

Recalibrating Defensive Killing: Liability, Mere Permissibility, and the Problem of Multiple Threats

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The concept of liability is currently at the centre of contemporary debates on interpersonal defensive killing and war. This often leads to radically asymmetrical moral positions between aggressors and victims, and between just and unjust combatants. This article argues that the dichotomy liable/non-liable is too rigid to adequately capture the moral landscape in many relevant defensive killing situations. By contrast, it proposes a more granulated framework that takes seriously both the conceptual features of rights as essentially individualistic entities and their strength in moral reasoning. Finally, the article also shows that far from creating problems for the morality of killing in war, the proposed framework allows us to better accommodate for the position of unjust combatants than standard revisionist accounts of just war theory.

I. INTRODUCTION

Liability to defensive killing is currently at the centre of contemporary debates on just war. This often leads to radically asymmetrical moral positions between just and unjust combatants. Many contemporary theorists argue that unjust combatants are usually liable to be killed because they have lost or forfeited their right to life. On these grounds, they argue that it is generally both permissible for just combatants to kill them and impermissible for unjust combatants to fight back. This position is based on the underlying morality of defensive killing in interpersonal situations. In this article I suggest that this dominant strategy is too rigid to convincingly accommodate some of the relevant cases of defensive killing both in war and in interpersonal self-defence. By contrast, I argue that liability plays a far less pervasive role in the underlying morality of defensive killing and that we need a more granulated framework. In order to develop such a framework, I suggest, we must take more seriously some of the central features of rights in moral and legal discourse. This move, in turn, not only brings important insights to contemporary discussions on war, but could also connect these debates with other increasingly relevant instances of permissible killing, such as those relevant to the programming of self-driving cars.

In general, it is suggested that a complete philosophical account of defensive killing would need to convincingly accommodate at least six different scenarios. They have been standardly described as the

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case of the culpable attacker (CA), the responsible attacker (RA), the innocent or minimally responsible threat (IT or MRT), the non-responsible attacker (NRA), the non-responsible threat (NRT), and the bystander (B). Their respective situations can be illustrated by the following examples:

CA: CA is a murderer and attacks V with a knife intending to kill her. V is able to grab a gun that someone had left on a table nearby and shoot A in self-defence.

RA: RA is threatened by A that if she does not kill V, A will chop RA's legs. RA attacks V and V shoots RA in self-defence.

IT or MRT: IT keeps her self-driving car well maintained. On one occasion, however, freak circumstances cause the car to go out of control. The car veers in the direction of a pedestrian (V) whom it will kill unless V blows it up by using one of the explosive devices she is carrying.

NRA: NRA is about to press the Q key in her mobile phone. Unbeknownst to her, C has connected that key to a device that will shoot V. V is aware of this and is in a position to shoot at NRA before she can press the key.

NRT: NRT is taking a walk on the terrace of a building. An attack by bees pushes her and causes her to fall on top of V, who is standing several floors below her and who would die by the impact. V has the possibility of killing NRT with a gun.

B: A is following V in her van trying to run her over (and kill her). V sees B a few feet away, runs towards her and throws her between herself and the van. The van kills B and V is able to escape to safety.

Almost everyone agrees that it is permissible for V to kill CA and RA but it is impermissible for her to kill B. The leading explanation for this conclusion is that unlike B, CA and RA are liable to being killed. By contrast, contemporary accounts characteristically diverge when considering the position of IT, NRA and NRT. Some theorists argue that there is no relevant difference between them and B, so it would have to be either permissible or impermissible to kill any of them – most suggest that our intuition that it is impermissible to kill bystanders is stronger than the one indicating that it is permissible to kill IT, NRA and NRT. Others draw the line between IT – liable – and NRA and

NRT – non-labile. But the issue upon which permissibility hinges is again to a large extent whether they are liable to being killed or not.¹

On the adequate treatment of these three cases rests much of the contemporary debate on defensive killing and, as a result, on a sound understanding of permissible killing in war. In this article, I argue that neither IT, NRA, NRT nor V are liable to being killed. Accordingly, and to this extent, we must treat them in a *pro tanto* symmetrical way. They stand in this respect separate from CA and RA, but also from B. I shall reach this conclusion on the basis of three main moves. First, I suggest that a more adequate treatment of these three cases needs to take more seriously the conceptual distinction between A being liable to being killed by V, and V being merely at liberty to kill A.² Second, I will present cases involving multiple threats or attackers as indicators that liability to defensive killing in these three cases is largely incompatible with the conceptual apparatus of rights. That is, I will argue that considering these three types of individuals liable to being killed is in tension with the standard claim that rights are typically individualistic creatures, that they usually function as constraints on the ‘mere’ aggregation of utility, and that they accommodate the key deontological insistence on the value and separateness of individuals. Finally, I will argue that these three cases must be sorted out by reference to the notion of conflict of *prima facie* rights. This framework not only leads to normatively more appealing solutions, but it is also conceptually better equipped to capture their underlying moral landscape.

The structure of the article is as follows. [Section II](#) critically examines three of the leading accounts on the morality of defensive killing available in the literature. [Sections III](#) and [IV](#) argue that neither the causal responsibility nor the moral responsibility accounts are able to consistently accommodate cases of multiple NRTs and ITs, respectively. [Section V](#) introduces a *pro tanto* or quasi-symmetrical framework for these ‘middle ground’ cases, which I suggest better captures the full set of normative considerations at stake. [Section VI](#) addresses a potentially problematic implication of the account favoured here for the morality of killing in war. [Section VII](#) succinctly concludes.

¹ I assume throughout that liability is a central element of permissible defensive killing, but this means that it is neither a necessary nor a sufficient condition for such permissibility.

² I assume here the standard Hohfeldian distinction between, liberties, claims, powers and immunities. See Wesley Hohfeld, *Fundamental Legal Conceptions* (New Haven, 1919).

II. THREE CONTEMPORARY ACCOUNTS OF PERMISSIBLE SELF-DEFENSIVE KILLING

Judith Thomson has influentially argued that if A would kill V unless she is killed, and by doing so A would violate V's right not to be killed, A loses her right not to be killed. As a result, V may permissibly kill her in self-defence.³ Under her approach, because CA, RA, IT, NRA and NRT would all violate V's right not to be killed, they forfeit their own right not to be killed. Thomson argues that although the fault of the aggressor may be relevant for certain purposes, e.g. *what* you may do to defend yourself, it is irrelevant to decide *whether* you can defend yourself 'when what is at question is his life against yours'.⁴ Furthermore, she argues that the permissibility of V killing A in self-defence 'goes hand in hand with the impermissibility of A fighting back, and that those two phenomena have a common source, namely, A's violation of V's rights. According to Thomson, then, the fact that A is causally threatening V's life, or very important goods, is a sufficient condition for A to be liable to being killed in self-defence by V.

Reacting against Thomson's framework, Jeff McMahan has defended an account of defensive killing which relies on the idea of moral responsibility. To be liable to be killed in self-defence it does not suffice that A causally poses an (objectively) unjustified threat to V; she must also be *morally responsible* for posing that threat.⁵ Thus, under his approach both moral responsibility and the existence of an objectively unjustified threat are necessary and sufficient conditions for liability to defensive killing.⁶ Liability again means that the attacker herself lacks the right not to be killed: V would be at liberty to kill A and A would be under a duty not to fight back. Accordingly, McMahan claims that NRA and NRT are not liable to being killed by V in self-defence, while IT is. This is hardly surprising. In so far as the liability of CA and RA is explained on the basis of the fact that they have both forfeited or lost at least some of their rights vis-à-vis V, and moral responsibility is a necessary condition for liability to defensive lethal force, NRA and NRT cannot be liable to defensive killing. This, in turn, means that V would be under a duty not to use lethal force against them, as this would entail violating their rights. If V defended herself *she* would become herself liable to being killed by NRA and NRT. In sum, the person falling on a victim through no fault of his own is not liable to

³ J. J. Thomson, 'Self-Defence', *Philosophy and Public Affairs* 20.4 (1991), pp. 283–310, at 303. For a similar position, see S. Uniacke, *Permissible Killing: The Self-Defence Justification of Homicide* (Cambridge, 1994), chs. 5 and 6.

⁴ Thomson, 'Self-Defence', p. 285.

⁵ J. McMahan, *Killing in War* (Oxford, 2009), p. 157.

⁶ McMahan, *Killing in War*, p. 35.

being killed by his victim. Her victim is under a duty to let herself be killed. This, McMahan concedes, may be counterintuitive, but this is a bullet he is prepared to bite.⁷

Some recent accounts defend an agent-relative justification for killing in self-defence which stands separate from the agent-neutral liability justifications, such as those of Thomson and McMahan. Jonathan Quong, for instance, suggests that each person has a ‘powerful agent-relative permission to avoid sacrificing or significantly risking their own life for the sake of others (absent any obligations voluntarily incurred)’.⁸ As a result, he claims that neither NRT nor her victim is *liable* to being killed; neither of them has forfeited any of their rights. This, however, does not mean that it would be impermissible for any of them to kill the other in self-defence. The fact that they both retain the right to life does not mean that their action is necessarily impermissible. Permissibility in this type of case can be defended on the grounds that each of them holds an agent-relative prerogative.⁹ Accordingly, this personal prerogative leads him to defend a set of more demanding conditions for liability to lethal killing.¹⁰

I will assess the personal prerogative as a plausible justification for permissibly killing another individual in [section V](#) below. At this juncture I am more interested in the conceptual structure that Quong’s argument presupposes. In particular, I want to focus on the distinction between Y being liable to being killed by X and X being merely at liberty to kill Y. As we have seen from the main arguments above, liability to defensive killing usually means that killing an individual would neither wrong her nor violate her rights.¹¹ This proposition is often explained on the grounds that Y has lost or forfeited her claim-right not to be killed.¹² But being liable to being killed certainly means more than this. For one, the fact that Y is liable to being killed by X standardly means that Y is under a duty not to fight back – she lacks the liberty to defend

⁷ McMahan, *Killing in War*, p. 35.

⁸ J. Quong, ‘Killing in Self-Defense’, *Ethics* 119.2 (2009), pp. 507–37, at 516–17. For similar positions, see C. Fabre, *Cosmopolitan War* (Oxford, 2012), p. 59, and Y. Benbaji, ‘A Defense of the Traditional War Convention’, *Ethics* 118.3 (2008), pp. 464–95, at 474.

⁹ Incidentally, this also entails that it would be impermissible for third parties to intervene on behalf of any of the individuals involved, in line with the moral difference between doing and allowing. Namely, it is often accepted that killing an individual is morally worse than letting her die, all other things being equal. See J. Quong, ‘Liability to Defensive Harm’, *Philosophy & Public Affairs* 40.1 (2012), pp. 45–77, at 75.

¹⁰ Quong, ‘Liability to Defensive Harm’, p. 75.

¹¹ McMahan, ‘The Basis of Moral Liability to Defensive Killing’, p. 386. There are different understandings of liability in the literature. I use this one for ease of exposition. Furthermore, I use liability in this particular sense, and not as a correlative of a normative power, in Hohfeld’s sense.

¹² As indicated in [section I](#), this loss or forfeiture could be *in personam* or *in rem*.

herself against X. Accordingly, it has been suggested that Y's liability means that X has a right to kill Y.¹³ Furthermore, if X kills (liable) Y she would neither owe compensation to her estate, nor owe her any type of apology or acknowledgement of the sacrifice Y had to endure for X's sake. In sum, liability to defensive killing is standardly characterized as a situation of total moral asymmetry between individuals. This is important, because Thomson and McMahan's accounts, as well as much of the relevant literature, rely heavily on this binary alternative liable/non-liable. I find this 'all-or-nothing' solution implausibly rigid to adequately capture the nuances in *NRT*, *NRA* and *IT*.¹⁴

By contrast, we may also conceptually account for permissible defensive killing without recourse to liability. We may argue that X is merely at liberty to kill Y even if Y has not forfeited or lost her right not to be killed. To illustrate this conceptual possibility we may recall that under most accounts of just war theory, a pilot X is at liberty to kill a proportionate number of non-liable non-combatants as a side-effect of an attack against a military objective. Unlike the liability framework described above, this situation allows for and in fact presupposes (though it is not by any means committed to) some sort of *pro tanto* symmetry between the two agents. Accordingly, X being merely at liberty to kill Y is compatible with Y not having lost her right to life. Furthermore, this entails that there would be some form of moral residue in X killing Y. This insight is usually explained through the notion that she would be (permissibly) infringing Y's rights.¹⁵ This moral residue may entail that some form of compensation or apology is owed to Y, or at least it should be acknowledged that her rights were infringed.¹⁶ In sum, to say that X is liable to being killed is conceptually very different from saying that Y is merely at liberty to kill her.¹⁷ With this analytical distinction in mind, let us re-examine some of the leading accounts of self-defensive killing available in the literature.

¹³ See e.g. Fabre, *Cosmopolitan War*, p. 61.

¹⁴ For a similar criticism, see Benbaji, 'A Defense of the Traditional War Convention'.

¹⁵ On rights' infringement generally, see, e.g. A. Botterell, 'In Defence of Infringement', *Law and Philosophy* 27.3 (2008), pp. 269–92. Against this notion, see J. Oberdiek, 'Lost in Moral Space: On the Infringing/Violating Distinction and Its Place in the Theory of Rights', *Law and Philosophy* 23 (2004), pp. 325–46.

¹⁶ Usually the notion of rights-infringement is associated with some form of compensation being in order. I take here a more cautious approach, in that it leads to a form of moral residue that sometimes can be compensated, but which can also be acknowledged in other ways.

¹⁷ Steinhoff proposes a similar analytical framework. However, he claims that in this type of situation both innocent parties have 'lost their *claim*-rights to life and to self-defence but *retained* their *liberty*-rights to life and self-defence' (U. Steinhoff, 'Rights, Liability and the Moral Equality of Combatants', *Journal of Ethics* 16.4 (2012), pp. 339–66, at 347, emphasis in the original). Accordingly, he does not see the relationship between the liberty and the loss, or better, the overriding of the relevant claim-right by each of these two individuals.

III. AGAINST THE CAUSAL RESPONSIBILITY ACCOUNT: THE CASE OF MULTIPLE NRTS

Thomson's causal responsibility approach has received several criticisms in the literature. Many people believe that given that NRT is not exercising any form of agency, she cannot be violating V's rights any more than a tiger or a hurricane could be said to do so.¹⁸ Accordingly, it would be at least odd to say that she has forfeited some of her rights. I think this criticism is compelling. However, I want to press a different line of argument here. I suggest this approach cannot successfully deal with a case of multiple NRTs. Let us consider the following example.

Killers: V is being unjustly attacked by 50 CAs. Because of the type of weapon they must employ, all 50 of them need to shoot together against V. Coincidentally, V has a gun that would allow her to avert the threat by killing all 50 CAs.

Most people would say that these 50 CAs are liable to being killed by V. Furthermore, this conclusion would most likely not change even if we raise the number of attackers to 100,500, or even 1,000.¹⁹ The fact that they are liable to being killed means that they simply lack a right not to be killed. Accordingly, V is at liberty to kill them (not under a duty not to do so) but also, because she has not lost her right to life, she cannot be prevented or interfered with their killing, either by them or by a third party in their defence. More importantly, the 50 CAs are under a duty not to fight back. Finally, by killing them V is not infringing their rights, so she does not owe them any type of compensation or apology.

Consider now the case of 50 individuals who are only causally responsible for the threat against V:

Tram: 50 NRTs are in a tram that has been pushed by a hurricane towards V. The fact that they are on board is necessary for the tram to be able to reach V. Furthermore, they have been pushed towards V while they were asleep, and now they are in a situation such that V must kill them to save his life (e.g. by shooting at the tram with a bazooka). If they are to survive, these 50 NRTs must kill V before he shoots at them.²⁰

¹⁸ See e.g. J. McMahan, 'Self-Defence and the Problem of the Innocent Attacker', *Ethics* 104.2 (1994), pp. 252–90, at 276, and M. Otsuka, 'Killing the Innocent in Self-Defence', *Philosophy & Public Affairs* 23.1 (1994), pp. 79–94.

¹⁹ We may reach a point in which for other considerations, most notably lesser evil ones, the number of culpable or responsible attackers is so big that, all things considered, it would be impermissible for V to kill them. This, however, is irrelevant for present purposes.

²⁰ For a similar case see K. Kessler Ferzan, 'Culpable Aggression: The Basis for Moral Liability to Defensive Killing', *Ohio State Journal of Criminal Law* 9 (2012), pp. 669–97, at 675.

According to Thomson's account these 50 NRTs would be liable to being killed by V. This seems to follow from the claim that by killing him they would violate his right to life. As a result, V would not only be at liberty to kill them; they would also be under a duty not to kill V pre-emptively. This conclusion, however, seems highly unpersuasive.

There are at least three ways in which Thomson could resist this conclusion. First, she may suggest that it need not follow from the premises. Namely, although under the causal responsibility account these NRTs would be liable to being killed, it would be impermissible for V to kill them on, e.g., lesser evil grounds. However, even if we were to concede that this move would not necessarily entail that it would be also impermissible to kill the 50 killers, something which would require further argument, this response would have an important flaw. The claim that the 50 passengers are liable to being killed implies that they lack the right not to be killed by V. Thus even if it is true that V would act impermissibly all-things-considered, Thomson's account would seem committed to the conclusion that the rights of the 50 passengers would not be infringed in any way, that *they* would not be wronged. I find this necessary implication of Thomson's view implausible. And the reason for this is precisely that they do not seem to have lost or forfeited their right not to be killed.

Second, Thomson could argue that what is doing the work here is the issue of numbers. But numbers in this case are used to show what is more difficult to see in the case of a single threat. Put differently, the relevant comparison is between the 50 killers (liable) and the 50 passengers in *Tram* (non-labile). Furthermore, the fact that rights are essentially non-aggregative should indicate that numbers do not necessarily make a difference to *individual* liability if we are not arguing on consequentialist or lesser evil grounds. Defenders of the causal responsibility position characteristically do not argue on such grounds, nor, I suggest, can they coherently do so. Accordingly, *Tram* seems a plausible heuristic device to show that one NRT is not liable to being killed.

Finally, defenders of the causal responsibility approach may suggest that considering a single NRT non-labile would also be unpersuasive. This would be equating her to the innocent bystander, and this too is deeply counterintuitive. I agree. Nevertheless, this proposition is based on the 'all-or-nothing' approach, which I suggest we need to abandon. Put differently, the fact that NRT is not liable to being killed need not entail that V lacks a liberty to kill her, that is, that V is under a duty to let herself be killed by a single NRT. Admittedly, more argument is needed to fully account for this claim. I will provide a framework to make sense of this proposition in [section V](#) below. For now it may suffice to acknowledge that this move is not readily available against

my criticism in so far it is theoretically consistent to argue that V is at liberty to kill NRT even if we admit that NRT is not herself liable to being killed.

IV. AGAINST THE MORAL RESPONSIBILITY ACCOUNT: THE CASE OF MULTIPLE ITS

I am certainly not alone in arguing that the causal responsibility approach of liability to defensive killing is over-inclusive.²¹ A reasonable move within the ‘all-or-nothing’ approach is to make the conditions for liability more demanding, and a plausible way to do this is to require A to be *morally* responsible for the threat she poses. Under this view, although NRTs are not liable to being killed by Vs, innocent threats (ITs) are. Take the often-cited case of conscientious driver (IT) described at the outset. McMahan has influentially argued that this IT is liable to being killed by V. He suggests that IT is ‘liable because [s]he voluntarily engaged in a risk-imposing activity and is responsible for the consequences when the risks [s]he imposed eventuate in harms’.²² He recognizes that what he considers as the relevant moral difference is ‘of comparatively slight moral significance’, but that given the costs of the driver’s actions ‘cannot be divided, it is fair that he should suffer them all rather than impose them all on the pedestrian’.²³

It is easy to see that if one takes the latter proposition as a given, our intuitions back McMahan’s conclusion. But this choice is based on the ‘all-or-nothing approach’, i.e. the centrality of liability in his account of defensive killing. By contrast, if one accepts that considering IT non-liable does not necessarily mean that V would have to endure the full cost of the situation, McMahan’s point seems to lose much of its purchase power. In fact, many people would intuitively agree that putting IT under a duty to let herself be killed simply because she decided to take a ride in her well-maintained car is a slightly draconian understanding of what morality requires from us. I therefore join Ferzan, Rodin, Bazargan and Tadros in considering it implausible to think that IT has forfeited or lost her right to life after having done what can reasonably be asked from her.²⁴ Nevertheless, the fact

²¹ J. McMahan, ‘The Basis of Moral Liability to Defensive Killing’, *Philosophical Issues* 15 (2005), pp. 386–405, at 387–8.

²² McMahan, ‘The Basis of Moral Liability’, p. 394.

²³ McMahan, ‘The Basis of Moral Liability’, p. 394.

²⁴ V. Tadros, ‘Orwell’s Battle with Brittain: Vicarious Liability for Unjust Aggression’, *Philosophy and Public Affairs* 42.1 (2014), pp. 42–77, at 72; K. Kessler Ferzan, ‘Can’t Sue; Can Kill’, *Criminal Law Conversations*, ed. Paul H Robinson et al. (New York, 2009), pp. 308–99, at 399; D. Rodin, ‘Justifying Harm’, *Ethics* 122.1 (2014), pp. 74–110, at 85; and S. Bazargan, ‘Killing Minimally Responsible Threats’, *Ethics* 125.1 (2014), pp. 114–36, at 123.

that different people have different intuitions on this particular case should alert us against being too confident on what intuitions tell us.²⁵ Accordingly, we need to resort to a compelling theory of defensive rights in order to reach firmer conclusions vis-à-vis the moral situation of IT. Again, I think a fruitful way forward is to look at situations with multiple threats.

Suppose it is not a car as in *IT* but a bus that needs to make an emergency stop. Take, for instance,

Bus accident: 50 ITs buy a self-driving bus to go for a ride on Saturday mornings. Today, as the bus is cautiously driving in the city, due to some freak event it leaves the road going towards pedestrian V. V has a weapon that could disintegrate the bus. One of the passengers, in her turn, has a weapon and could strike V pre-emptively.²⁶

Just as in our initial *IT* case above, the 50 passengers have knowingly created a minor risk for V and due to a freak event they are now directly threatening V. If V is to save his life he would have to kill the 50 passengers in the bus. Would we still be prepared to accept that the 50 ITs are liable to being killed by V, i.e. that he would not wrong them if he killed them? I think not and, again, I suggest the better way of accounting for this conclusion is to argue that IT is not liable to being killed by V either.

An advocate of the moral responsibility account could complain that 50 ITs being non-liable to be killed by V is entirely compatible with both 50 CAs and one IT being so liable. Nevertheless, I am not sure this move is available to McMahan. Admittedly, an important aspect of his approach is that the degree of an agent's responsibility has a direct impact on the degree of her liability. McMahan distinguishes between culpable threats, partially excused threats, excused threats and innocent threats.²⁷ All of them are, in turn, distinguished from NRTs, that is, a person who without justification causally threatens to harm someone (V) in a way to which she is not liable, but who is in no way morally responsible for so doing. This would explain why a single CA may be liable to being killed if she threatens V with chopping off her hand – a non-deadly threat – but an IT would most likely not.²⁸

²⁵ On the differences between intuitions as an empirical matter, see the research reported in J. Greene, *Moral Tribes* (London, 2013), ch. 3.

²⁶ This case is meant to address McMahan's *Conscientious driver* case as replicated in *IT* above. In order to make it more easily comparable to *Tram*, we could stipulate that the weight of the 50 passengers was necessary for the bus to be able to kill V.

²⁷ See e.g. McMahan, *Killing in War*, ch. 4.

²⁸ R. Nozick, *Anarchy State and Utopia* (Princeton, 1993), pp. 34–5, and Thomson, 'Self-Defense', p. 287.

Similarly, their different degrees of responsibility may also account for 50 CAs being liable to be killed, while 50 ITs are not so liable.

Nevertheless, distinguishing between different degrees of responsibility does not translate to the issue of numbers too readily, at least not in the way McMahan's argument would need. Suppose CA is hiding behind five innocent bystanders. Although we would normally say that it would be impermissible for V to kill CA if he can only use a bazooka that will kill all six of them, we would maintain that CA is liable to being killed by V. Rights are typically individualistic creatures – at least the right to life is; they capture the relationship between two concrete individuals. Thus, the fact that there are innocent people next to a culpable attacker who are not liable to being killed does not mean that the culpable attacker is or becomes herself non-liable, but only that it is impermissible to shoot at her (despite her being liable). If V were to shoot and due to sheer good luck only killed the culpable attacker he would not wrong *her* or violate *her* rights. This holds, even if we admit that she should probably be prosecuted for impermissibly endangering the five bystanders.

Recently, McMahan has introduced the notion of 'proportionality in the aggregate' to sort out this type of difficulty. Proportionality in the aggregate, he claims, is sensitive both to the level of responsibility of the attacker or threat, and to the numbers involved. When

we consider all the harm that would be involved in the killing of [50 ITs], taking into account that each is only minimally responsible for the threat he poses, and compare it to the threatened harm to the victim that can be prevented only by killing all [50], taking into account that the victim bears no responsibility for the fact that killing is unavoidable, we can judge intuitively that killing all [50] would be disproportionate.²⁹

Now given that McMahan claims that proportionality is internal to liability (and proportionality in the aggregate would be internal too) this accounts for the fact that whereas one IT would be liable to being killed by V, 50 ITs would not.

I find his division of labour unconvincing. Let us go back to the case of a culpable assassin (CA) who uses five innocent bystanders as shields. If V has no other way to kill CA than by also killing the five shields, I agree with McMahan that it would be impermissible for V to kill CA. However, *contra* McMahan it would be odd to suggest that CA would *herself* become non-liable to being killed by V. Such a position would

²⁹ J. McMahan, 'Liability, Proportionality, and the Number of Aggressors', *The Ethics of War*, ed. S. Bazargan and S. Rickless (forthcoming).

entail, implausibly in my view, that *she* (CA) would be wronged by V if V were to shoot; that V would violate *her* rights. McMahan could object that by including bystanders I am ‘aggregating’ apples with oranges, in so far as bystanders are clearly not liable to defensive killing.³⁰ But I see no reason why we can ‘aggregate’ ITs but not ITs, CAs, Bs, and so on.

Let us take a situation in which each individual may be considered *prima facie* liable to defensive killing, or at least satisfies the agential conditions for liability. Namely, suppose CA is now the driver of a bus carrying 50 ITs, and that she culpably seeks to kill V by running over her. In this case, proportionality in the aggregate would again be committed to the view that if the only way V can defend herself is by blowing up the bus, CA would not be herself liable to being killed by V.³¹ Again, the fact that it is implausible to say that CA has *herself* a right against V that she not shoot at her, that CA will *herself* be wronged by V if she were killed, makes this suggestion unconvincing.

Finally, McMahan may retort that the latter two implications need not follow from his initial premise. He has argued that even if CA is not liable in this type of case, it may still be the case that she is not wronged by V if she is killed.³² The reason for this is that killing CA may achieve some good effects independently of the physical defence of the victim. For instance, it may allow V to assert her dignity or moral status in the face of the wrong done to her and deter others. Similarly, he claims, many people would accept that CA deserves some harm, and that she may be liable to some harm even if she is not liable to being killed.

This suggestion seems *ad hoc*. But more importantly, I think it is unconvincing for three reasons. First, this solution would make liability largely irrelevant in a significant number of situations, something which is at odds with McMahan’s overall approach to defensive killing. To argue that asserting one’s dignity or moral status, coupled with the fact that an individual deserves some harm, or is liable to some harm short of death, suffice for her not being wronged if she is killed would seriously undermine the central role that liability plays in accounting for the permissibility of defensive killing. Second, to claim that CA is not liable in this situation *means* that she has a *prima facie* right not to be killed by V. I very much doubt that these further goods would suffice to override the value of such a right under most circumstances.

³⁰ I am not sure he can make that move. If proportionality is generally internal to liability, proportionality in the wide sense must also be.

³¹ I assume here that McMahan would want to resist the claim that both CA and the 50 ITs are all liable to being killed, and that it is permissible for V to kill them all.

³² McMahan, ‘Liability, Proportionality, and the Number of Aggressors’.

This suggestion would ultimately be incompatible with the strength we typically ascribe to rights in moral and legal discourse. Finally, and perhaps decisively, I suspect most people will think that CA has forfeited her right and that the reason it is impermissible for V to shoot at the bus has nothing to do with *her* rights being violated.

In sum, I suggest that McMahan cannot have it both ways – i.e. one IT liable to being killed but 50 ITs not. Given that he acknowledges that the plight for IT's liability is quite weak, and that we may assume that 50 ITs being so liable is a rather implausible position to sustain, we may have to consider IT not liable after all.

V. A QUASI-SYMMETRICAL FRAMEWORK

In the previous two sections I have provided a set of examples meant to show that it is theoretically problematic to claim that NRT or IT are liable to being killed by V. I have thereby argued that the causal and the moral responsibility accounts of liability to defensive killing fit well neither with the individualistic character of moral rights, nor with the strength and function we standardly ascribe to them. I will not pursue the issue of liability to lethal force any further here. The purpose of this article is not to identify a set of necessary and sufficient conditions for liability to defensive killing, but rather to suggest that liability plays no relevant part in sorting out this type of situation.

In [section II](#) I rejected that considering NRT or IT non-liable necessarily entails that V is under a duty to let herself be killed. This type of reasoning is based on an 'all-or-nothing' approach which I have argued seems implausibly rigid. I will now argue that NRT, NRA, IT and V belong in a more granulated framework; that they are in a *pro tanto* symmetrical position. This suggestion is not particularly new. Agent-relative accounts characteristically argue, at least vis-à-vis *NRT*, that each individual (NRT and V) has an agent-relative permission to avoid sacrificing or significantly risking her own life for the sake of others (absent any obligations voluntarily incurred).³³ My main claim of innovation is to suggest that the area in which we should talk of *pro tanto* symmetry is wider than this position admits; that it is not solely governed by this prerogative, but rather by other sorts of considerations which warrant far more attention than they have received. Put differently, it seeks to relocate an important part of the discussion on permissible killing by identifying as the point of departure a situation of *pro tanto* moral symmetry between the relevant agents, at least with regard to none of them having lost the right to life.

³³ But see also, Steinhoff, 'Rights, Liability and the Moral Equality of Combatants'.

But before I present this account, let me succinctly clarify where the problem with agent-relative accounts lies.

As indicated above, Quong has argued that if neither NRT nor V is liable to being killed, it would be permissible for each to kill the other in self-defence on the basis of an individual's personal prerogative.³⁴ This prerogative would override the other's right not to be killed. However, as McMahan has persuasively argued, conceding this type of role to the personal prerogative proves too much. The reason for this is that it would end up conferring on V a liberty to kill an innocent bystander (B) as a means of self-preservation.³⁵ If the personal prerogative suffices to provide a permission to kill someone who is not liable to defensive killing, advocates of such view would need a further argument about why this does not include bystanders whose death is necessary for V to save herself. Quong has sought to resist this objection by reference to the moral difference between 'eliminative' and 'opportunistic' killing.³⁶ Unlike eliminative killing, opportunistic killing entails a situation in which someone's death is not itself necessary for V's survival. Given that we may standardly accept that killing someone opportunistically is morally worse than killing her eliminatively, and that V would kill NRT eliminatively whereas she would kill B opportunistically, this move may allow the personal prerogative to account for the permissibility of killing the former and the impermissibility of killing the latter.³⁷

Nevertheless, this distinction does not fully dispel McMahan's initial concern. Put differently, his objection need not entail that it is permissible to kill any innocent bystander, but only some of them. McMahan illustrates this point by reference to the following example:

³⁴ My argument here roughly follows Quong's argument in his 'Killing in Self-Defence', pp. 520–1. For other agent-relative justifications for the permission to act in self-defence, see N. Davies, 'Abortion and Self-Defense', *Philosophy & Public Affairs* 11.3 (1982), pp. 232–45, and S. Levine, 'The Moral Permissibility of Killing a Material Aggressor in Self-Defense', *Philosophical Studies* 45 (1984), pp. 69–78. Cécile Fabre has also defended a more differentiated account in her *Cosmopolitan War*, which is also based on the argument of partiality. More recently, Saba Bazargan has built a more symmetrical account based on lesser evil considerations (see his 'Killing Minimally Responsible Threats'), and S. Burri has argued for flipping a coin, in her 'The Toss-Up Between a Profiting, Innocent Threat and His Victim', *The Journal of Political Philosophy* 23.2 (2015), pp. 146–65. I will not be able to address their arguments here.

³⁵ J. McMahan, 'Self-Defense and the Problem of the Innocent Attacker', *Ethics* 104 (1994), pp. 252–90, at 268–71. See also, M. Otsuka, 'Killing the Innocent in Self-Defence', *Philosophy and Public Affairs* 23 (1994), pp. 74–94.

³⁶ W. Quinn, 'Actions, Intentions and Consequences', *Philosophy and Public Affairs* 18 (1989), pp. 334–51, at 344.

³⁷ On this move, see Quong, 'Killing in Self-Defense', pp. 525–32.

Bridge: suppose V is being chased by a bear and reaches a point where her only escape is through a wobbly, public bridge. On the bridge sits bystander B in a way such that if V were to run through it, B would fall to the river and die.

If V were to cross the bridge he would be killing B eliminatively, and not just opportunistically. In McMahan's words, 'shaking [B] off seems clearly the elimination of an obstacle rather than the strategic use of her resource for one's own benefit'.³⁸ Yet if it is permissible for V to give her personal interests priority over those of others, it is not clear on what grounds Quong can consistently argue that it would be impermissible for her to cross the bridge. Accordingly, this example shows that Quong's resort to the personal prerogative commits him to the permissibility of V killing (at least) such an innocent bystander.³⁹ Given how strong our intuition that it is impermissible to kill innocent bystanders in self-defence is, this would suffice to reject Quong's agent-relative proposal.⁴⁰

I believe there is a more appealing way to sort out cases of permissible defensive killing amongst non-liable individuals than merely resorting to an agent-relative prerogative. A standard way to sort out this type of situation in law and morality is by recourse to the idea of conflicts of *prima facie* rights.⁴¹ Namely, it is often admitted that *prima facie* rights exist outside of particular circumstances and they are bound to conflict with other *prima facie* rights. This obtains in many different contexts, such as the possible conflict between the right to freedom of speech and the right to someone's integrity, or between the right

³⁸ J. McMahan, 'Self-Defense against Justified Threateners', *How We Fight: Ethics in War*, ed. Helen Frowe and Gerald Lang (Oxford, 2014), pp. 128–9.

³⁹ Quong has responded to this claim by suggesting that such a use of the bridge may be opportunistic, rather than eliminative (see his 'Killing in Self-Defense', pp. 525–32). I will not consider this further argument here.

⁴⁰ A caveat is in order here. As McMahan himself acknowledges ('Self-Defense against Justified Threateners', pp. 120–1), his objection does not necessarily undermine the claim that it is permissible for NRT to kill V. All the objection supports is that grounding a permission to (eliminatively) kill a non-liable threat on the existence of a personal prerogative would commit defenders of this prerogative to accepting a permission to kill at least some innocent bystanders. This proposition seems to me correct. Yet, it neither provides an argument for subjecting NRTs and Vs to his preferred 'all-or-nothing' framework, nor does it mean that agent-relative considerations must play no role in self-defence situations, as I shall argue below.

⁴¹ For two plausible defences of this approach, see J. J. Thomson, *The Realm of Rights* (Cambridge, MA, 1990) and J. Feinberg, *Rights, Justice, and the Bounds of Liberty* (Princeton, 1980). I have defended this understanding of conflicts of rights at greater length in A. Chehtman, *The Philosophical Foundations of Extraterritorial Punishment* (Oxford, 2010), ch. 2. For an alternative take on this issue, i.e. the 'specificationist' position on rights, see e.g. J. Oberdiek, 'Specifying Rights Out of Necessity', *Oxford Journal of Legal Studies* 28 (2008), pp. 127–46.

of property over a particular good and the right of someone else to destroy that property to protect a particularly important good of hers.⁴² Accordingly, once we examine the concrete situation we may assign one of the parties an all-things-considered right, liberty, and so on, but we would standardly claim that the other person's *prima facie* right is neither lost nor violated, but (permissibly) infringed.

I suggest that this framework helps illuminate the underlying moral landscape in the cases of NRT, NRA and IT. Let us consider *NRT* first. You recall, in this case A is causally threatening B through no fault of his own and the only way for B to save herself is to kill A. Consider now the following situation.⁴³

Killings: A is driving a trolley and sees B tied to the rails ahead with no time to stop it. (Let us assume that the fact that A is on board is causally necessary for the trolley to kill B.) A could turn the trolley in the next fork by pressing a red button, thereby avoiding B. But this would entail the trolley hitting a wall and A dying. B has a green button that can divert the trolley towards the wall and A has a second green button that can lock the fork. Whoever pushes her green button first will live.

This is a tragic situation: whoever presses the green button first will kill the other. I believe that most people will agree that it is permissible for both A and B to press their green button.⁴⁴ Neither of them can invoke a sufficiently strong reason for the other one to let herself be killed. Furthermore, their situation is not sorted by reference to lesser evil considerations. That is, the reason why A and B can each decide to save herself is best accounted for on grounds of the moral strength of their right not to be killed coupled with their agent-relative personal prerogative. For it is plausible to argue that in this type of situation it is permissible for each of them to give greater weight to her interests than those of the other person (much the same as most people will agree that, as the old joke goes, A and B can both permissibly seek to outrun the other when a bear is chasing them). The way to account for this situation would therefore be that each one's interest in not being killed together with their personal prerogative would suffice to give each one

⁴² See e.g. J. Feinberg, 'Voluntary Euthanasia and the Inalienable Right to Life', *Philosophy and Public Affairs* 7 (1978), pp. 93–123, at 102.

⁴³ It differs from the standard version of NRT, among other things, in that B is not using any type of weapon. As argued by Joshua Greene, this type of consideration may introduce a bias in our intuitive assessment of the case. See Greene, *Moral Tribes*, ch. 3.

⁴⁴ See, e.g. Fabre, *Cosmopolitan War*, p. 57. Admittedly, some people may argue that A and B would be under a duty to flip a coin. See e.g. Burri, 'The Toss-Up'. I don't think that morality is so demanding, but this makes no difference for the point at stake, which is precisely about the ultimately symmetrical position A and B are in.

of them an all-things-considered liberty to press the green button (in the sense that neither of them is under a duty not to do so).

Interestingly, though, the fact that neither A nor B is liable to being killed need not lead to an all-things-considered moral symmetry between them in every situation. Consider now:

Age difference: The situation is as *Killings* but now A is a 90-year-old woman, with a few months left to live, whereas B is a 25-year-old woman.

Numbers: The situation is as *Killings* but now there are five people in the trolley.

I do not know of any plausible account of right's forfeiture that can consistently argue that A forfeited her right to life in the former case, but the five people have not forfeited theirs in the latter. As per my argument in [section III](#), I assume that none of the relevant individuals in these cases is liable to being killed. Notwithstanding this fact, most people will argue that whereas it is permissible for B to kill A in *Age difference*, it is impermissible for her to kill the five individuals in *Numbers*. By the same token, we would suggest that it is impermissible for A to 'fight back' in *Age difference* and for B to 'fight back' in *Numbers*. Arguably, the reason for this is that the harm that B and the five individuals would suffer in *Age difference* and *Numbers*, respectively – a harm they have the right not to suffer – makes their killing impermissible. Or better put, that A's interest in staying alive (even if coupled with her agent-relative prerogative) is not sufficiently important to allow her to override B's interest in not being killed in *Age difference*, whereas B's interest in staying alive (coupled with his agent-relative prerogative) is not sufficiently important to override the interest of the five individuals in *Numbers*.

These examples lead us to three preliminary observations. First, the proposed explanation simply acknowledges that rights are not the ultimate source of moral value, but rather work as middle-level reasons which help us tackle difficult philosophical issues. In Raz's terms, they 'belong to the ground level of practical thought in which we use simple-to-apply rules'.⁴⁵ When we face a situation of conflict between *prima facie* rights we need to focus on the underlying moral considerations. Second, these cases illustrate that it is possible that conflicts of rights lead to one of the parties being (merely) at liberty all-things-considered to kill the other(s), while others lead to her being under a duty all-things-considered to let herself be killed. Each of these possibilities

⁴⁵ J. Raz, *Ethics in the Public Domain: Essays in the Morality of Law and Politics* (Oxford, 1994), p. 48.

is compatible with none of them being liable to being killed. Finally, *Killings* shows that conflicts of rights are not exhausted by lesser evil considerations. Or better put, lesser evil considerations need not play a relevant role in explaining why it is permissible to kill a non-liable individual. This normative work is to a significant extent performed by the strength of moral rights (much as liability, i.e. the lack of such moral rights, plays a critical role in the situation of CA and RA).

Furthermore, I suggest that this account of conflicts of rights can readily sort out McMahan's criticism against agent-relative accounts of defensive killing. Namely, he plausibly complains that Quong's personal prerogative would entail allowing V to kill at least some innocent bystanders. But this criticism does not affect the conflict of rights framework I advocate here even if it makes room for the personal prerogative. The reason for this is precisely that the personal prerogative is but one consideration in this broader framework, and arguably not the one doing most of the normative work. To see this, let us go back to McMahan's case of *Bridge*. Unlike the situation in *Killings*, where the conflict of rights was between A and B's *prima facie* right not to be killed by the other, the conflict between the *prima facie* liberty of the person fleeing the threat (A) and the *prima facie* claim-right of the bystander (B) sitting on the bridge would be equivalent to a conflict between A's *prima facie* claim-right to be saved by B and B's *prima facie* claim-right not to be killed by A. Following the moral difference between killing and letting die it seems clear that all else equal the latter would override the former, i.e. that it would be morally impermissible all-things-considered for the fleeing victim to cross the bridge and kill the innocent bystander even if she had no other way to survive.⁴⁶ Accordingly, unlike the case of NRT, B stands apart in a *pro tanto* asymmetrical position vis-à-vis V.⁴⁷

In sum, this framework allows for both symmetrical and asymmetrical positions while resorting neither to the notion of liability nor exclusively to the personal prerogative. It neither falls back on mere lesser evil considerations. Instead, it takes the strength and conceptual features of moral rights as its central underlying consideration. Admittedly, sorting out conflicts of *prima facie* rights can get messy. But this is not a problem for my account in so far as my main

⁴⁶ The moral difference between killing someone opportunistically and eliminatively would have to be assessed in this same 'dimension' of the conflicts of rights framework.

⁴⁷ And yet this conclusion is in turn compatible with the claim that under certain circumstances it may be permissible for five individuals to cross the bridge, or for a 25-year-old youngster to do so if B were about to die in the next few hours or weeks. That is, their position may ultimately be symmetrical all-things-considered or even ultimately asymmetrical in the other direction. Nonetheless, no one needs to be considered liable to being killed in order to reach any of these conclusions.

purpose is to show that these cases are better captured by this type of analysis than by the 'all-or-nothing', liability-centred framework.

Before concluding, let me show how this framework can help us provide a more compelling account of *IT*.⁴⁸ In the previous section, I argued that considering *IT* liable to being killed is theoretically problematic in so far as it is difficult to consistently make the case that one *IT* is liable to being killed but 50 are not. I will now take this point further. Namely, I suggest that even if we concede that moral responsibility affects the way in which we should sort out conflicts of *prima facie* rights, this hardly entails that *IT* is liable to be killed by *V*. For one, even if, for the sake of argument, we grant that *IT* and *V* are in asymmetrical moral positions all-things-considered, i.e. that *IT* is under a duty to let herself be killed by *V*, it still does not follow that she is liable to being killed. The better view is that if *V* were to kill *IT* she would be (permissibly) infringing her rights, much as in *Killings*, *Age difference* and *Numbers* above. Namely, even if we agree that *V* is at liberty to kill *IT* whereas *IT* is under a duty not to fight back, there will be some form of moral residue as a result of her death. *IT* would be owed some kind of recognition, or apology by *V*, which may be symbolized by some form of compensation to her estate or acknowledgement of the harm she endured. This implication shows precisely that, in killing her, *V* would be (permissibly) infringing *IT*'s rights, i.e. that *IT* is *not* liable to being killed.

Furthermore, I suggest the framework I am proposing here gets us significantly closer to adequately identifying the point at issue and the terms of the debate. Namely, I have argued that there is broad agreement both on the fact that it is permissible for *V* to kill *IT*, and that were she to do so she would be liable to compensate *IT*'s estate or at least would owe some kind of apology or recognition of the sacrifice *IT* had to endure. The only question that remains at issue is whether *IT* is under a duty to let herself be killed by *V*, or whether it would be permissible for her to kill *V*. I have argued that the only way to do justice to this question is to take as our starting point the consideration that *IT* has not lost her right not to be killed. This clearly alters the terms of the discussion as presented by McMahan. For it is far easier to suggest that *IT* is under a duty to let herself be killed if we assume that she has lost her right to life than if we must point to a consideration sufficiently important to override such right to the extent that she must be put under such a duty. Put differently, I readily admit that the fact that she is morally responsible (though innocent) for the threat she is now posing

⁴⁸ The same fundamental claim applies to *NRT* and *NRA*. If anything, their case is more symmetrical to *V*s than to *IT*s.

is among the relevant considerations that must be taken into account in solving the conflict of *prima facie* rights between her and V. But I find it implausible to suggest that this consideration alone suffices to override the weight of her right in staying alive. This conclusion seems all the more persuasive if we admit that it is permissible for individuals to give greater weight to their interests than to those of another person, as the personal prerogative allows. So I suggest that under the framework hereby advocated *IT* seems closer to *Killings* than to *Age difference* and this fits well both with the conceptual apparatus of rights and with their strength in moral reasoning.

VI. A PROBLEMATIC IMPLICATION FOR THE MORALITY OF WAR?

Before concluding, let me take up a final difficulty. Saba Bazargan has plausibly suggested that tightening the conditions of liability to lethal force in the way hereby advocated may have problematic implications for the morality of killing in war.⁴⁹ For one, it may directly impact the assessment of revisionist or neo-classical theorists regarding the moral inequality between just and unjust combatants. If minimally responsible threats are not liable to being killed in war, and most unjust combatants are only partially or minimally responsible, this would seem to put them on a par with just combatants. This would not only make it harder to justify resorting to force from an *ad bellum* perspective, as Bazargan indicates, but it would also make a majority of the unjust combatants non-liable to defensive killing. Just combatants would then only be at liberty to kill unjust combatants, but the great majority of the latter would also be at liberty to fight back. In this [section](#) I argue that this implication does not follow from the premises. Or better put, I argue that advocating more demanding conditions for liability to defensive killing on the basis of the argument hereby put forward does not lead *per se* to this particular implication. If the moral equality between just and unjust combatants is to be defended, it would have to be defended on other grounds.

To examine this issue let us consider the other standard case of an *IT* usually discussed in the literature: *Resident*. McMahan presents it thus:

Resident: The identical twin of a notorious mass murderer is driving in the middle of a stormy night in a remote area when his car

⁴⁹ Bazargan, 'Killing Minimally Responsible Threats', p. 136. He, by contrast, is concerned with how the fact that just combatants would be infringing the rights of unjust combatants may alter the threshold for permissibly waging a war.

breaks down. He is nonculpably unaware that his twin brother, the murderer, has within the past few hours escaped from prison in just this area, and that residents have been warned of the escape. The murderer's notoriety derives from his invariable modus operandi: he violently breaks into people's homes and kills them instantly. As the twin whose car has broken down approaches a house to request to use the telephone, the resident of the house takes aim to shoot him preemptively, believing him to be the murder.⁵⁰

McMahan considers Resident an innocent though morally responsible threat, and thereby liable to lethal force.⁵¹ I find both these propositions spot on. What I will challenge is that the latter proposition follows from the former in the way he suggests.

Interestingly, not everyone agrees with McMahan's conclusion. Bazargan, for instance, suggests that Resident is not liable to being killed by Twin brother, and that she is in a position of *pro tanto* moral symmetry with him. This means that it would be permissible for Resident to defend herself if Twin brother were to pre-emptively defend himself against Resident's threat. It would be permissible for each of them to kill the other. Yet in order to defend this conclusion, Bazargan presents us with a slightly revised version of the case. In his version, Resident now opens the door to Twin brother and she has a reason to be armed due to the fact that she has been 'harassed' in the past.⁵² Put differently, in his version of this case, it may be plausibly argued that resident makes a more reasonable call than McMahan's Resident, who kills Twin brother from a position in which she was not yet being threatened.

I am not persuaded that Bazargan's amendments to the case suffice to warrant his preferred conclusion. Yet, I believe they (a) illustrate well why McMahan's version is intuitively compelling; and (b) point in the right direction as to why *Resident* helps us explain that making the conditions for liability to lethal harm more demanding need not lead to a symmetrical position between the overwhelming majority of just and unjust combatants. Indeed, I find McMahan's version of the case largely uncontroversial because under a plausible account of self-defensive rights his Resident would lack the liberty to kill Twin brother. The reason for this is mainly that killing him was both unnecessary and disproportionate under the circumstances. In so far as Twin brother had not shown *any* sign of intending to kill Resident, or of being armed,

⁵⁰ Bazargan, 'Killing Minimally Responsible Threats', p. 164.

⁵¹ In fact, he suggests that Resident bears less responsibility than Conscientious driver, because he acts 'not merely subjectively permissibly but with subjective moral justification' (McMahan, *Killing in War*, p. 166).

⁵² Bazargan, 'Killing Minimally Responsible Threats', pp. 114–15.

and that Resident was 'safely' inside his home and armed, it seems impermissible for him to kill Twin brother pre-emptively even if all the evidence suggests he is Serial killer.⁵³ Having a weapon imposes very stringent obligations on its use, and I do not believe they were sufficiently met in this situation.⁵⁴

By contrast, consider the following version of this case:

Resident 2: The situation is as *Resident*, but now Twin brother arrives in the middle of the night to a house in an unpopulated area. He believes the house is empty, but for precaution he picks up a gun he takes in the trunk of his car. When Twin brother is approaching the house, Resident exits through the door on a hunting expedition. Mistaking Twin brother for Serial killer, and while Twin brother is raising his gun to put his hands up and show he means no harm (yet effectively seeming to aim at Resident), Resident shoots him.

I believe that *Resident 2* shows that a case in which Resident does *everything* that is morally required from her before shooting at Twin brother does not support the intuition that she is liable to being killed (as McMahan claims), even if she is ultimately mistaken. Put differently, McMahan suggests that Resident takes a great moral risk,⁵⁵ but in his version of the case he fails to highlight that Resident seems to impermissibly take too great a moral risk. I suggest that it is this consideration that lies at the core of the intuition that *Resident* is liable to being killed. Furthermore, *Resident 2* shows that the argument advocated in this article does not directly translate into the moral equality of just and unjust combatants in war. At least not in a way that would be problematic for revisionist just war theorists. For one, some combatants would be in a position akin to that of CA or, at least, RA. Even those rank-and-file soldiers who are not culpable would generally be in a situation which is fundamentally closer to *Resident* than to *IT*. That is, we should hold combatants to stringent duties of care before they decide to go to war, i.e. intentionally impose lethal threats on

⁵³ Quong presents us with a situation in which, much like Bazargan, Resident has opened the door and he lunges against Twin brother with a knife. Unlike Bazargan, however, he shares McMahan's conclusion that Resident is liable to being killed because he intentionally and unprovokedly attacks his twin brother (Quong, 'Liability to Defensive Harm', p. 53). Again, I believe his conclusion falls on the right side, but this is because Resident would still be acting somewhat negligently, something which Conscientious driver is not. Otsuka also supports liability here (see his 'Killing the Innocent in Self-Defence', p. 91).

⁵⁴ This does not mean that Resident should be convicted for murder. But I do not think a conviction for manslaughter should be discarded.

⁵⁵ McMahan, *Killing in War*, p. 166.

other human beings.⁵⁶ Finally, and perhaps decisively, *Numbers* and *Age difference* show that even if we grant the point that my framework puts just and unjust combatants in a *pro tanto* symmetrical position, i.e. that *ad bellum* unjust combatants would under certain circumstances not be liable to be killed by just ones, it can still insist on the claim that it would be all-things-considered permissible for just soldiers to kill unjust ones and impermissible for the latter to fight back.⁵⁷ In that situation the rights of unjust combatants would be permissibly infringed.

VII. CONCLUSION

In this article I have sought to escape the rigid and deeply asymmetrical ‘liable/non-liable’ dichotomy which is prominent in the literature on defensive killing and make room for a set of cases which must be sorted through the mechanism of conflicts of rights. The resulting account therefore distinguishes three groups of cases. First, that of CA and RA, who are most likely liable to being killed by V. Second, that of B, who is not liable to being killed. Third, the group of ‘middle’ cases, namely those of NRA, NRT and IT, who are in a *pro tanto* symmetrical position vis-à-vis V. Furthermore, I have suggested that this account is not only more compatible with our intuitive reactions to some of the relevant cases, but that it fits better with some of the standard conceptual and normative features of rights.⁵⁸

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⁵⁶ Interestingly, this case further supports the conceptual distinction drawn in [section III](#). Even if it is permissible for V to kill Twin Brother in *Resident 2*, TB is not liable to being killed (but neither is Resident).

⁵⁷ This conclusion, in turn, is compatible with certain unjust combatants being actually liable to being killed.

⁵⁸ I am grateful to Daniele Bruno, Alasdair Cochrane, Marcelo Ferrante, Massimo Renzo, Eduardo Rivera López (twice), and Uwe Steinhoff for written comments and conversations on earlier drafts of this article. I am also grateful for useful discussions to the participants in the Oxford Criminal Law Discussion Group, the War Seminar at Oxford University and the Faculty Seminar at Universidad Torcuato Di Tella, especially Janina Dill, Cécile Fabre, José Luis Martí, Jeff McMahan and Horacio Spector. The reviewers for *Utilitas* provided me with two extremely useful rounds of comments. The usual disclaimer applies.