

# Liability and Just Cause

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In "Just Cause for War," Jeff McMahan develops an account of the just cause condition in just war theory that is revisionist and even, as he says, "heretical."<sup>1</sup> Moreover, the general tendency of his revisions is to make the theory less permissive, or less likely to approve the use of military force. In this paper I defend a standard, more permissive version of just war theory against his revisions.

As McMahan points out, the just cause condition is absolutely central to just war theory. It is, first, one of six or so conditions that all must be satisfied before a war can be just; without a just cause, the resort to military force is wrong.<sup>2</sup> But it also has priority over many other conditions, since it figures essentially in their definitions. For a war to be fought with a right intention, for example, those who initiate it must be motivated by a desire for its just causes, and there is a similar dependence in the proportionality and last resort conditions.<sup>3</sup> The proportionality condition permits war only if the harm it will cause is not out of proportion to the relevant goods it will achieve. But not all goods are relevant here. Imagine that fighting a war will boost our nation's economy, as World War II ended the depression of the 1930s. Though undeniably good, this type of effect cannot count toward a war's justification; an otherwise disproportionate conflict cannot become proportionate because it will boost GDP. Nor is it relevant if a war will give pleasure to soldiers eager for real action or will stimulate more profound art. As McMahan says, the goods relevant to the proportionality condition are only those in the war's just causes, and the same holds for the last resort condition. It permits a war only when there is no less destructive way of achieving its relevant goods, or if its balance of relevant goods over evils caused is preferable to that of any alternative. Again, however, only goods in the war's just causes count—war cannot be preferable to diplomacy because of economic or artistic effects. So both these key conditions presuppose a specification of relevant just causes.

McMahan's account of the just cause condition is centered on the concept of liability, so there is a just cause for war when and only when a group of people has made itself liable to the use of military force by being responsible for

a serious wrong to others. As he puts it, "There is a just cause for war when one group of people—often a state, but possibly a nation or other organized collective—is morally responsible for action that threatens to wrong or has already wronged other people in certain ways, and that makes the perpetrators liable to military attack as a means of preventing the threatened wrong or redressing or correcting the wrong that has already been done." He proceeds to derive from this claim a fairly standard list of substantive just causes, including resisting aggression and preventing major humanitarian crimes by a government against its citizens. But what places a cause on the list is the above claim about liability.

At the most general level, McMahan's appeal to liability is in line with the broad tradition of just war theorizing. Both classical theorists, such as Aquinas and Grotius, and many present-day ones agree that a just cause requires that a serious wrong be either committed or in prospect. But McMahan's claim adds two more restrictive elements to this idea. First, he applies the concept of liability not just to the resort to war as a whole but to each individual goal of war, so one is permitted to use force against group X in pursuit of goal Y only if X have made themselves specifically liable to the use of such force for that purpose, by being responsible for a wrong specifically connected to Y. This restriction is implicit in his claim that responsibility for a wrong permits military force only as a means of "preventing . . . or redressing or correcting the wrong." As I will argue below, this significantly reduces the role that such considerations as disarming an aggressor and deterring aggression can play in justifying war. Second, he applies the concept of liability not just to an enemy group X as a whole but to each individual member of X, so one is permitted to use force against a given person only if he himself shares in the responsibility for the relevant wrong. This radically changes the moral status of soldiers, especially on the just side of a war, and forbids much killing of soldiers by soldiers that would otherwise be permitted.

It is in these two ways—by reducing the role of such considerations as disarmament and deterrence and changing the moral status of soldiers—that McMahan's account makes just war theory less permissive. Let me consider them in turn.

## CONDITIONAL JUST CAUSES

In an earlier article McMahan and Robert McKim clarified an important aspect of traditional just war theory by distinguishing between what McMahan now

calls “independent” and “conditional” just causes.<sup>4</sup> An independent just cause can by itself satisfy the just cause condition, and, when present, is always relevant to justifying war; thus, resisting aggression is an independent just cause. By contrast, a merely conditional just cause cannot help satisfy the just cause condition; if one has only conditional just causes, one is not permitted to fight. But once another, independent just cause is present, a conditional cause can become a legitimate goal of war and can contribute to its justification—for example, by helping to make it proportionate and a last resort. Three main conditional just causes have been recognized: forcibly disarming an aggressor, deterring future aggression, and preventing humanitarian crimes that, while serious, do not mount to the level of an independent just cause.

On most versions of just war theory, the mere fact that a state has weapons it may or even is likely to use aggressively at some time in the future is no justification for war against it now; *pace* the Bush doctrine, merely preventive war is wrong. But once a state has committed aggression, forcibly disarming it and thereby incapacitating it for future aggression becomes on most views a legitimate goal of war. If the process of reversing a state’s aggression will destroy much of its military hardware, leaving it less able to attempt future aggression, the resulting prevention of aggression is on this view a relevant good produced by war. More strongly, disarmament can sometimes permit continuing a war after its independent just causes have been achieved. Many hold that in World War II the Allies were permitted to disarm Germany and Japan even after their aggressions had been reversed and the territories they had occupied had been liberated. Similarly, many hold that in 1991 it was permissible for the UN coalition to send troops into Iraq after liberating Kuwait in order to eliminate Iraq’s weapons of mass destruction. This is why, when the coalition chose not to do so, they were permitted to write conditions about disarmament into a cease-fire agreement that they backed with the threat to resume force if its terms were not complied with. On most views, then, though not on its own a sufficient justification for war, disarmament can become a legitimate goal given some other, independent just cause.

A similar point applies to deterrence. The mere fact that war against a given state will deter future aggressors cannot justify war; deterrence is not an independent just cause. But once there is another, independent just cause, deterrence becomes a relevant good of war and can play a vital role in its justification. Consider the 1982 Falklands War. While Argentina’s occupation of the islands

provided an independent just cause for war, their remoteness and sparse population may have made that cause insufficient to outweigh the harms of war in a proportionality calculation. But when British prime minister Margaret Thatcher justified the war she did not appeal only to that just cause; she also cited the need to resist aggression wherever it occurs, which was in effect an appeal to deterrence. And deterrence may have done more to make the war proportionate than its initial just cause did.

Something similar is possible for the last resort condition. In the lead-up to the 1991 Gulf War, the Soviet Union and France sought a negotiated Iraqi withdrawal from Kuwait, but it was evident that any such withdrawal would require concessions to Iraq—for example, about some disputed islands on the Iraq-Kuwait border. The United States and its closest allies vigorously opposed the negotiations, saying there must be “no rewards for aggression.” For them the conditional just cause of deterrence made diplomacy unacceptable when it might otherwise have been a morally preferable choice.

The final type of conditional just cause, preventing lesser humanitarian crimes, is illustrated by the 2001 war in Afghanistan. While the Taliban government’s oppression of the Afghan people, and especially of Afghan women, was serious, I think most would deny that it constituted an independent just cause; a war fought only to liberate Afghan women would have been wrong. But once the Taliban provided an independent just cause by harboring terrorists, the fact that war against them would liberate Afghan women became for many a relevant benefit. Here a good of the same type as some independent just causes—because it involved a government’s violating its citizens’ rights—but of insufficient magnitude to be an independent cause, became a conditional cause given another ground for war.

Though McMahan introduced the distinction between independent and conditional just causes, his “Just Cause” article in effect rejects it, and instead recognizes only independent causes. One reason for this change in view is his tightening of the concept of liability. Versions of just war theory that allow conditional causes use this concept in what can be called a “partly global form.” They permit war only when an enemy has made itself liable by being responsible for a serious wrong, and deny that some goods, such as economic and artistic ones, can ever be relevant to justifying war. But they allow certain other goods, such as disarmament and deterrence, to become morally relevant benefits given another, independent just cause, and to do so even if there is no specific liability

to the use of force in pursuit of them: the more global liability associated with the independent just cause suffices to make them legitimate goals. By contrast, McMahan's current view does require specific liability, allowing force in pursuit of Y only given a specific wrong connected with Y. This has various restrictive implications.

"Just Cause for War" discusses conditional just causes most explicitly in its section on disarmament. McMahan writes that while he used to think disarmament can be only a conditional just cause, he now sees that it can be an independent just cause: If a state manifestly intends and is actively preparing to commit aggression, its doing so by itself makes it liable to war, just as in criminal law preparing to commit a crime makes one liable to prosecution for conspiracy. This claim is persuasive, and extends the traditional concept of preemptive war in a more permissive direction. But McMahan's conception of liability commits him to a converse claim that he does not explicitly defend—namely, that disarmament is a legitimate goal only given specific liability to disarmament on the other side. This liability will be present if a state, while committing one aggression, already intends and plans further aggressions, and this may have been true of Germany in 1939 and perhaps Iraq in 1990. But it clearly was not true when the Allies disarmed Germany and Japan at the end of World War II. At that point Germany and Japan had no effective governments and could not intend further aggressions even if they wanted to. Yet most commentators think those disarmaments were clearly justified, and they likewise think a partial disarmament of Iraq was justified in 1991 even if Saddam Hussein did not yet plan further attacks.

Another ground of specific liability is suggested by McMahan's later discussion of deterrence: If by committing aggression a state now raises the probability that it will aggress in the future, that probability is itself a further wrong that licenses military action now to block it. But what is permitted here is only disarmament that reduces the probability of future aggression to what it was before the aggression; no further reduction is possible. And that again is more restrictive than most just war theorists accept. By 1945 the devastating costs of military defeat had already dramatically reduced the possibility that Germany or Japan would aggress again, yet most hold that the disarmaments were justified. Most would likewise hold that disarming Saddam in 1991 was justified even if his invasion of Kuwait only reflected an underlying tendency to aggression that would have been as strong in the future without that invasion.<sup>5</sup> The most common and

to my mind most intuitive view is the one expressed in McMahan's original account of conditional causes: even if disarmament that is not a response to active planning cannot by itself justify war, it can be permitted once another, independent justification for war is present.

This view also matches the most attractive view on a topic McMahan often cites as a parallel to that of war—namely, criminal punishment. That someone is likely to commit a crime in the future is on most views not a sufficient justification for imprisoning him now; like merely preventive war, merely preventive detention is wrong. But once he has acted criminally, the fact that locking him up will incapacitate him for future crimes is a legitimate ground for punishment, and in many popular discussions is the most important one. But the legitimacy of incapacitating punishment does not depend on the criminal's having already intended any future crimes, nor on his first crime's having increased their probability; the one crime is enough. This view of punishment still requires liability, since only a criminal who has made himself liable by criminal action may be punished. But the liability is only the more global one of having acted criminally rather than any specific liability for incapacitation by imprisonment.<sup>6</sup>

There are similar restrictions in McMahan's discussion of deterrence. He allows this as a legitimate goal of war only when a state has made itself specifically liable to the use of force for deterrent purposes, as when its aggression has increased the probability that other states will in future commit similar wrongs. And many acts of aggression will, if unresisted, have this effect. But imagine that, if unresisted, A's aggression will reduce the level of deterrence by degree  $m$ , while our resisting it will not only prevent the  $m$ -degree loss but improve deterrence by degree  $n$  over the status quo ante. On McMahan's view only the  $m$ -degree and not the  $n$ -degree gain is relevant to the war's justification, and we have to ask whether that is plausible. If the Falklands War had strengthened international security compared to before Argentina invaded, would that not have been a relevant benefit? In 1991 many said the Gulf War would inaugurate a "New World Order" in which aggression was deterred by the knowledge that it would be resisted by international action organized through the Security Council. If that had actually happened, would it not have counted significantly in favor of the war? These questions may be hard to answer in any real case because it is impossible to know for certain which deterrent effects return one to the status quo and which improve upon it. But the analogue of McMahan's view is again not plausible for criminal punishment. While deterrence cannot by itself justify

punishment, once someone has acted criminally the fact that imprisoning him will deter others is on most views a legitimate and vital goal of punishment. But its permissibility is not governed by anything like McMahan's restriction. Many crimes have in themselves no effect on deterrence, since they are unknown to the general public, yet surely deterrent punishment is permissible for them. Some crimes could even strengthen deterrence: they are so horrific that press accounts of them could cause widespread repugnance, increasing people's moral aversion to committing similar acts. Even so, if punishing the perpetrators of these acts somewhat more harshly would improve deterrence even further, is doing so not permissible?

McMahan gives the following objection to deterrence as a goal of war: "Deterrence is problematic as a just cause for the same reason it is problematic as the sole aim of punishment. In both cases it seems objectionable because it uses the harming of some as a means of influencing the action of others." The reference to deterrence as a "sole aim" here is puzzling, since what his opponents propose is only the weaker view that deterrence is a legitimate goal given some other, independent just cause. And he himself allows that deterrence is sometimes a legitimate goal, when an aggressor has wrongfully reduced the level of deterrence by degree *m*. So why does pursuing deterrence in that case not likewise objectionably harm some as a means of benefiting others? His answer is presumably that the aggressor has made himself liable to such pursuit by his wrongful action. But the opposing view likewise holds that deterrence is a legitimate goal only when an enemy has made himself liable. The two views differ about what the condition for liability is, McMahan requiring specific liability for a specific reduction in deterrence and the opposing view only a more global liability grounded in some just cause. But the dispute between them cannot be settled by appeal to a Kantian formula forbidding the treatment of people as means, since one's interpretation of that formula will depend crucially on which view about liability one accepts.

McMahan's critique of the third type of conditional cause, the prevention of lesser humanitarian wrongs, adds a further restriction to his account. He cannot here rely just on his initial requirement of specific liability, since that is often satisfied. The Taliban, for example, were indeed responsible for oppressing Afghan women. But he argues that while responsibility for lesser humanitarian wrongs may license some action to correct them, it cannot license anything as destructive as war. Allowing conditional causes of this type, he writes, "seems to imply that an end that is insufficient to justify killing and maiming—namely, alleviating

religious oppression—can contribute to the justification for an activity—war—that necessarily involves killing and maiming. And that makes no sense.”

The objection here is not to the logical coherence of a view recognizing these conditional causes. Given something like G. E. Moore’s “principle of organic unities,” it is perfectly possible for a consideration that cannot on its own justify war to add to the case for war when combined with other considerations.<sup>7</sup> But McMahan rejects the view that lesser humanitarian causes can contribute to the justification of war as morally unacceptable. For it to be permissible to use military force against group X for purpose Y, he argues, not only must X be responsible for a wrong specifically connected with Y, but that wrong must be serious enough to constitute an independent just cause, one that by itself licenses killing and maiming for the sake of Y. And the Taliban’s oppression did not meet that second condition. Earlier in his article he wrote that there is a threshold of seriousness such that only goods that are both of a relevant type and above that threshold can count as just causes. His “makes-no-sense” argument about lesser humanitarian wrongs extends that idea, saying that goods must pass the double test to ever be relevant to the moral assessment of war.

If this is McMahan’s view, it has very restrictive implications for the other types of conditional just cause. Disarmament will now be a legitimate goal only when an enemy’s planning for future aggressions is sufficiently advanced that it by itself provides a just cause for war, which may only rarely be the case. (Were Saddam Hussein’s designs on Saudi Arabia sufficiently advanced in 1991 to justify preemptive war against him without his invasion of Kuwait?) And deterrence will almost never count in favor of war, since on most views it is never an independent just cause. McMahan’s earlier discussion allowed that if state A’s aggression will increase the probability of future aggressions by degree *m*, the fact that war against A will prevent that increase is a relevant good. But his makes-no-sense argument as I am reading it contradicts that view. A’s leaders might reduce deterrence by degree *m* without committing any aggression—say, by making speeches lauding aggression and encouraging other states to commit it. On most views this behavior would not justify war against A; as I have noted above, deterrence is not an independent cause. But then, given the extra restriction he introduces to exclude lesser humanitarian causes, deterrence can never be a legitimate goal of war or relevant to its justification.

These implications are in my view a further reason to reject McMahan’s account of liability, but what about lesser humanitarian wrongs? Should we take

them to ground conditional just causes? In the case of the first two types of conditional cause, disarmament and deterrence, there were two considerations favoring their recognition. First, this seems to be the view that most who have applied just war theory in the past have assumed and the view that is most intuitive. Thus, it seems right that the Allies were permitted to disarm Germany and Japan after World War II, and that the deterrent effects of the Falklands and Gulf wars counted in their favor even if they could not justify them on their own. Second, the view is further confirmed by its structural similarity to the most plausible theory of criminal punishment, which likewise treats incapacitation and deterrence as conditionally permitted goals. It must be admitted, however, that both considerations seem less decisive for the third type of conditional cause, the prevention of lesser humanitarian wrongs.

First, there is here no long tradition of accepting these causes, since the possibility that they might help justify war has only recently been recognized. And even if we do accept them, we may want to hedge them with various restrictions. Thus, we may say that when preventing a humanitarian wrong requires removing a state's government, doing so is permissible only when that removal is already licensed by the war's independent just causes. This condition was arguably satisfied in the Afghanistan War, since the Taliban's refusal to stop harboring terrorists already permitted the United States and its allies to end their regime. But if a state merely commits a one-off aggression against a neighbor, removing its government is not normally permitted, and neither, we may then say, is preventing any lesser domestic wrongs that government is committing. On most views the rights abuses of Argentina's ruling junta in the 1980s were not sufficient to justify military intervention to remove them. But presumably it would also not have been permissible for Britain to remove the junta after they invaded the Falklands, since the invasion did not itself license that regime change. In addition, we may insist that the relevant wrongs be above a threshold of seriousness. A government may, for example, deny defendants in criminal trials some protections they should have or operate a tax system that is in various ways unfair. Even if we have an independent justification for removing this government, we may have to leave the righting of these lesser wrongs to its successor; only weightier ones, such as religious oppression on the order of the Taliban's, are proper objects of our concern.<sup>8</sup> These restrictions still allow some prevention of lesser humanitarian wrongs, as in the Afghanistan example. But the fact that they suggest themselves may reflect some hesitation on our

part about this third type of conditional cause that we do not feel about disarmament or deterrence.

Moreover, the parallel with criminal punishment does not in this case give such clear support to the proposed conditional cause. While incapacitation and deterrence are widely accepted as legitimate goals of punishment, it is much more controversial whether any other goals are so. Some philosophers have held that moral reform can be a proper aim of punishment. They have said that if a person has not committed a crime, the state may not try forcibly to improve his character, but once he has acted criminally, moral improvement becomes a legitimate goal of punishment, and not just as a means to crime prevention but also as desirable in itself. Like the permissive view about lesser humanitarian wrongs, this one allows forcible internal reform of an agent when, but only when, he has committed a wrongful external act.<sup>9</sup> But while this view about punishment has been held in the past, I suspect that most today would reject it, saying that even when a person has acted criminally, his moral improvement, crime prevention aside, is only his business and his responsibility.

So there are no decisive arguments for recognizing the third type of conditional cause, but there are also no decisive arguments against doing so, and the view that accepts them does have some intuitive appeal. If after the Afghanistan War the United States had contented itself with any post-Taliban government that did not harbor terrorists, whatever its human-rights policies, its actions would surely have been widely condemned. And whatever we decide about the third type of conditional cause, the powerful arguments in favor of the first two show that the elements in McMahan's liability account that exclude them are too restrictive to be plausible. It is indeed true that the resort to military force is permissible only when another state has made itself liable to such force. But the liability is only the more global one of the standard view rather than the very restrictive specific liability McMahan requires.

## TARGETING SOLDIERS

So far I have discussed McMahan's claim that one may use force against group X in pursuit of goal Y only if X are responsible for a serious wrong connected to Y. I now turn to his second distinctive claim, that one may use force against an individual member of X only if that individual, and not just X as a whole, is responsible for a wrong.

This claim would have massively restrictive implications if it concerned all the killing and harming of war. In most wars many people are killed even though they are not targeted by military force: their deaths are collateral—that is, foreseen but not directly intended—effects of force directed at other, usually military, targets. And many of these people have done nothing to make themselves liable; this is most obviously true of children. So if McMahan's claim forbade all killing without individual moral responsibility, it would make a just war *de facto* impossible. But this is not his intention. His claim concerns only the targeting of people by military force, which means it applies primarily to the use of force against enemy soldiers. Even here, however, it has highly revisionist implications.

The most common contemporary view affirms what Michael Walzer calls the "moral equality of soldiers": soldiers on both sides of a war, regardless of the justice of their cause, are equally permitted to kill each other and equally liable to be killed, so a soldier who kills an enemy in war does not act wrongly.<sup>10</sup> But McMahan's claim forces him to reject this view, first, with respect to soldiers fighting on the just side of a war. Since their state has committed no wrong, they cannot be liable for any wrong and enemy soldiers who kill them are, morally speaking, murderers. He does not think that soldiers on an unjust side, whom he calls unjust combatants, should be prosecuted for murder after the war, but his reason is only the pragmatic one that a policy of prosecution would have bad effects. For him the underlying moral truth is that unjust combatants have no right to kill just combatants and act wrongly when they do. Second, his claim also changes, if less dramatically, the status of soldiers on an unjust side. He holds that they are liable to be killed so long as they are participating in a wrong and are morally responsible agents.<sup>11</sup> But he also thinks their degree of liability depends on the degree of their moral culpability, which can vary. In some wars some unjust combatants are not at all culpable for their actions and are therefore entirely excused, and even those who are culpable—because they know or should know that their state is acting wrongly—are not so to the highest degree. However objectionable their conduct may be, it is not as objectionable as that of the political leaders who initiated their state's wrong. So while permitted, the killing of these soldiers is not as unproblematically so as on the moral-equality view.

McMahan rests his claim about individual responsibility on a critique of what he takes to be the standard justification of the moral-equality view, which is certainly the most common offered in the recent literature. It holds that what

permits the killing of soldiers in war is not their “moral” but their “material” noninnocence, where to be materially noninnocent is to pose a threat to another person. Since soldiers on both sides threaten each other, the argument goes, they are both equally liable to be killed by those they threaten.<sup>12</sup> As McMahan points out, however, we do not accept this reasoning in other contexts. If individual A attacks individual B and B uses force in self-defence against him, B’s defensive action, though a threat to A, does not permit A to use force against B. On the contrary, since A wrongfully initiated the threatening situation, he has no rights against B and is the only one liable to the use of force against him. In cases of individual self-defence we do not take material noninnocence to suffice for liability, and McMahan concludes we should not do so in war either.

I find this critique of the standard view decisive, but McMahan ignores a more persuasive justification of the moral equality of soldiers that is most clearly available given volunteer militaries on both sides of a war. It says that by voluntarily entering military service, soldiers on both sides freely took on the status of soldiers and thereby freely accepted that they may permissibly be killed in the course of war. More specifically, they accepted that they may permissibly be killed by specific people—enemy soldiers who have made a reciprocal surrender of rights—in specific circumstances—those of formally declared hostilities between their and another state. By volunteering, in other words, they freely gave up their right not to be killed in certain circumstances and so made their killing in those circumstances not unjust. And since they both did so without regard to the justice of either’s cause, their resulting status with respect to each other is the same. Their situation is like that of boxers who, in agreeing to a bout, permit each other to do in the ring what would be forbidden as assault outside it. And just as the boxers’ interaction is governed by formalized rules, so is the soldiers’: there are uniforms to distinguish the people who have surrendered and gained rights from those who have not, and formal declarations of war and cease-fires to indicate when the permissibility of killing begins and ends. There is, to be sure, an important difference between the two cases. Whereas a boxer agrees to each of his bouts individually, a soldier makes a more global surrender of rights to all enemy soldiers in all future wars. But in both cases there is a voluntary permitting of what would otherwise be a serious violation of rights.

It may be asked why soldiers make this global surrender of rights rather than consenting to individual wars as they come along or permitting themselves to be killed only by soldiers who fight in a just cause. The answer is that they could in

principle make these narrower surrenders but do not. As McMahan recognizes, the common conception of military status has the moral equality of soldiers built in as a component; both it and the legal rules governing the military allow that soldiers on both sides of a war can kill without acting wrongly. And those rules also require the more global surrender, since they allow that soldiers who refuse to fight in a declared war can be prosecuted for desertion. It is easy to see why they do so. States normally want an obedient military, and therefore want soldiers who are committed to fighting in all the wars their governments enter rather than being able to choose among them. To ensure this outcome, states build the more global commitment into their legal definitions of the military role and require a global surrender of rights by all who enlist. Understanding this, and lacking any other way of entering military service, the soldiers then comply.

Though less prominent in the literature than the material-noninnocence justification, this surrender-of-rights justification does occasionally appear. Walzer's influential discussion mostly grounds the moral equality of soldiers in the fact that they threaten each other, but at one point he says that an enemy soldier is a legitimate target because "he has allowed himself to be made into a dangerous man."<sup>13</sup> While "dangerous man" here points to material noninnocence, "allowed himself" suggests a voluntary assumption of status like that central to the surrender view. Even more suggestively, Paul Christopher says that treating others as ends means treating them "according to the roles that they have freely chosen for themselves," where that means that "soldiers may be killed because that is treating them appropriately as soldiers."<sup>14</sup>

Though it neatly supports the moral equality of soldiers, this surrender justification is open to several objections. The first argues that the right not to be killed cannot be given away, because it is inalienable. Imagine that A offers B \$100,000 per year for ten years in return for the enforceable claim-right to kill B at the end of that time, and that B accepts both the offer and the money. Many will say that despite this, A is not morally permitted to kill B at the end of the ten years. Though other less weighty rights can be surrendered in contracts, the most important ones, including the right not to be killed, cannot. But if the right not to be killed is in this way inalienable, it cannot be surrendered by volunteering for military service.

The most direct reply to this objection insists that the right not to be killed is alienable, since all rights can be given away. Robert Nozick, Joel Feinberg, and others have taken this line,<sup>15</sup> but there are less radical replies that point to

differences between the surrender involved in military service and that involved in the contract between A and B.

First, what the contract tries to give A is an enforceable claim-right to kill B, one whose exercise it would be wrong of B to try to block or prevent. But volunteering for military service gives enemy soldiers only a liberty right to kill; one's own right to defensive force against them is absolutely retained. So the surrender of rights in the military case is considerably less far-reaching and therefore perhaps less problematic. Second, once B has accepted A's money, the rights resulting from the contract are asymmetrical: A has the right to kill B but B has no similar right against A. But the rights in the military case are equal on both sides: soldiers on both sides are permitted to kill their enemy and liable to be killed by them. Finally, the transfer of rights in the contract case is irrevocable. Once B has accepted A's money, he cannot say he has changed his mind and now wants not to be killed; he cannot do this even if he offers to return the money. But the assumption of military status is always revocable: a soldier always has the option of either deserting from the military or surrendering to the enemy. Of course neither of these options is cost-free: if he deserts and is caught he will be imprisoned by his own side, whereas if he surrenders he will be imprisoned by the enemy. But being imprisoned is a lesser infringement of rights than being killed, and I doubt many will say the right not to be imprisoned is inalienable.

In this connection it is vital to recognize the role of time in alienation. Those who believe the right to life is inalienable need not and often do not deny that a person can permit another to kill him—for example, in voluntary euthanasia. But that is because they distinguish between waiving and alienating a right. When one waives one's right not to be killed, as in voluntary euthanasia, the waiver is simultaneous with the killing it allows; one now permits a doctor to give one a lethal injection at that moment. But the alienation of a right occurs across time. In the contract between A and B, B's accepting the money now is supposed to permit A to kill B at some future time whether or not B then wants to permit that killing. So unlike a waiver, which involves just a present exercise of choice, alienating a right involves an attempt by present choice to limit one's permissible choices in the future. That is why those who deny that a right is inalienable can find waiving it perfectly acceptable.<sup>16</sup>

Because it is revocable by desertion or surrender, the assumption of military status is closer in this key respect to waiving than to alienating the right not to be killed. There remains an obvious difference, since a soldier does not positively

want to be killed, whereas a patient who requests euthanasia does. But the possibility of revocation allows us to see the permission to kill a soldier at a time as grounded in his choice at that time to remain a soldier, which assimilates it to the less contentious case of waiving rather than the more problematic one of alienation.

These features of military surrender also assimilate it to the boxing case. There too each boxer grants his opponent only a liberty-right to assault him, retaining his own right to defend himself; the resulting distribution of rights is equal; and each boxer can always revoke his surrender of rights by conceding defeat. We can also construct a boxing analogue of the contract case, where A offers B, say, \$1,000 a year for ten years in return for the claim-right to punch him into unconsciousness at the end of that time. Our verdict about this contract may not be as clear as it is about the one involving killing, but I suspect some will say the contract is not binding, so if A does punch B he is morally guilty of assault. If they do say that but continue to allow standard boxing matches, they will be granting moral significance to the very features I have highlighted in a soldier's surrender of the right not to be killed.

I do not claim that these replies decisively answer the inalienability objection, but together they make a substantial case in defence of the surrender justification. There is, however, a second objection to this justification. It concerns soldiers whose adoption of military status was not fully voluntary, either because they were conscripted or because they entered the military only because they had no other acceptable career options. How can these soldiers have voluntarily surrendered their right if their joining the military was forced?

There is a hard-line and a soft-line reply to this objection. The hard-line reply takes no account of degrees of voluntariness, saying that even in the cases at issue a soldier's entry into military service was to some degree voluntary, because it involved a choice: a conscript, for example, could have gone to jail or fled his country. And its being voluntary even to that limited degree was sufficient for it to involve a full surrender of rights. Walzer suggests this hard-line reply when he says that a soldier has "allowed himself" to be made into a dangerous man even though, as in cases of conscription, "his options may have been few."<sup>17</sup> And the reply fits the common understanding of a contract. A contract between A and B is no less binding on B if he was "forced" into it by unfavorable circumstances or even by hard dealing by A. Of course, the contract is void if it was entered into under duress, but I assume that duress requires some action by A that is

independently wrong, a condition that is not satisfied in the military case if, as I will assume, conscription is not in itself forbidden. So the hard-line reply is that even a reduced degree of voluntariness is sufficient for a full surrender of non-combatant rights.

The soft-line reply does take account of degrees of voluntariness, and therefore gives conscripts, both literal and "economic," a different status from full volunteers. This is most easily done in the proportionality condition governing the conduct of war, which says an act in war is permissible only if the harm it will cause is not out of proportion to its relevant benefits. In applying this condition the standard view is that the deaths of enemy soldiers count for almost nothing. We are not permitted to kill these soldiers wantonly or for no purpose, but if even a minor military benefit will result, doing so is permissible. For example, if we have to kill a hundred or even a thousand enemy soldiers to save the life of one of our soldiers, we are morally permitted to do so. And in this context the soft-line reply can make a difference. It can give greater weight to the deaths of enemy soldiers who were forced into service by conscription or economic hardship, so we must accept greater risks to our soldiers to avoid those deaths. One case where this view could have been applied was the 1991 Gulf War. The troops liberating Kuwait faced Iraqi forces composed largely of teenage conscripts. On the soft-line view, the liberating troops should have been prepared to accept greater casualties among themselves in order to reduce Iraqi casualties than if the Iraqis were all volunteers. Another application comes in a proposal for how military forces fighting terrorism, as the Israeli military are in the Palestinian territories around Israel, should weigh the preservation of different types of lives. Asa Kasher and Amos Yadlin argue that Israeli forces should give the highest priority to saving the lives of Israeli civilians, then Israeli soldiers, then Palestinian civilians, then Palestinian terrorists. The contentious part of this ordering is that it places Israeli soldiers ahead of Palestinian civilians, and one reason Kasher and Yadlin give for doing so is that an Israeli soldier is often "a conscript or on reserve duty," since the state cannot defend itself without "a just system of conscription and reserve duty."<sup>18</sup> Now, we may question how powerful this reason is. In particular, while granting that the soldiers' conscript status gives them higher moral standing than they would have as volunteers, we may deny that the difference is large enough to place them ahead of Palestinian civilians. But central to this part of Kasher and Yadlin's argument is the soft-line claim that the degree of a soldier's standing depends on the degree of voluntariness of his entry into the military, and that claim may indeed be intuitively attractive.

It is harder to build differential status into the just war discrimination condition, which distinguishes legitimate from illegitimate targets. So here the soft-line view may remain hard, saying that even the minimal voluntariness involved in letting oneself be conscripted makes one always a permissible object of force. But there is an alternative approach. A soft-line view can say that when conscripts are actually attacking our troops or close to doing so, they are legitimate military targets. Though they have not surrendered or forfeited any rights, their status is like that of innocent threats in the morality of self-defense, who may be attacked just because they are a danger. But when conscripts are asleep in barracks far behind the front lines, they are not legitimate targets because they are not then a sufficiently imminent threat. While volunteer soldiers may be attacked at any place and time during a war, conscripts have higher moral standing because they are only sometimes liable to attack and at other times immune.

I will not choose between the hard-line and soft-line replies, nor between the softer and less soft versions of the latter; if all are available, there is some persuasive response to the objection about partly forced enlistment. But there is a final objection, raised by McMahan in some as-yet unpublished lectures, that points to a serious limitation in the surrender justification of moral equality.<sup>19</sup>

This objection concerns the harm unjust combatants cause noncombatants, who have not surrendered their right not to be killed and are also not a threat. In most contemporary wars soldiers on both sides, even if they aim only at military targets, collaterally harm and even kill some civilians. Their doing so is not forbidden by the discrimination condition, but it is restricted by the proportionality condition, which allows collateral harm to civilians only when it is not out of proportion to the relevant good an act will do. And it is hard to see how "relevant good" can be understood except in terms of a war's just causes. Surely what counts as proportionate harm depends on the seriousness of the stakes in war. A level of civilian harm that would have been acceptable in World War II, fought against a genocidal enemy, might not have been acceptable in the Falklands War. But if unjust combatants have no just causes, then no acts in which they harm civilians can be proportionate, and all such acts are wrong. This creates a fundamental moral *inequality* between soldiers. Soldiers on a just side can fight entirely permissibly, if they target only enemy soldiers and cause only proportionate collateral harm. But except in a war fought entirely apart from civilians, such as perhaps a purely naval war, unjust combatants cannot fight permissibly. Whenever they harm civilians, even if only collaterally, their actions are disproportionate

and therefore morally wrong. It does not follow that they should be prosecuted after the war; for the pragmatic reasons McMahan cites, it may be best to excuse them. But the moral reality is that in most wars unjust combatants cannot fight justly, whereas just combatants can.

One might try to reformulate the proportionality condition to remove this inequality, as international law in effect does. Its version of the condition forbids harm to civilians that is excessive "in relation to the concrete and direct military advantage anticipated,"<sup>20</sup> where "military advantage" is understood neutrally between the warring sides. This approach might even allow different proportionality constraints in different wars, by saying that greater moral stakes in a war raise the acceptable levels of collateral harm for both sides, so both sides in World War II were permitted to cause more harm to civilians than in the Falklands War. But it is hard to see how the greater wrongs perpetrated by Nazi Germany permitted not just Allied but also German soldiers to kill more enemy civilians, and, more generally, this whole approach seems misguided. The assessment of any act's proportionality must surely depend on *its* relevant benefits, which in war depend on the just causes of the agent's side. But then any harms unjust combatants cause enemy civilians are disproportionate and therefore forbidden.

Important though this point is, it does not affect our main topic, which is the moral liability to be *targeted* in war. McMahan claims that to be liable for targeting, a soldier must himself be responsible for some wrong, and since there is no wrong on the just side, just combatants are not permissible targets. In reply I have argued that if soldiers on both sides have surrendered their right not to be killed to all enemy soldiers in all future wars, then with respect to each other they are moral equals, each permitted to kill their enemy and liable to be killed by them. The two sides are not completely morally equal, since in most wars just combatants can fight proportionally while unjust ones cannot. But insofar as they target each other, both act permissibly and neither's acts are wrong. In that important respect they are moral equals.

## CONCLUSION

McMahan's liability account starts from the compelling idea that there is a just cause for war only when a state has committed or threatened a serious wrong, one that makes it liable to the use of force to prevent that wrong. But he supplements this idea with two further claims that have very restrictive implications.

The first is that one is permitted to use force against state X in pursuit of goal Y only if X has committed a wrong specifically connected to Y, and serious enough by itself to license war for the sake of Y. I have argued that this claim drastically and counterintuitively reduces the role disarmament, deterrence, and the prevention of lesser humanitarian wrongs can play in justifying war. The more plausible view uses the concept of liability more globally, saying that if a state provides an independent just cause for war, say by committing aggression, it licenses other states to pursue certain conditional just causes, such as disarmament and deterrence, even if it has committed no wrong specifically tied to those goals. McMahan's second claim is that one is permitted to direct force against an individual only if that individual is responsible for a serious wrong. This again has restrictive implications, implying that some soldiers on the unjust side of a war have only qualified liability to be killed, while those on a just side have none, so targeting them with military force is always wrong. In reply I have defended a surrender-of-rights view according to which soldiers on both sides have, by entering military service, freely given up their right not to be killed by enemy soldiers in any future wars and therefore face each other as moral equals. This view makes the permissibility of targeting an individual depend, as McMahan rightly insists, on a fact about that individual rather than just about some group to which he belongs. But this fact does not involve his being responsible for any wrong; it involves his having voluntarily surrendered rights. Nor is the relevant fact specifically tied to this war and its just causes; it is again more global. The concept of liability is indeed vital to the morality of war, but it does not play as extensive a role as McMahan claims, and does not restrict the use of force in the drastic way his account of just cause does.

#### NOTES

- <sup>1</sup> Jeff McMahan, "Just Cause for War," *Ethics & International Affairs* 19, no. 3 (Fall 2005), pp. 1–21; available at [www.cceia.org/resources/journal/19\\_3/articles/5270.html](http://www.cceia.org/resources/journal/19_3/articles/5270.html).
- <sup>2</sup> McMahan notes that in some admittedly unusual circumstances a war can lack a just cause, and so be unjust, but nonetheless be morally permissible. I ignore this possibility in this paper.
- <sup>3</sup> Closely related to these is the reasonable hope of success condition, but as McMahan notes, it can be subsumed under the proportionality condition. On this, see also Thomas Hurka, "Proportionality in the Morality of War," *Philosophy and Public Affairs* 33 (2005), p. 37.
- <sup>4</sup> Jeff McMahan and Robert McKim, "The Just War and the Gulf War," *Canadian Journal of Philosophy* 23 (1993), pp. 502–06.
- <sup>5</sup> Could McMahan hold that the underlying tendency is itself a ground of liability? That would be massively permissive, allowing war when there has been neither any actual aggressive act nor even any intention to perform one.
- <sup>6</sup> Note that the liability is only more, and not completely, global. While one may imprison a criminal, one may not torture him, use him without his consent in medical experiments, and so on. This

parallels the way in which, in just war theory, a state's providing an independent just cause by, say, aggressing, permits other states to seek some goals, such as deterrence, by war against it, but not to pursue others, such as increasing GDP or stimulating art. There too the liability is only more, but not completely, global.

- <sup>7</sup> G. E. Moore, *Principia Ethica* (Cambridge: Cambridge University Press, 1903), pp. 27–36; see also Shelly Kagan, “The Additive Fallacy,” *Ethics* 99 (October 1988), pp. 5–31.
- <sup>8</sup> Given this condition, the lesser humanitarian wrongs that provide conditional just causes will be situated between two thresholds. They will be below the threshold for being an independent just cause but above the threshold that determines when a humanitarian wrong can be another state's legitimate business.
- <sup>9</sup> See, e.g., A. C. Ewing, *The Morality of Punishment* (London: Kegan Paul, Trench, Trubner & Co., 1929).
- <sup>10</sup> Michael Walzer, *Just and Unjust Wars*, 2nd ed. (New York: Basic Books, 1992), pp. 34–37; see also Paul Christopher, *The Ethics of War and Peace*, 2nd ed. (Upper Saddle River, N.J.: Prentice-Hall, 1998), p. 25.
- <sup>11</sup> Jeff McMahan, “The Ethics of Killing in War,” *Ethics* 114 (2004), pp. 723–25.
- <sup>12</sup> See, e.g., Thomas Nagel, “War and Massacre,” *Philosophy and Public Affairs* 1 (Winter 1972), pp. 139–40; Anthony Kenny, *The Logic of Deterrence* (London: Firethorn Press, 1985), p. 10; and Walzer, *Just and Unjust Wars*, pp. 43, 145, n. 145.
- <sup>13</sup> Walzer, *Just and Unjust Wars*, p. 145.
- <sup>14</sup> Christopher, *The Ethics of War and Peace*, p. 126, n. 23.
- <sup>15</sup> Robert Nozick, *Anarchy, State, and Utopia* (New York: Basic Books, 1974), p. 331; and Joel Feinberg, “Voluntary Euthanasia and the Inalienable Right to Life,” *Philosophy and Public Affairs* 7 (Winter 1978), pp. 122–23.
- <sup>16</sup> Feinberg, “Voluntary Euthanasia and the Inalienable Right to Life,” pp. 114–18; Feinberg emphasizes this distinction before expressing his skepticism about whether any rights are inalienable.
- <sup>17</sup> Walzer, *Just and Unjust Wars*, p. 145.
- <sup>18</sup> Asa Kasher and Amos Yadlin, “The Military Ethics of Fighting Terror: An Israeli Perspective,” *Journal of Military Ethics* 4 (2005), p. 17. This is not the only reason they give. They also argue that a state's soldiers deserve priority just as citizens of the state, and that the responsibility for any civilians' deaths during antiterrorist operations belongs primarily to the terrorists who brought the combat into the civilians' vicinity (pp. 17–18). But they do not explain how large a role these different reasons play in justifying their final ordering.
- <sup>19</sup> Jeff McMahan, “The Ethics of Killing in War: The Uehiro Lectures 2006,” Lecture 1, “Unjust Warfare,” p. 6 (forthcoming).
- <sup>20</sup> 1977 Geneva Protocol I Additional to the Geneva Conventions of 12 August, 1949, and Relating to the Protection of Victims of International Armed Conflicts, Art. 51 (5) (b), in Adam Roberts and Richard Guelff, eds., *Documents on the Laws of War*, 3rd ed. (Oxford: Oxford University Press, 2000), p. 449.

# Contributors

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