

A defence of the Moral Equality of Combatants

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Introduction

There is a trend in contemporary ethics of war to challenge the ‘orthodox view’¹ (McMahan 1994) that combatants are morally equal. The doctrine of the moral equality of combatants mainly stems from Michael Walzer’s *Just and Unjust Wars* from 1977, but is also taken to reflect a common-sensical moral intuition. That soldiers enjoy equal rights, permissions and liabilities disregarded of the cause of their war is taken not only to be a useful convention, but the convention presumably embodies a moral truth.

Jeff McMahan is perhaps the most prominent critic of the orthodox view. A fundamental problem which has incurred McMahan (and others) to question the equality doctrine as a *moral* - not just legal or conventional – doctrine is that the orthodox view seems committed to defending the counter-intuitive claim that those who pursue an unjust aim and those who pursue a just aim are morally on a par. This moral parity is counter-intuitive both in terms of their permissions to kill and their liability to being attacked (where liability to being attacked means that one is not wronged by being attacked²). It is hard not to feel the *oomph* of this objection, and it should certainly be taken seriously by anyone who aims to defend the equality doctrine. It seems obvious that none of the harm unjust combatants inflict in pursuit of a wholly unjust, even criminal, aim, can have any justification. It would be better if they did not fight, and under this perspective, it is also true that they ought not to fight.

McMahan claims that for pragmatic reasons we should maintain the legal rule of equality, but we must give up the idea that it reflects moral truth. In this paper I will defend a weak doctrine of moral equality, according to which the legal doctrine reflects some moral truth³. In establishing a weak doctrine of equality, I will mainly target McMahan’s objectivist approach

¹ J McMahan 1994. “Innocence, Self-Defence and Killing in War”, *Journal of Political Philosophy*, 2, 3, pp.193–221.

² What is also commonly spoken of as forfeiture of one’s right to life. (see e.g. M Walzer 2000. *Just and Unjust Wars: A Moral Argument with Historical Illustrations*. New York: Basic Books, and J McMahan 2009. *Killing in War*. Oxford: Oxford University Press)

³ I use ‘truth’ here in a minimalist sense.

to liability, and argue that it is subjective, not objective, justification which is relevant to the moral standing of combatants – i.e., both to their permissions and liabilities. I argue that McMahan’s account for distribution of costs according to objective features is unfair and puts too much emphasis on moral luck. Moreover, though I agree with McMahan that a universal doctrine of moral equality is not very plausible (though for slightly different reasons than him), I disagree with his assumption that defenders of the orthodox view are committed to such a strong doctrine.⁴ In short, I defend a subjectivist account of the Equality Doctrine and, *pace* McMahan I hold that this view suffices to morally ground combatant equality.

The paper has two parts. First, I argue a subjectivist account of permissibility and liability. Second, I show how we on the presumption⁵ that (some) unjust combatants fight with subjective justification can establish a weak doctrine of the moral equality of combatants.

PART I.

McMahan separates liability from desert, and relates liability to moral responsibility - in the thin sense of acting in the capacity of being a moral agent – rather than to guilt. Contrary to a desert-based account, according to which it is intrinsically valuable that the liable person suffers⁶, the responsibility-based account purports to distribute costs on the basis of fairness. One way of putting this is that in a situation where it is true that either A must die or B must die (i.e. a typical self-defence situation), moral responsibility for creating the situation is a relevant factor which tips the balance in the disfavour of, say, A. However, that A is morally responsible for posing a threat is not sufficient for A to be liable to defensive killing by B; the threat A poses must also be objectively unjust.⁷ That A poses an objectively unjustified threat in virtue of being a morally responsible agent is a necessary *and sufficient* condition for A to be liable to defensive killing. Being liable, A is not wronged by the defensive killing and does not have a right of counter-defence. Hence A need not be at fault, guilty or for any other

⁴ In fact, McMahan himself admits that a weak doctrine on the moral equality of soldiers - according to which just combatants are justified in fighting while unjust combatants are merely permitted to fight - may “actually capture what many people believe more accurately than any other version of the moral equality of soldiers.” (2009: 112). However, he does not consider this option himself, and he goes on to argue against the stronger version of the Equality Doctrine.

⁵ I will not argue in favour of this presumption here, merely suggest its plausibility (I have argued it extensively in L Bomann-Larsen 2007. *Reconstructing the Moral Equality of Soldiers*. Acta Humaniora 313. Oslo: Unipub) For the purposes of this paper, the presumption suffices, because McMahan argues that even if it is the case that the presumption holds true, we still don’t get moral equality, and this is the argument I aim to contest.

⁶ McMahan 2009: 8.

⁷ This means that B is not liable, hence is wronged by the threat, and that A is acting as a moral agent (a rock cannot threaten someone unjustly).

reason blameworthy for posing the threat, in order to lose her right not to be attacked. She may even be subjectively justified in posing the threat; the decisive factor in her disfavour is that she lacks objective justification for posing the wrongful threat. It is McMahan’s claim to the *fairness* of this cost-distributing scheme I will mainly question in the following.

According to McMahan,

An act is objectively permissible or justifiable when what explains its permissibility or justifiability are facts that are independent of the agents beliefs. By contrast, an act is subjectively permissible or justified when two conditions are satisfied: first, the agent acts on the basis of beliefs, or perhaps reasonable or justified beliefs⁸, that are false, and second, the act would be objectively permissible or justified if those beliefs were true. *So* [my emphasis], for a person to be exempt from liability it is not sufficient that the person should believe, or even be justified in believing, that his act is justified; it is necessary that it be objectively justified.⁹

The distinction between the subjective and objective perspective can be outlined as a follows: In the objective perspective, all the facts are available, and what is the right thing to do will be determined by the facts. The objective point of view would ultimately be the omniscient point of view, since no one has access to all the facts; some of them will obtain in the future. In the subjective, or deliberative, stance, the agent has limited knowledge of the facts, and must act on her limited knowledge and what she believes about the facts.

An informative example which lays out the difference between the subjective and objective perspectives is offered by Smith and Jackson:

A doctor has a patient with a minor but unpleasant skin condition on his leg. She knows that there is only one drug that is capable of curing the skin condition completely. She knows that in 95% of the cases it does so without any deleterious side-effects but that in 5% of cases it leads to the loss of the affected limb. There is no way of knowing which group any given patient falls into but, as it happens, our patient is one of the majority. What ought the doctor to do?¹⁰

The point made by Smith and Jackson is that there is no single answer to the latter question, because there are two senses of ‘ought’ involved in this case. In the objective sense, as a matter of *fact*, the doctor ought to give the drug. In the subjective sense, as a matter of what

⁸ I will presume in the following that the beliefs in question are reasonable, but not get into detail about what that may mean.

⁹ McMahan 2009: 43

¹⁰ M Smith & F Jackson, 2006. “Absolutist Moral Theories and Uncertainty”, *Journal of Philosophy*, 103, pp.267-283: 71

the doctor knows, she ought not to give the drug. So while God (as a term of art) ought to give the drug, the doctor ought not to. Smith and Jackson refer to these two senses of ‘ought’ as the *objective ought* and the *decision-ought*.¹¹

The ‘decision-ought’ is an action-guiding conclusion to a practical deliberation. From the deliberative stance, then, there is only one answer to what the doctor ought to do: she ought not to prescribe the drug, and she would be wrong to do so. However, this does not invalidate the sound point that there is a conceivable “best state of affairs” which depends on her actually prescribing the drug, and in this evaluative respect, it is meaningful to say that she ought to have done so. And yet, note that it would be mistaken to *excuse* the doctor for what she did. She does the right thing in the circumstances.

McMahan holds that justification is a species of permission; i.e. that X is *permissible* if no moral reasons count against it, but X is only justified if there are positive moral reasons counting in favour of X. On this view, permission applies both on the objective and the subjective levels, because a non-justified permissible act is simply an act that is morally neutral.

The broader concept of permissibility answers to the question ‘May (or should) one do X?’, which in the deliberative situation may be substituted for ‘May (or should) I do X?’¹². Roughly following Scanlon, I will assume that an act is made permissible by the same features that we appeal to in judging fault¹³, and that ‘permissibility’ therefore has moral content. “Permissibility is determined by the use of (these) principles in guiding deliberation”¹⁴. An impermissible act is normally an act which is made impermissible by the same reasons which in backward-looking assessment determine fault (provided that excusing conditions do not apply). Hence it is the same features counting in favour of not providing the drug in the doctor’s case, which makes her act permissible *and* allow us to judge the doctor as

¹¹ Suzanne Uniacke invokes a similar distinction: “We need to distinguish between a rightful act from a fully informed perspective and that which was permissible or right from the perspective of the agent in the circumstances. (S Uniacke, 1994. *Permissible Killing*. Cambridge: Cambridge University Press: 17)

¹² ‘I’ is substitutable for any ‘one’ in this case where the available information remains constant no matter who the agent is. The doctor not prescribing the drug is acting correctly not only from a first-person point of view, but also from a third-person point of view. If the third person is, say, a former doctor of the patient who happens to know but cannot communicate that the patient is in the majority group, she would have to appreciate that our doctor did the right thing

¹³ T M Scanlon 2008. *Moral Dimensions. Permissibility, Meaning, Blame*. Cambridge, MA: Harvard University Press: 49.

¹⁴ *Ibid*

faultless – not the objective features that only an omniscient being has access to. This is not to say that the objective perspective does not matter. It makes perfect sense to say that ‘it would have been better’ if the doctor had prescribed the drug. But this notion of ‘better’ has no moral significance – it neither informs the deliberation *ex ante* or the judgment of the action *ex post*, it merely evaluates a state of affairs. When we sometimes say in retrospect that, given what we know now, we should have acted otherwise. (“it would be better if we had...” “if only we knew then what we know now...”), that does not entail that we acted impermissibly, or wrongly, when we acted.

Consider two ways in which subjective and objective justification may come apart:

- 1) The agent is subjectively justified but objectively unjustified (as in the doctor case above)
- 2) The agent is subjectively unjustified but objectively justified.

For unjust combatants only the first is obviously relevant, as they are, *ex hypothesis*, objectively unjustified, but may still be subjectively justified and hence act permissibly on this score. But for the moral equality of combatants, arguably also the second is relevant: (objectively) just combatants may fight without subjective justification, and given the subjectivist account, this has bearing on their moral standing as well. I will return to this in part (III).

At this stage it is useful to compare these two possibilities of divergence between the subjective and objective ought by way of an example. Consider an example of (2), borrowed from Judith J Thomson¹⁵:

Here is Alfred, whose wife is dying, and whose death he wishes to hasten. He buys a certain stuff, thinking it a poison and intending to give it to his wife to hasten her death. Unbeknownst to him, that stuff is the only existing cure for what ails his wife. Is it permissible for Alfred to give it to her?¹⁶

¹⁵ Thomson uses this example to render it implausible that intentions matter to permissibility. In denying the existence of the subjective ought Thomson would also deny that beliefs matter to permissibility, but McMahan does not. In fact, he thinks that both beliefs *and* intentions play a role for permissibility, the latter even objectively.

¹⁶ J J Thomson, 1991. “Self-Defense”, *Philosophy and Public Affairs*, vol. 20, no. 4, pp. 283-310: 293.

Thomson answers herself: “Surely yes.” But how can it be permissible *for* Alfred to give his wife the stuff he is certain will kill her?¹⁷ Admittedly, Thomson’s project is quite different from McMahan’s in that she denies the existence of the subjective ought (which I just think is plainly false). But the case is informative in discussing the significance of the objective versus the subjective ought for liability. The following argument is therefore not directed against Thomson’s pure objectivism as much as against McMahan’s partial objectivism.

In determining whether an act is permissible, the agent asks himself: May I do X? To answer this question he must consult his moral and factual beliefs about the deliberative situation. The reasons counting in favour or against an act must be reasons that are available to the agent. Alfred – let us call him Bad Mistaken Alfred - asking himself if he may give his wife poison to kill her and believes that what he buys will actually kill her, acts impermissibly because the reasons he acts on renders the action wrong. It does not matter to his question ‘May I poison my wife?’ that the stuff will in fact, as it happens, save her life. This fact is not, for him, a reason counting in favour of his action (whether it would count in favour of his action, for him, if he *did* know depends on his motives for killing his wife: say, save her from suffering or inherit her money sooner). Yet we may still plausibly hold that his action is objectively justified. After all, he does cure his wife.

Now, the question is if an agent’s liability depends on whether she acts with subjective or objective justification? A useful test is to consider whether a third party has a right to intervene. McMahan explicitly states that “epistemic error [i.e. subjective justification] may ground a permission to act, but it cannot possibly ground a right against interference”¹⁸. But this is only partially true, and its truth depends on the epistemic state of the interfering agent knows. It is commonplace that if a third party *knows* that the stuff will heal the wife, she is not permitted to intervene, and certainly not by killing Bad Mistaken Alfred (though he is still at moral fault for believing the stuff to be poison). On the other hand, it seems equally commonplace that - supposing for a moment that the stuff was actually poisonous - if a third party does know this fact, she is allowed to intervene, if necessary by killing Bad Non-Mistaken Alfred to stop him from giving the stuff to his wife. The interesting variety, however, is where the third party does not know that the stuff will heal the wife, yet firmly

¹⁷ Supposing for the sake of argument that euthanasia is morally wrong - and on the stipulation that the wife has not consented, it arguably is.

¹⁸ McMahan 2009: 63

believes – as does Bad Non-Mistaken Alfred (and this is essential) - that the stuff is poison. In that case, the bystander is permitted to intervene by killing Bad Non-Mistaken Alfred if necessary. Moreover; the wife is permitted to defend herself against Bad Alfred’s insertion of the syringe (or whatever), and it cannot make any difference to her right of self-defence what sort of stuff is really in it, if she has good reason to think it is poison. Bad Alfred, on his part, has no right to defend himself against either the third party or his wife. Granted his reasonable belief that the stuff will kill his wife, he is a culpable threat and liable to being killed in self-defence (on the condition that everyone else believes what he believes). Whether his action is objectively justified does not seem to affect his liability in this case.

Does this not create a puzzle for McMahan’s account? According to McMahan, a culpable threat is someone who (intentionally) poses a threat without any justification or excuse, and who is fully liable to defensive action for that reason¹⁹. But Bad Mistaken Alfred is not a *real* threat – he is merely a *perceived* threat - and still it seems that there is a right of defence against him, which is based on what the intervener knows or reasonably believes²⁰.

My claim is that for any participant in the story about Bad Alfred it is the case that what they may permissibly do and not do, and what they are liable to suffer, depends on their combined reasonable beliefs that the facts obtain and not on whether the facts obtain. Bad Alfred is liable to being killed in self- or other-defence not for the objective fact of posing a threat to his wife’s life (which he isn’t in the original case), but for acting on the belief that he threatens her life. Moreover, the defenders act permissibly in intervening based on what they know or reasonably believe about the situation. If they know the stuff will heal the wife, they cannot kill Bad Mistaken Alfred simply because he is culpable. But if they reasonably believe the stuff will kill the wife, they act permissibly in her defence, because Bad Mistaken Alfred is culpable and because they believe him to be a threat.

However, consider another variety of the case, in which the subjectivist approach seems to have counter-intuitive implications. Take Good Non-Mistaken Alfred, who knows that the

¹⁹ Ibid, 159.

²⁰ McMahan seems to acknowledge that this category of threat (provided that ‘threat’ can be read as ‘perceived threat’) exists: “there are also those who pose a threat of wrongful harm through action that is objectively justified but subjectively impermissible” (ibid, 175). However, he dismisses this as “of no obvious relevance to the moral status of combatants in war.” (ibid) To the contrary, I would say, it is highly relevant, both because it shows the relevance of subjective justification to liability, and because – as a corollary - it matters to the moral standing of just combatants which is essential to equality. (I return to this in section II.)

stuff will heal his wife, but the wife and /or the bystander reasonably believes that he is about to poison her. Good Non-Mistaken Alfred is not liable on the basis of fault (nor objectively), but according to the subjectivist account the wife and bystander seem to act permissibly in killing him on their mistaken belief that he is culpable threat. This may seem counter-intuitive, but I don’t think it is false. It is just that since Good Non-Mistaken Alfred is not liable, he has a right of counter-defence. We see this more clearly if we compare with Good Mistaken Alfred. Good Mistaken Alfred *believes* the stuff will heal his wife, but the stuff is *in fact* poisonous. Assume that and the wife and bystander reasonably (and, as it happens, correctly) believe the stuff to be poison. Good Mistaken Alfred is not liable on the basis of fault, though he is a real threat. Here, compared to in the case above, the wife and bystander have both subjective and objective justification for lethal defence, but poor Alfred has done nothing different, he has just had really bad luck. It is an odd account which bases liability on *nothing but* bad luck, and it seems obvious (to me, at least) that both Good Mistaken and Good Non-Mistaken Alfred has a right of counter-defence. This right is not based on objective justification – which is different in the two cases – but on the basis of him acting with subjective justification, which is the same in both cases.

McMahan on his part suggests that it is a *necessary* condition that an act is objectively justified for an agent to be exempt from liability. In parenthesis, however, he admits that it might not be *sufficient* that the act is objectively justified: “it is arguable that (...) beliefs could make a difference to (...)liability”²¹. Unfortunately, McMahan does not pursue this line of thought, but concludes that “on this (...) view a person would be exempt from liability only when his act is justified both subjectively and objectively”²². But if that is so, only Good Non-Mistaken Alfred would be exempt, and again the only, and decisive, distinguishing factor between him and Good Mistaken Alfred is awfully bad luck.

I find it more plausible that the moral fault in Bad Alfred provides the necessary *and* sufficient condition for his liability, and the absence of moral fault in Good Alfred provides the necessary *and* sufficient condition for his exemption. For *intervention* to be permissible, however, the necessary and sufficient condition is the defenders’ reasonable belief that Alfred poses a threat. Without this belief, true or not, the bystander has no justification for stopping

²¹ Ibid, 43.

²² Ibid.

either Bad or Good Alfred by lethal means²³. When the epistemic conditions are satisfied both for the purported threat and the defender(s) – the threat has no right of counter-defence (due to his liability). When only the defenders’ epistemic condition is satisfied, the purported threat has a right of counter-defence (after all, he is innocent).²⁴ This discussion suggests that McMahan’s claim that objective justification is a *necessary* condition for exemption from liability is false.²⁵

Compare with the driver case, where McMahan argues that if a conscientious driver (“by a freak accident”) loses control over her car and thereby threatens to kill a pedestrian, she is liable to being killed by the pedestrian in self-defence (again, her being liable entailing that she has no right of counter-defence). To McMahan, it makes no difference to the driver’s liability what reasons she has for driving²⁶, i.e. whether she drives for fun or drives an ambulance with a dying patient to the hospital; as long as (1) she is morally responsible for getting into the car and (2) lacks objective justification for killing the pedestrian. If we accept the asymmetry in this case, reference to moral fault cannot explain it, while reference to lack of objective justification can. But should we accept the asymmetry?²⁷

²³ Note that it is still the fact the belief is about that provides the right/wrong-making factor, whether the fact obtains or not. It is thus not that I *have* the belief, but the content of it, which provides me with a reason for and against an action (Scanlon 2008: 51).

²⁴ An interesting addition to the case is where the wife and first bystander mistakenly believe that Alfred is a threat, but where he is not at fault and the stuff is not poison, yet a second bystander does know that the stuff is not poison. It seems to follow from my account that the second bystander would be permitted to kill the first bystander (and ironically, the wife), in defence of Alfred. But then again, this is only the upshot of Alfred’s not being liable and thus being permitted counter-defence, which also grounds other-defence, combined with what the intervener knows.

²⁵ McMahan distinguishes between culpable threats and partially excused threats. A morally faulty threat will encompass both. Then he classifies fully excused and subjectively justified threats as innocent threats which are nevertheless liable, before singling out objectively justified and just threats (and non-responsible threats) as those who are not liable at all. I would prefer, simply, to distinguish between morally faulty threats on the one hand and innocent threats on the other, in terms of their liability.

²⁶ Although it makes a difference to her degree of innocence.

²⁷ Consider the following case: I aim at a munitions factory with no intention of killing a group of innocent bystanders, but as it happens, since they are very close by, they do get killed. McMahan claims about this case: I act with objective justification (in virtue of having a just cause) in aiming at the factory, although I do wrong the bystanders, strictly speaking, by infringing on their rights not to be killed. Objectively speaking, the world becomes better by my action because the death of these civilians is a lesser evil than the just side loosing the war (say) and hence, their deaths are justified as the lesser evil. The fact that they are not liable to being killed (they have done nothing to make themselves liable), however, gives them a right to defend themselves against me, but not because *I* am liable. Since (objective) justification defeats liability, I am entitled to counter-defence. If, however, I were to aim at the civilians *intentionally*, then even if I was objectively justified in virtue of my just cause, I would be liable to being killed by them in self-defence, and *not entitled* to counter-attack. Here my intentions, according to McMahan’s account, make a crucial difference to my liability. But if that is so, why should not my justified or reasonable beliefs make a similar difference? If my intention alone can make a difference to my liability, why should not my justified belief that I have a just cause make a similar difference to my liability?

I find McMahan’s conclusion in the ambulance-case counter-intuitive²⁸. The driver has done nothing to make herself liable to defensive action, hence either the bystander is not permitted to defend herself with lethal means at all (but should accept that bad luck lies where it falls), *or* there is a symmetrical right of defence, which entails that the ambulance driver has a right of counter-defence. Why should sheer bad luck matter to liability in this case, when in other cases - i.e., in the case of a non-responsible threat such as the falling fat man who I can deflect by turning my awning²⁹ – bad luck does not matter? McMahan anticipates this response by acknowledging that some may think that “the degree to which (innocent and non-responsible threats) differ in their responsibility is too slight for conflicts between them and their potential innocent victims to be resolved decisively in favour of the victim”³⁰. Still, he himself regards the distinction as sufficiently robust to uphold asymmetry (and in any event, he denies that most unjust combatants would qualify as the kind of innocent threats that would be in such close proximity to non-responsible threats). McMahan suggests that it is fair to ground liability in moral luck because I “act with the knowledge that bad moral luck is a possibility”³¹. Presumably, by acting even for the best of reasons I take a moral risk which suffices to render me liable on the basis of bad moral luck. But what about the moral risk of *failing* to act? Say the ambulance driver refuses to take the moral risk of threatening a pedestrian; she refrains from driving, and the patient dies. That is a moral risk the driver is not permitted to take, neither subjectively nor objectively - and she would be liable for punishment for negligence and fault.

In light of this quandary, McMahan’s scheme for distribution of liability does not seem fair, but rather an over-demanding moral theory. In fact, McMahan’s account implies that one is morally responsible (and potentially liable) for anything that follows causally from what one does in virtue of being a moral agent.³²

²⁸ Of course, the very fact that we have different case- intuitions indicates that the intuition-based approach is somewhat dubious. But my disagreement with McMahan is not mainly based on differences in our intuitive responses.

²⁹ See Thomson 1991, McMahan 2009: 167-173.

³⁰ McMahan 2009: 179

³¹ *Ibid*, 177

³² It is pertinent to ask why - when he presupposes that common-sensical (but philosophically challenged) moral intuitions like the killing/letting-die distinction are morally significant – McMahan does not want to acknowledge the equally common-sensical intuition that fault is relevant to liability and luck is not.

PART II

In this paper I presuppose, rather than argue, that unjust combatants are subjectively justified for participating in war. However, I believe that the best case for the subjective justification of unjust combatants is made by taking value pluralism seriously. Whether one is a value pluralist all the way down, as it were, or just acknowledges pluralism as a sociological fact does not make a difference to subjective justification. But given that different sound moral theories compete and give conflicting recommendations (e.g. partial versus impartial theories), soldiers are arguably justified in acting according to obligations or concerns generated by either of these. Moral risk is involved here as well, because how can one be sure one is acting according to the best moral theory? In a conflict of obligations, a *pro tanto* obligation will always have to be omitted. Sartre’s famous dilemma illustrates this nicely:

[A] pupil of mine sought me out in the following circumstances. His father was quarrelling with his mother and was also inclined to be a ‘collaborator’; his elder brother had been killed in the German offensive of 1940 and this young man, with a sentiment somewhat primitive but generous, burned to avenge him. His mother was living alone with him, deeply affected by the semi-treason of his father and by the death of her eldest son, and her one consolation was this young man. But he, at this moment, had the chance of joining the Free French Forces or of staying near his mother and helping her to live (...) his disappearance – or perhaps his death – would bring her into despair (...)

[H]e found himself confronted by two very different modes of action; the one concrete, immediate, but directed towards only one individual; and the other action addressed to an end indefinitely greater, a national collectivity, but for that very reason ambiguous – and it might be frustrated on the way. At the same time he was hesitating between two kinds of morality; (...) the morality of sympathy, of personal devotion, and, on the other side, a morality of a wider scope but of more debatable validity.³³

The potential combatant’s deliberative predicament can be construed as a dilemma of this kind; as an ‘entrapment’ in a conflict between obligations stemming from moralities that cannot be reconciled, and thus where one or more morally justified courses of action must be omitted. This translates to the situation faced by *any* potential combatant – just and unjust. On the one hand, the potential combatant is facing a partial type of obligation, stemming from

³³ J P Sartre, 1994. “Condemned to be Free,” in: Peter Singer (ed.), *Ethics*. Oxford: Oxford University Press, pp. 152-155: 153

democratic duties, duties to defer to the collective decision to go to war, to fulfil his role obligation as soldier to protect and defend the community of which he is a member. On the other hand, the potential combatant is facing an impartial obligation not to fight in an unjust war, because fighting in an unjust war entails risking killing innocent people, and advancing an unjust cause.

Presuming that some unjust combatants fight with subjective justification – i.e., they believe their war is just, or they act on the duty to defer to democratic government or on some other moral reason - what does this entail for the equality doctrine? McMahan does not deny that the subjectivist approach is coherent³⁴, or that unjust combatants may act with subjective justification. But he argues that even so, this cannot support moral equality because 1) equality must hold universally and 2) objective justification beats subjective justification. I have argued in part I that (2) is implausible because it puts too much emphasis on moral luck. A soldier who refuses to fight, say, in the face of a legitimate democratic decision, takes the moral risk of being wrong, just like a soldier who defers takes the moral risk of being wrong. On the subjectivist account, the permissions and liabilities of both just and unjust combatants derive from the good reasons on which they act, not on objective factors.

I suggested at the outset that McMahan’s claim that the equality doctrine must hold *universally* is too strong. The doctrine I will defend is weak in two senses, which I shall keep separate by using ‘weak’ with reference to the *in bello* permission to kill enemy combatants, and ‘approximate’ with reference to overall equality of combatants. To begin with approximate equality: even on the assumption that subjective justification involves much more than just epistemological mistakes about the war being just, it is still quite clear that not every individual combatant is subjectively justified for participating in war. Not just any reasons taken to be moral reasons by an agent do in fact establish subjective justification; it is not always the case that the agent gives an appropriate answer to the question ‘May I do X?’ That would make all sorts of atrocities permissible as long as the agent believed them to be morally warranted. Which normative concerns are relevant to subjective justification must be settled independently. But it seems clear that the officer who is a firm believer in Nazi-ideology and who willingly takes up arms to fight for the establishment of the *Third Reich*,

³⁴ “A proponent of the [equality] doctrine might consistently hold the Augustinian view that a combatant acts wrongly if he acts out of hatred for the enemy, or for the pleasure of killing. This would apply to just and unjust combatants alike and would thus preserve the essential claim that it is not a reason to regard different combatants as morally unequal.” *The Journal of Political Philosophy*: Volume 14, Number 4, 2006, pp. 377–393: 378

while possibly justified according to his beliefs, is still wrong, and at fault, for holding these beliefs, and hence for acting on them. In other words, not all normative beliefs are justifiable, but when a normative belief is justifiable – i.e. correct according to some sound moral theory - so does the agent acting according to it act justifiably.

Secondly, some combatants act with excuse rather than justification, and an excuse does not give a permission. An excuse mitigates fault, partially or fully, but that an agent is excused does not affect the “species description”³⁵ of the act; an excuse is not a right- or wrong-making factor. Hence ordinary excuses such as coercion or duress cannot explain how unjust combatants fight permissibly. In contrast, acting with subjective justification proper *does* affect the action-description. Still, excusing factors may render an agent morally faultless, and hence affect her liability. A fully excused threat comes close to a non-responsible threat, though, as McMahan points out; an excused threat is still morally responsible to the extent that she acts. Even under extreme coercion, say, at gunpoint, one can choose to sacrifice oneself. But granted the argument that the difference between subjectively justified threats and their innocent victims is too slight to be morally decisive, so, arguably, is the difference between fully excused threats and their innocent victims. Though fully excused threats do not act with permission, they may therefore not be liable to attack, in the sense that they do not have a right of counter-defence. Young, propagandised conscripts fighting for Nazi-Germany may not have been permitted to fight, but could still for these exculpatory reasons be exempt from liability. In addition, there are partially excused threats whose socially inferior position, poverty, ignorance and other factors play into the picture. Not all of these are faultless in the sense that they are in proximity to subjectively justified or fully excused combatants, and some of them are in closer approximation to those who are culpable, but in many such cases it seems rather harsh to hold them fully morally responsible given the massive persuasive powers and promises of golden acres offered by government officials.

McMahan has suggested that there subjectively and objectively justified adversaries should be morally on a par, or fully excused and justified adversaries should be morally on a par, and if this parity entails permission and exemption from liability, this still does not suffice to support the Equality Doctrine. It is still the case that while all individuals on the just side are objectively justified, not all individuals on the unjust side are either subjectively justified or

³⁵ D’Arcy quoted in Uniacke 1994: 23.

even fully excused. Presumably this is what is entailed in ‘universal equality’ – that each and every individual must be morally on a par with every other. But if moral standing derives from *subjective* justification, this affects the moral standing of individuals on the just side as well. Just combatants may fight without any subjective justification, e.g. for reckless or selfish or blood-thirsty or racist reasons. They might not care at all if their war is just. If assessed on the subjective level, then, there is symmetry between the sides, but not universal equality between all individuals. This is what is meant by *approximate* equality. Further, since there is no way of distinguishing between individual reasons for participation short of a trial on the Last Day³⁶, approximate equality provides a basis for grounding the rules of war in a presumption of innocence in virtue of subjective justification.

McMahan asserts that in spite of its lack of moral foundation, we should maintain the legal rule of combatant equality for pragmatic reasons³⁷. My claim is stronger; while admittedly the legal rule of combatant equality grants combatant standing to some individuals – on both sides - on a morally wrongful basis, it also grants combatant standing to some individuals – on both sides – on a morally rightful basis. This is a moral justification for the legal rule, not a pragmatic one

Further, McMahan claims that only universal equality can give an equal *right* to kill. There is evidence that by ‘right’ he means *claim-right*³⁸. But how can there even conceivably be a *mutual* claim-right to kill as long as a claim-right entails that there is no right of interference? If the right to kill in war was a claim-right, the equality doctrine would be logically impossible, simply because if A has a claim-right to kill B then B has no right to interfere with A’s killing B. A claim-right does not only hold against third-parties, but against all parties. Thus holding that the right to kill in war is a *claim-right* begs the question against the Equality Doctrine. There is reason to think that none of the defenders of the Equality Doctrine have ever believed the right to kill in war as anything but a liberty-right – on both sides - correlative to a no-claim not to be killed on the part of the adversary. Their problem, of course, is to explain the no-claim.

³⁶ Note that also on this hypothetical trial, it would be subjective, not objective, justification that mattered to the judgment of individual combatants.

³⁷ McMahan 2009: 109. Actually, he gives a consequentialist reason for maintaining it, but to a deontologist like McMahan a consequentialist reason is tantamount to a pragmatic one.

³⁸ McMahan 2009: pp 62-63.

The problem of killing innocent aggressors is much debated, and I will not reiterate the debate here. Common-sensically, there is a right of self-defence against innocent threats, but because they are not liable to being killed, the intuition has proven extremely difficult to justify without recourse to some principle of self-preference that is morally questionable³⁹. Still, most would presumably agree that we are excused for killing innocent threats in self-defence, provided, of course, that we are innocent ourselves and hence not liable to the attack. It is true that an excuse does not generate a permission. But in the case of self-defence, the fact is that if A does not kill B, B kills A. In other words, where both threats are innocent and if there is not right of defence against innocent threats, self-sacrifice is imposed on A. But that would imply a principle of “B”-preference which is no more justifiable than a principle of “A”-preference. Fairness seems to require that A and B are granted symmetrical rights of defending themselves against each other, not in terms of being justified, but as an “exculpation before the fact”, as it were, which grants a weak permission to defend oneself.⁴⁰

And yet, symmetry between mutually innocent threats is one thing. Quite another, McMahan claims, is the right of a third party to interfere. If the mutual threats are really morally on a par and there is no identifiable moral difference between them, then arguably, a third party may flip a coin, or refrain from intervening on either side. If the difference is slight, a weighted lottery of some sort may be the fair solution; in the driver/pedestrian case for instance, the lottery could be weighted so as to give the driver a slightly smaller chance of survival than the pedestrian, given the slight difference in responsibility⁴¹. But arguably, this looks very different in war.

Even if we grant that combatants are approximately equal on the basis of subjective justification, it is still a fact that the one side has a just cause which the other side lacks. And surely, a third party should intervene on the side which has the objectively just cause. This brings us back to the case of Alfred; where the right of intervention was argued to depend on what the intervener knows or reasonably believes. If the intervening country C has good reason to believe that country A has an objectively just cause, it should intervene on the part of A against B. But as I suggested, the right of intervention is to some degree separate from the liability of the individual B-combatants. If B-combatants are presumptively innocent, they

³⁹ See e.g. Uniacke 1994.

⁴⁰ Now we also see that in the ambulance-case, where I suggested that there is no liability on the part of the ambulance driver, there is a symmetrical right of self-defence between the bystander and the driver.

⁴¹ McMahan 2009, 180.

are in fact wronged in defensive action both by A- and C-combatants. The apparent problem this raises can be solved in the same way as McMahan solves the problem of killing civilians in double effect-cases; the killing of innocents is justified as the lesser evil, because, all-things-considered, it is best that the just side wins. And like the civilians in double effect-cases, B-combatants who are non-liable yet threatened have a right of counter-defence against A- and C-combatants.⁴²

On a final note: It is a problem with the weak doctrine that it seems to imply pacifism. To have a no-claim – the correlative to a liberty-right - is equivalent to being liable, and to be exempt from liability is equivalent to retaining a claim-right not to be killed. But if combatants have a right not to be killed, how can war be just at all?

The state asks, or forces, some of its citizens to give up their fundamental rights for the sake of the state, or for other citizens. Only *consent* can make that request justifiable. McMahan has argued that consent is not sufficient for making killing in war permissible; for several reasons. First, he argues that consenting to be a combatant does not entail consent to being killed (i.e. waiver of one’s right to life). A police officer accepts the risk of being killed in service, but that does not entail that he gives the criminal a permission to shoot him⁴³. That is true, but the analogy is false. To consent to be a combatant is very different from consenting to be a police officer. Contrary to the police officer, a combatant consents to being a military *target*, and it does not make sense to consent to being a target, but not to be targeted. And dying is occasionally the result of being targeted. That is what the combatant consents to, and must accept as a corollary. Second, however, McMahan claims that even consenting to being killed is not sufficient to make killing permissible. One must also have good moral reasons, and presumably, these must be objective. I am sceptical to the claim that consent is not sufficient to render killing permissible, but of course, there are requirements that must be satisfied in order for the consent to be actual consent. Without getting into the requirements of actual consent here (in war, we may presume that it is rarely obtained), it should suffice that the combatant himself considers his reasons to be good enough to be willing to die for them – this reasons being the same as those making him subjectively justified in participating in war.

⁴² Note that although McMahan insists that there is a presumption against intentional killing which sets the threshold higher for intentional than for unintentional killing, he is not an absolutist. Intentional killing too, can be justified as the lesser evil, provided that the stakes are high enough to render the killing a lesser evil. *Ibid*, 22

⁴³ *Ibid*, 52

Conclusion

McMahan’s approach makes liability sensitive to luck. That one is morally responsible for an objectively unjustified threat is simply not sufficient to render it fair that one should pay with one’s life. Moreover, his account of liability has unfortunate implications because it renders moral action extremely difficult. There is moral risk involved in refraining from acting as well. Further, the casual chain of events following for an action is in principle endless. At which point does one cease to be responsible, and thus liable, for the results on what one once initiated? In light of this, the principle guiding the weak doctrine of equality, based as it is on subjective justification as the source of moral standing, seems both fairer and less demanding.