, while noncombatants are
34 not held to remotely the same standard. He dismisses the objection that
35

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

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

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

17 Just cause is also applied inconsistently in the proportionality calcu-
18 lation: when arguing that minimally responsible unjust combatants are
19 liable, the magnitude of the threatened harm—their side's unjust
20 victory—renders killing proportionate (p. 197). Yet where noncombata-
21 nts are concerned, the great importance of winning is not mentioned.

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

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

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

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

28 Additionally, if a guard's right to life is dependent on the size of his
29 cohort, we need only raise a sufficiently large gang to ensure none of us
30 become liable. Assuming it is conventionally proportionate to kill a
31 guard in order to rescue an unjustly held prisoner—suppose he will be
32 executed tomorrow, and there is no other means of rescue—we should
33 turn to the basic model of defensive justice for guidance. Is it better to let
34 A endure this cost, or to inflict it on his guards, who are each to some
35 degree responsible? For each guard, we must ask whether he should
36 suffer a harm, or A should be left to die. By hypothesis, there is a clear
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38 60. McMahan, *Ethics of Killing*, p. 404.

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

8 Perhaps narrow proportionality could protect noncombatants, if it
9 governed some other aspect of self-defense than the liability of the
10 target. In *Killing in War*, McMahan proposes that the less responsible the
11 just combatants' targets are for the threat they face, the more risks that
12 just combatants must assume, to ensure minimizing the harm to those
13 targets (pp. 192ff.). He offers an example from the first Gulf War: in the
14 first scenario, allied forces confront the Iraqi republican guard; in the
15 second scenario, they face a conscript battalion. The guards, assume, are
16 more responsible than the conscripts for their part in the war. McMahan
17 argues that the allies should take greater risks on themselves when fight-
18 ing conscripts than when fighting the republican guard, if they can
19 thereby reduce the conscripts' suffering. For example, they should try to
20 capture prisoners, and encourage surrender, rather than attacking out-
21 right.⁶¹ This is supposed to be analogous to the *tackle* and *bottle* cases
22 above: if a republican guard is about to steal my vase, I can use the bottle,
23 but if it's a conscript, I have to tackle him. The same approach might
24 mitigate the harms that noncombatants are liable to suffer. If their
25 responsibility is low, perhaps just combatants ought to take greater risks
26 on themselves when threatening noncombatants than when unjust
27 combatants are their targets.

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

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

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

9
10 V. EFFECTIVENESS

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

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

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

29
30 62. When I choose *tackle over bottle* in the vase case, instead of one of us suffering an
31 unendurably severe harm, we each suffer a lesser one. In that sense the harm is divided
32 between us. When we speak of risks, it seems like we can do the same: I accept a 30 percent
33 chance of being killed, instead of a 10 percent chance, to give you a 50 percent rather than
34 10 percent chance of survival, say. But this is misleading, when our lives are at stake: if ten
35 just combatants assume a 30 percent chance of being killed, then other things equal three
36 of them will be killed. They have not endured a lesser harm, analogous to the bruised
37 shoulder in *tackle*. Death is an indivisible harm.

38 63. McMahan, “Basis,” p. 394.

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

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

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

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

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

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

39 66. ‘CNN.Com—September 11 Memorial’, <http://www.cnn.com/SPECIALS/2001/memorial/lists/by-age/> accessed 4/1/2010.
40

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

4 The question, then, is whether attacks on noncombatant adults will be
5 militarily necessary often enough to make this implication of McMahan's
6 account unsupportable. I think so. Suppose country A launches an
7 aggressive war against country B. The leaders of B predict that in a con-
8 ventional war, they will win at the cost of 20,000 just combatants' and
9 just noncombatants' lives. Instead, they could launch targeted and
10 massive attacks on the economic, political, and social institutions of A,
11 predicted to kill 90,000 unjust noncombatants, including among them
12 72,000 adults, who are presumed liable, and 18,000 nonliable children.
13 This second approach, assume, will ensure victory without any just com-
14 batants or just noncombatants dying. The lives of the 72,000 liable unjust
15 noncombatants should not trouble the leaders of B, so they need weigh
16 only the benefit of saving their compatriots' lives against the cost of
17 foreseeably killing 18,000 children. The latter strategy, on McMahan's
18 account, involves the least nonliable suffering, so B should presumably
19 adopt it. The example is of course highly abstract, but the underlying
20 reasoning could well apply in more standard military contexts.

21 Moreover, attacks on noncombatants are even more likely to be effec-
22 tive in unconventional and asymmetric warfare. The weaker party may
23 have no other means of fighting an enemy with a preponderance of
24 conventional power than attacking its civilian population. In these days
25 of alienated warfare, where most of us are insulated from the costs of
26 conflict, it is reasonable to think that taking the fight to the electorate will
27 succeed.⁶⁷ Indeed, in recent research on the strategic logic of suicide
28 bombing, Robert Pape is unequivocal about the success rate of delibera-
29 te terrorist attacks, most of which targeted noncombatants. Examining
30 a set of thirteen suicide terrorist campaigns that were completed
31 between 1980 and 2003, Pape argues that seven led to "significant policy
32 changes by the target state toward the terrorists' major political goals."⁶⁸
33 As he observes: "even a 50 percent success rate is remarkable: interna-
34 tional military and economic coercion generally works less than
35

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

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

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

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

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

27 28 VI. CONCLUSION

29 This article has argued that McMahan’s responsibility-based view of the
30 ethics of killing in war faces a dilemma, borne out of the equally minimal
31 responsibility of many combatants and noncombatants for the objec-
32 tively unjustified threats posed by their belligerent state. Either we must
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34 69. *Ibid.*, p. 65. Pape notes that terrorists learn strategic lessons from one another. They
35 pursue these attacks because they are effective. Pape, *Dying to Win*, pp. 73ff.

36 70. On force protection, see Hamutal Shamash, “How Much Is Too Much? An Exami-
37 nation of the Principle of Jus in Bello Proportionality,” *Israel Defense Forces Law Review* 2
38 (2005–6): 103–48.

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

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

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

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

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

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

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

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

33 *Killing in War* presents MEC with serious, and in my view insur-
34 mountable problems. Absent some novel defense, this thesis is now very
35 difficult to sustain. But this success is counterbalanced by the strikingly

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

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

