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The Spectrum of Liability to Defensive Harm and the Case of Child Soldiers

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Abstract

We typically see child soldiers as not morally responsible because of their age and/or because they are victims of adult exploitation. Work on child soldiers and their moral responsibility is relatively sparse within just war thinking and political philosophy (Thomason in *Ethical Theory Moral Pract*, 19:115–127, 2016a; Thomason in *Seeing child soldiers as morally compromised warriors* [Online]. The Critique. Available: <http://www.thecritique.com/articles/seeing-child-soldiers-as-morally-compromised-warriors/> [Accessed 2 April 2020], 2016b), and instead focuses mostly on whether child soldiers are liable to attack (McMahan, in Gates, Reich (eds) *Child soldiers in the age of fractured states*, University of Pittsburgh Press, Pittsburgh, PA, 2010; Vaha in *J Military Ethics*, 10:36–51, 2011). This paper brings these two areas together. Many of us have the intuition that combatants should exercise at least some constraint when fighting against child soldiers. I will argue that, contra McMahan (2010), exercising restraint in this way is a requirement of justice. I will argue that agents can be more or less liable to attack (liability to attack is on a spectrum) in defensive killing cases depending on how morally responsible they are for the threat they cause. I will outline how, whilst child soldiers are not wholly responsible for the threat they cause to combatants, their responsibility is also not completely diminished. I will argue that child soldiers are therefore liable to attack, but to a lesser extent than fully responsible agents. I will show that combatants fighting against child soldiers are therefore required, as a matter of justice, to use the most proportionate method of attack which may not always be to kill the child soldier. I will conclude that combatants are therefore required, as a matter of justice, to exercise a degree of restraint when fighting against child soldiers.

Keywords Liability · Defensive harm · Child soldiers · War · Self-defence

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Introduction

According to the Child Soldier World Index ‘at least 46 States still recruit children under the age of 18 into their armed forces’ and there have been ‘at least 18 conflict situations in which children have participated in hostilities since 2016’ (The Roméo Dallaire Child Soldiers Initiative 2020). As victims of adult exploitation, child soldiers are usually perceived as not morally responsible for the atrocities they commit (Thomason 2016b). As such, child soldiers are, for example, not prosecuted under international law (although domestic laws can differ) (UNICEF 1997; International Criminal Court 1998).

There is relatively little literature solely on the moral responsibility of child soldiers within the just war tradition and political philosophy more generally (Thomason (2016a, 2016b) is a notable exception). Instead, debate has mostly concentrated on the question of whether child soldiers are liable to defensive harm in virtue of their responsibility (McMahan 2010; Vaha 2011). With some reports of children receiving military training on both sides of the Ukraine–Russia conflict (some as part of school), discussions of whether adult soldiers should exercise restraint against armed children seem particularly relevant today.¹

In this paper, I will present a scalar account of liability to defensive harm which focuses on the moral responsibility of agents and draws on the work of Jeff McMahan (2005, 2010). I will argue that liability to defensive harm is scalar and gives rise, at least in some cases, to *pro tanto* duties for combatants fighting child soldiers to bear some costs to avoid excessive harm coming to the child soldier.

The structure of this paper will be as follows. In §2, I will provide a note on the conception of moral responsibility this paper rests upon, namely a largely neo-Strawsonian, backwards-looking approach. The arguments within this paper that attempt to map liability to defensive harm onto moral responsibility are, however, compatible also with other theories of moral responsibility, for example more forward-looking approaches. To argue for a requirement of justice to exercise restraint against child soldiers, in §3 I will outline McMahan’s (2010) argument that we should take some notion of moral responsibility into account when we consider liability to defensive harm. In §4, I will outline the most important considerations to be taken into account when we evaluate the moral responsibility of child soldiers, including their age, victim status and coercion. I will then explain how moral responsibility is a scalar property that depends on several factors, before addressing the consequences of bringing moral responsibility and liability to defensive harm together in §5. §6 will outline two ways scalar liability could be formulated, before committing to an account which places emphasis on the costs the attacked agent must bear. Finally, in §7 I will tackle three objections McMahan (2010) raises to the suggested view specifically in relation to child soldiers: (i) its consequences in kill-or-be-killed cases, (ii) that the notion of mercy can explain our intuitions about the

¹ For reports of Russian cadet schools see Matviyishyn (2019) and Dickerman and Korniyenko (2020). For reports of Ukrainian children learning how to use guns see Greenhaigh (2022) and Hughes (2022).

relevant constraints and (iii) the thought that the view is not sufficiently pragmatic so as to work in real or non-ideal situations.

A Note on Moral Responsibility

Before explaining the link between liability to defensive harm and moral responsibility as defended by McMahan (2010), it is important to make explicit the notion of moral responsibility this paper rests upon. Moral responsibility is often understood in terms of being the appropriate object of reactive attitudes such as praise and blame (Wolf 1990; Strawson 1993; Watson 2014).² Ordinary agents are then generally thought to be morally responsible for their voluntary actions and the direct consequences that follow from them. Agents are assumed to be fitting targets of the reactive attitudes, and thus morally responsible, (i) because their actions are usually thought to be up to them and (ii) unless there are any conditions that excuse their moral responsibility because in those conditions the agents seem to lack this crucial control over their actions. These excusing conditions may be internal to the agent themselves (such as being morally ignorant, lacking moral competency or the psychological complexity to understand moral reasons) or external (i.e. being forced or coerced). These excusing conditions can also apply to an agent simultaneously. For example, a child soldier may simultaneously be both forced and lacking moral competency.³ Moreover, the extent to which an excusing condition may apply can differ—an agent could be more or less coerced, for example. Because of this, moral responsibility is not just an ‘on or off’ property—it can come in degrees, or so I will argue below.

McMahan’s View

Literature on killing in defence in war often relies on the notion of liability of defensive harm. An agent who is liable to defensive harm is an agent who has forfeited their right not to be harmed or killed. An agent who is liable to defensive harm is therefore not wronged if they are harmed, at least not if the harm inflicted on the agent is necessary and proportionate to avert a threat of objectively unjustified harm to which the agent is relevantly connected.

For orthodox just war theorists such as Walzer (2015), this distinction between agents who are liable to defensive harm and those who are not relies on the notion of self-defence (McMahan 2010, p. 28). For them, those who pose a threat to others are

² This may not be McMahan’s (2010) understanding of moral responsibility (at least in the context of liability to defensive harm). McMahan (2010), as I understand him, is more concerned with a link between the *consequences* of some action, and whether the agent could foresee those consequences. Under my view of moral responsibility, McMahan’s view is focused on only one of the conditions that excuse moral responsibility—ignorance. This is a less general view of moral responsibility than the neo-Strawsonian approach I have in mind.

³ For McMahan (2010) these conditions may excuse culpability but not moral responsibility.

liable to defensive harm. Put simply, since combatants pose a threat, they are liable to defensive harm. Non-combatants do not pose a threat and are therefore not liable to defensive harm. Since child soldiers pose a threat, they are thus liable to defensive harm according to orthodox just war theorists (McMahan 2010, p. 28).⁴

McMahan (2010, pp. 28–29) argues that, whilst Walzer (2015) is right to appeal to self-defence in explaining liability to defensive harm, the account of liability to defensive harm this explanation provides is incorrect. When we take the previous account of liability to defensive harm and apply it to non-war contexts, grounding liability to defensive harm in self- (or other-) defence in this way is, to use McMahan's (2010, p. 29) turn of phrase, 'plainly unacceptable'. Grounding liability to defensive harm in self-defence is too permissive since it allows for agents to be liable to defensive harm due to any threat, not just unjust threats. To see this, consider the following case paraphrased from McMahan (2010, p. 29):

Unjust Assailant: You are attacked without justification by someone in a 'malicious and culpable' way. If you do not kill the assailant, you yourself will be killed by them.

In **Unjust Assailant**, our intuition is that you are justified in fighting back.⁵ However, if liability to defensive harm rests on the notion of self-defence, by fighting back you pose a threat to the unjust assailant you are liable to defensive harm from them also (McMahan 1994; McMahan 2005; McMahan 2010, p. 29; Quong 2012; Strawser 2014). By fighting back you lose your moral right not to be attacked. McMahan (2010, p. 29) argues that this simply cannot be the case—you are morally *justified* in attacking your attacker, who will not be *wronged* by your action, even if you kill [them]'. McMahan (2010, p. 29) hence argues that the account of liability that Walzer's just war theory is based on is incorrect in that it understands liability to defensive harm as deriving from *any* posing of a threat, not just the posing of an *unjust* threat.⁶

If we accept McMahan's revised view of liability to defensive harm 'the only combatants who are morally justified in fighting are those who fight for a just cause in a just war' (McMahan 2010, p. 29). Under this view those fighting on an unjust side are not, in general, morally justified in killing enemy combatants.⁷ McMahan (2010, p. 29) accepts this view.⁸ However, he argues that even this condition (posing an unjust threat) is neither necessary nor sufficient for an account of liability

⁴ In international law, this difference in liability is grounded in more pragmatic considerations. Having a neutral law which grants combatants the right to target other combatants but not non-combatants is intended to limit the destruction of war.

⁵ For the purposes of this paper I will assume that this is the typical intuition people have about **Unjust Assailant**.

⁶ Since the threat against you in **Unjust Assailant** is unjust, the unjust assailant is liable to be killed by you. However, since you are acting in self-defence if you attack them back, the threat you pose to them is not unjust and you are therefore not liable to defensive harm.

⁷ Of course, some exceptions may exist. For example, a just combatant involved in an unjust mission.

⁸ For a more complete argument, see McMahan (2006). This view is in direct contention to Walzer's (2015, p. 39) 'moral equality of combatants' view.

to ‘defensive violence’. Instead, McMahan (2010, pp. 29–30) argues that responsibility (specifically his conception of *moral* responsibility) is important in such an account.⁹ To further illustrate this thought, consider the case below:

Lone Dictator: Imagine that there is an evil dictator who rules using fear rather than support. The dictator, from the comfort of their own country, orders their army to invade a neighbouring country. The soldiers do not want to fight. However, they must follow orders. To stop the invasion, the invaded country has two options: (1) kill the soldiers, or (2) kill the dictator (since the dictator does not have supporters, the invasion will end almost instantly).

In **Lone Dictator** there are two views we can take on the moral responsibility of the soldiers. They are either (1) posing an unjust threat but are not morally responsible for it, or (2) posing an unjust threat and have diminished moral responsibility for it.¹⁰ Conversely, the dictator poses no immediate threat personally to the invaded country (the dictator is not fighting), but is morally responsible for the threat to the invaded country.¹¹ When faced with this decision, our intuition is that the invaded country should kill the dictator to stop the war, rather than kill the soldiers.¹² This suggests that moral responsibility for a threat of harm that lacks objective justification grounds liability (McMahan 2010, p. 30).

McMahan (2010, p. 30) goes further than this to argue that moral responsibility is also *necessary* for liability. The soldiers have diminished moral responsibility for the threat they pose. Their action is performed under duress, and this seems to be an important factor in moral responsibility—agents must have voluntarily acted in that way (McMahan 2010, p. 30). Responsibility for the unjust threat is thus relevant for liability to defensive harm—our intuition is that the dictator would be liable to defensive harm, but the soldiers would not. Other reasons that justify the use of violence by the invaded country against the soldiers may still apply. However, these reasons would not rest on the soldiers being liable to defensive harm, but rather

⁹ McMahan (2010, pp. 29–30) uses a case involving a drugged assailant to explain the necessity of moral responsibility. However, the case is ambiguous and I believe leads to confused intuitions. For simplicity, I have developed a different case which I believe captures the point better.

¹⁰ The soldiers may be seen as not morally responsible or having diminished moral responsibility because they have been forced or coerced into fighting. The first conception is the kind of agent that McMahan (2010, p. 30) calls a non-responsible threat. This is of course a simplification of an enormously complex issue, specifically concerning what it means to fight for an unjust cause, and what it means to fight under duress. Whilst I cannot address this complexity in detail here, it is important to note that the case of soldiers in **Lone Dictator** is not identical to the case of child soldiers, nor is it identical to other cases where combatants are fighting for an unjust cause under duress. What is important for this paper, however, is that there is some reason why the soldiers in **Lone Dictator** are not responsible or have diminished responsibility, but nonetheless pose a threat. The specific reasons for the diminished responsibility of the soldiers in **Lone Dictator**, whilst important, do not have a direct implication on this paper.

¹¹ As McMahan (2010, p. 30) notes, of course usually moral responsibility for the threat, and the posing of a threat coincide.

¹² Suppose for the sake of argument that the invaded country can kill the dictator before the invasion happens, and therefore would not need to defend themselves against the soldiers.

		Moral responsibility status	
		Morally responsible for the threat	Not morally responsible for the threat
Threat status	Poses the threat	<i>Liable to defensive harm</i>	<i>Not liable to defensive harm</i> <i>(The soldiers)</i>
	Does not pose the threat	<i>Liable to defensive harm</i> <i>(The dictator)</i>	<i>Not liable to defensive harm</i>

Fig. 1 Liability to defensive harm of those in the Lone Dictator case tracked by moral responsibility status and the threat they pose

would likely take a form similar to a lesser evil justification (i.e. to avoid innocent civilians being wounded).¹³

To recap, moral responsibility is necessary for an agent to be liable to defensive harm. The below table (Fig. 1) attempts to systematise the intuitions from the **Lone Dictator** case:

Even if you do not grant that these soldiers are completely non-responsible agents, this does not pose a problem for this view. If these soldiers have diminished responsibility (they are partly though not wholly responsible for their actions), this may suggest, as I will argue in §4 and §5, that moral responsibility is a scalar property—that it can come in degrees.¹⁴ As such, I will go on to claim that liability to defensive harm, in virtue of the connection to moral responsibility, is also scalar. Moreover, the above table suggests that whether or not the agent poses the threat themselves has no bearing on their liability to defensive harm.¹⁵ Using the case of child soldiers, in what follows I will argue for this understanding of the relationship between moral responsibility and liability to defensive harm.

¹³ Lesser-evil justifications appeal to the fact that an agent can sometimes bring about harm if this is necessary to bring about a significant good. This harm is usually foreseen or incidental harms—whether less evil justifications justify intentional harm is a point of contention.

¹⁴ This is certainly something that McMahan (2010) himself endorses *to a point*. In this paper, as will become clear, I go further than McMahan and argue that liability to defensive harm is always scalar. For McMahan (2010, p. 35) on the other hand, liability to defensive attack seems to be only scalar in the sense that it can dictate categories of responsibility. For example, moral responsibility coupled with culpability is a kind of enhanced moral responsibility and thus should be treated as such.

¹⁵ Of course, whether the agent physically poses the threat is usually an important determinant in whether the threat will be stopped—cases such as **Lone Dictator** are few and far between in reality. To put it more precisely, the Dictator is liable to defensive harm because they are morally responsible for an unjust threat. For an interesting discussion of causal contribution and liability to defensive harm see Tadros (2018).

The Moral Responsibility of Child Soldiers

If we recall the conception of moral responsibility noted in §2, child soldiers are a particularly interesting example for a discussion of whether an agent is liable to defensive harm. In this section I will suggest child soldiers are neither non-responsible agents, nor are they fully responsible for their actions. There are many conditions that excuse moral responsibility that may apply to child soldiers. Of course, the excusing conditions that apply to individual child soldiers will be just that—individual to the particular agent (the child soldier) in question. However, child soldiers are often portrayed in the media and by charities as collectively not morally responsible (Thomason 2016b; Drumbl 2012). For example, their age (as all child soldiers are under 18) has been argued to mean that their moral competency or psychological complexity has not yet developed to the extent needed to be morally responsible (Boyden 2003).¹⁶ Child soldiers are also often thought to be coerced or forced to act in the ways they do.¹⁷ In particular, child soldiers are sometimes forcibly recruited and/or forced to fight (UNICEF 2021). Child soldiers may also be ignorant of the situation they are in, for example they may not be able to assess how just the war they are fighting is. Their responsibility may also be further reduced due to the use of drugs and alcohol that are used to make these children less risk averse and more compliant to the demands of their leaders (Drexler 2011).

The upshot of these excusing conditions is that if child soldiers are not morally responsible for the unjust threat they cause, then they are not liable to defensive harm since they have not forfeited their right not to be harmed. Yet, despite this, we can and should resist the claim that child soldiers are always completely non-responsible and so never liable to defensive harm. Indeed, child soldiers themselves often resist this claim themselves. Thomason (2016a), for example, outlines the ways in which child soldiers often express guilt, and thus a degree of holding themselves morally responsible, for their actions in war. In an interview with journalist Will Storr, Norman Okello, a former LRA child soldier expressed this guilt:

When you kill for the first time, automatically, you change... Out of being innocent, you've now become guilty. You feel like you're becoming part of them, part of the rebels.

(Okello cited in Storr 2014, n.p.)

Not only do child soldiers themselves often express responsibility for their actions, studies into the moral development in children suggest that preschool children can distinguish between moral and social events, suggesting children can understand moral reasons (Smetana 1981; Smetana and Braeges 1990; Smetana et al. 1993).

The stereotype of a young boy forced to fight gives rise to the argument that child soldiers are not morally responsible; however, this stereotype is not always accurate.

¹⁶ For a discussion of whether war disrupts the moral development of children see Boyden (2003).

¹⁷ See campaigns such as Kony (2012) by Invisible Children who used phrases such as '[the child soldiers] don't want to do what [Joseph Kony] says but he forces them to do bad things' in their campaign video (Russell, 2012, 00:10:24–00:10:29).

For example, unlike the stereotype of a child soldier that often appears in our minds, many child soldiers are teenagers (Talbert and Wolfendale 2018, pp. 114–115). Even if we concede that young children are not morally responsible, international law draws the line of responsibility at 18. It seems odd to suggest that children only become responsible in the war context on their 18th birthday. Drawing on the work of Drumbl and Fisher, Talbert and Wolfendale (2018, pp. 115–116) highlight the discrepancy between how we treat teenagers outside of the war context as morally responsible, for example in terms of medical treatment, family law and even domestic criminal proceedings. This discrepancy between how children are treated in peacetime and war raises some reason to doubt that child soldiers are not, at least in part, morally responsible.

The stereotype also focuses on the ways child soldiers may be recruited. Whilst it must be acknowledged that some child soldiers are forcibly recruited into armed forces and groups, many freely sign up. As Singer (2006, p. 61) notes, in some cases the number of child soldiers who enlisted for service can be more than half. The voluntary enlistment of children into armed forces and groups is also demonstrated in the British Army where children can start an application to join from 15 years and seven months (Ministry of Defence 2022). And this is taken up by many children. In the 2021 *UK Armed Forces Biannual Diversity Report*, it was found that 22.1% of the armed forces recruits in 2020 were under 18 (Ministry of Defence 2021, p. 11). It does not seem correct to suggest that those under 18 in the British Army are not at least in part morally responsible agents.

The guilt child soldiers sometimes express, their age and the fact that some child soldiers voluntarily enlist all suggest that child soldiers are at least not completely non-responsible agents, and we may be able to attribute a degree of responsibility to them. These conditions that may or may not apply to child soldiers are reasons to think that moral responsibility is a scalar property. Even if the excusing conditions do apply to some degree, child soldiers may still be sufficiently morally responsible to be liable to defensive harm. For example, it is reasonable to assume that child soldiers may satisfy many of the conditions of moral responsibility to some, or even a significant, degree. Moral responsibility seems to come in degrees rather than as a binary notion, so it is too simplistic to say that the moral responsibility of child soldiers is wholly diminished.

Moral Responsibility and Liability to Defensive Harm Revisited

Having outlined the conception of moral responsibility this paper relies on in §2, and the link between moral responsibility and liability to defensive harm in §3, in this section I will outline what follows from these conceptions. The case of child soldiers clearly suggests that moral responsibility is a scalar property—an agent can be more, or less morally responsible. Given this, if we recall the table in Fig. 1 in §3, perhaps a better iteration of the link between moral responsibility and liability to defensive harm would therefore take the same categorisations of moral responsibility status and threat status, and place them on axes (in Fig. 2):

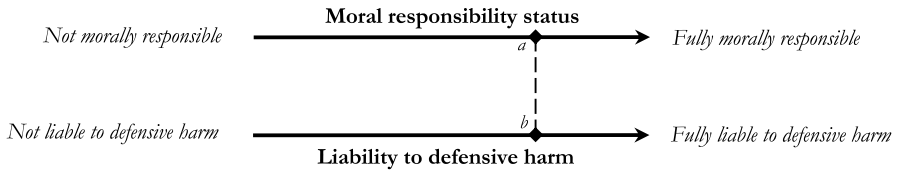


Fig. 2 Correlation between moral responsibility status and liability to defensive harm

In Fig. 2 then, the relationship between moral responsibility and liability to defensive harm would be a strict correlation from the degree of moral responsibility (e.g. ♦a) to the degree of liability to defensive harm (e.g. ♦b).¹⁸

If we then are to see the previous two views in conjunction with each other—that (i) moral responsibility is necessary and sufficient for liability to defensive harm, and (ii) that child soldiers have some degree of moral responsibility—this would have the following three kinds of consequences. First, given the link between moral responsibility and liability to defensive harm, I suggest that liability to defensive harm should also be on a spectrum. Second, the relationship between moral responsibility and liability to defensive harm suggests that there may be cases where child soldiers (if they are at least partly morally responsible) are at least to some degree liable to defensive harm, and therefore just combatants are justified in attacking, or even killing, them. Third, this relationship between moral responsibility and liability to defensive harm may also create constraints on defensive killing in relation to child soldiers if their moral responsibility is sufficiently diminished. I will take each of these consequences in turn.

Taking the first consequence, with respect to liability to defensive harm, if liability to defensive harm is linked to moral responsibility and moral responsibility comes in degrees, then it would suggest that liability to defensive harm could also come in degrees. An agent could therefore be more or less liable to defensive harm (and therefore the degree of force used against them would differ) depending on the degree of their moral responsibility. But what would this actually mean? There are two ways this can be conceptualised—a limiting harm view, and a bearing costs view. In §6 I will outline these views before discarding the limiting harm view as implausible. I will then pursue the bearing costs view.

Concerning the second and third consequences, there are two potential implications of liability to defensive harm coming in degrees which bear on the ability to justify attacking, or not attacking, an unjust threat. The first is that the degree of liability to defensive harm determines the permissibility of different kinds of attack. The second is that the degree of liability to defensive harm also

¹⁸ The use of ‘fully’ liable to defensive harm, and ‘fully’ morally responsible here may not be the most accurate depiction of this scale. I believe that it would be very hard, if not impossible, to find a ‘fully’ morally responsible (and therefore ‘fully’ liable) agent in the real world given the myriad of excusing conditions that can apply even minimally. However, for the purposes of demonstrating how I believe that this view would work, I believe that these terms can be symbolic of some such ideal agent we can understand could exist, wherein none of the excusing conditions apply to them even minimally.

determines the cost of the just attacker having to bear to avoid causing too much harm to the unjust attacker. These implications are related in that the permissibility of certain actions impacts the costs that an agent must bear. These implications map directly onto the two views outlined in §6—the limiting harm view, and the bearing costs view.

Liability to Defensive Harm as Scalar

So far I have outlined some of the consequences of liability to defensive harm being scalar and related to moral responsibility. In what follows I will explore two ways in which these ideas could be conceived. The first, explored in §6.1, is the limiting harm view. This view essentially places a cap on the amount of harm an agent is liable to depending on their moral responsibility. Similar views have been defended by Bazargan (2014) and Frowe (2014). However, I will argue that the limiting harm view does not fully capture our intuitions since the maximum amount of harm that is permissible may not be enough to avert the threat. In §6.2 I will then pursue what I believe to be a more plausible conception of liability to defensive harm—a view I call the ‘bearing costs’ view. This view mirrors the limiting harm view in some ways but instead places a threshold at which other agents involved may have to bear some costs.

Limiting Harm View

Liability to defensive harm has a bearing on the permissibility of defensively attacking the agent in question. Put simply, if an agent is liable to defensive harm, then imposing necessary and proportionate defensive harm on the agent is not morally wrong. This is typically the kind of understanding implicit in the notion that, when an agent is liable to defensive harm, they have forfeited their right to not be attacked.¹⁹ As McMahan (2005, p. 386) states, ‘the person to be killed has acted in such a way that to kill him would neither wrong him nor violate his rights’.

If liability to defensive harm is a scalar property, then it would perhaps seem natural that the permissibility of different kinds of defensive attacks would also be scalar to account for the degrees of liability. In what follows I will first dismiss the view that permissibility can come in degrees, before discussing whether liability to defensive harm has a bearing on the kinds of attacks agents are permitted to use.

Liability to defensive harm encompasses the principles of discrimination and proportionality. The principle of discrimination essentially determines who is a legitimate target of attack, and the principle of proportionality determines to what extent targets can be harmed in pursuit of the military aims (i.e. is the level of attack excessive?) (Frowe 2018, p. 47; McMahan 2018, p. 423). If liability to defensive harm

¹⁹ This seems to be the typical stance in self-defence literature. For discussions of rights forfeiture see McMahan (2005), Tadros (2016) and Quong (2012).

determines the permissibility of such attacks, it will do so on the basis of whether the agent is a legitimate target and/or what level of force is appropriate.²⁰ For example, if an agent is not liable to defensive harm because their moral status (i.e. being a civilian who has not posed a threat) does not make them a legitimate target, then no level of force would be appropriate, and thus no attack is permissible. Conversely, and importantly where the scalar conception of liability to defensive harm differs from current literature, if an agent were partly liable to attack because they performed the action but it was done under duress, then the agent would be a legitimate target, and some level of force may be appropriate.

The principle of discrimination is a binary property—an agent is either a legitimate target or is not. It is thus the second of these principles, proportionality, which I take the degrees of liability to defensive harm to map onto most accurately. Different types of attack may be more, or less, proportional. For example, there is a difference between breaking someone's arm and killing them. Recall the example above—we may think it permissible to break the arm of someone acting under duress, but not to kill them. This difference is in degrees. When talking about the proportionality of different actions we would typically compare them; 'breaking their arm is *more proportional* than killing them, but *less proportional* than hurting their wrist'.

I take it that proportionality being understood as a scalar property is not novel. However, in this paper I am proposing a more complex understanding of proportionality than is typical in the literature. This proposal takes not only the relationship between defensive harm inflicted and unjustified harm averted into account, but also considers the degree of responsibility of the agent who is liable to the defensive harm, as in the example of an agent acting under duress above. Essentially, the idea is that the less moral responsibility an agent has, then the less harm can be inflicted upon them. I will return to this idea of the relationship between liability to defensive harm and proportionality in §7 in relation to objections from McMahan (2010).

Returning to the three consequences of this view, the second and third (that combatants may be at least sometimes justified in killing child soldiers in self-defence, and that there may be restraints on the ways in which child soldiers can be harmed) seem relevant here. In some cases, it may perhaps be the most proportional option to kill the child soldier in virtue of their moral responsibility, and this may therefore be a permissible action. Conversely, in other cases there may be some restraints on the way the child soldier can be harmed because they have diminished moral responsibility and so are only liable to a certain amount of harm.

²⁰ The principle of proportionality here is understood in the narrow sense outlined by McMahan (2009). It is narrow since it only considers the harm inflicted intentionally on the attacker and the harm averted intentionally, rather than considering harms which may be inflicted 'foreseeably but unintentionally' such as those inflicted on bystanders (McMahan 2009, p. 21). Whilst this might seem odd to restrict discussion here to narrow proportionality in a discussion of conduct in war, I do so because whether an agent is liable to defensive harm should not rest upon unintended consequences if what makes them liable is their moral responsibility. Wide proportionality considerations would therefore be considered, but not in discussions of the liability of the agent.

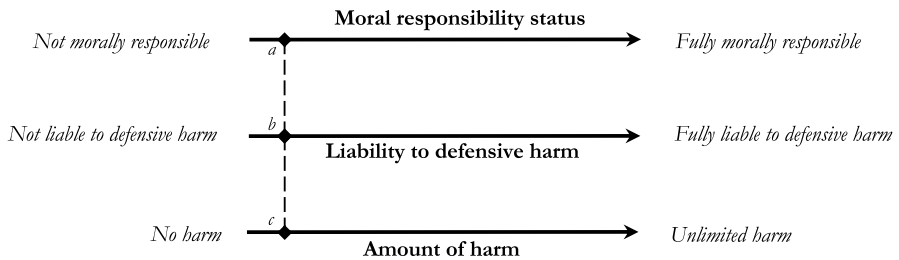


Fig. 3 Correlation between moral responsibility status, liability to defensive harm, and the limit of the amount of harm

If an agent's liability to defensive harm is related to their moral responsibility in this way, we could understand the amount of harm which they are liable to as being limited in a certain way. One limit could be a 'cap' on the maximum amount of harm that can be inflicted on the agent. Figure 2 above then may be added to create the following figure (Fig. 3):

Under this view, the relationship between an agent's liability to defensive harm (e.g. $\blacklozenge b$) determines the level for the maximum amount of harm the agent is liable for (e.g. $\blacklozenge c$). For example, if a minimally responsible agent ($\blacklozenge a$) were to unjustly attack another agent, the minimally responsible agent would only be liable for a minimal amount of harm ($\blacklozenge c$) because they are only minimally liable to defensive harm ($\blacklozenge b$).²¹

This may initially seem to be an attractive view. If moral responsibility status directly relates to the agent's liability status, then it seems plausible that this would place a similar constraint on the amount of harm the agent can bear. But this view has undesirable consequences. If we take kill-or-be-killed cases such as **Unjust Assailant**, if the unjust assailant is minimally morally responsible, under this limiting view the unjust assailant would only be liable for a minimal amount of harm (perhaps something along the lines of a broken leg). The minimal harm you are permitted to inflict upon a minimally responsible agent under this view therefore may not be enough to avert the attack. If you were to kill the unjust assailant then this could not be justified on the grounds that they were liable to defensive harm.

Some of the literature on defensive killing does endorse a limit on the amount of harm a minimally responsible agent can be liable to which at first look seems to overcome this consequence in kill-or-be-killed cases (Bazargan 2014; Frowe 2014). This is typically a threshold or cut-off point under which an agent should not be harmed. Saba Bazargan (2014, p. 114) develops an account of liability to defensive harm in which 'minimally responsible threateners' are 'liable only to the degree of harm equivalent to what she risks causing multiplied by her degree of responsibility'. I believe that this is equivalent to the view outlined in Fig. 3.²² Put simply, there is a limit to the amount of defensive harm a minimally responsible threatener

²¹ Here I use the term minimally responsible, as opposed to some other term such as partly responsible, to depict an agent who is only marginally responsible, rather than an agent who is 'partly responsible' which does not denote a specific amount of responsibility. A partly responsible agent could, for example, be only minimally non-responsible.

²² See §5.

is liable to. Interestingly, however, Bazargan's (2014) view is hybrid in that harm above this limit is justified as a lesser-evil than killing the victim. In cases where the minimally responsible threatener is killed on these grounds, Bazargan (2014, p. 136) argues that the minimally responsible threatener's rights are *infringed* upon, though not *violated*. This view therefore introduces a limit on the amount of harm that can be imposed on a minimally responsible threatener, only to take it away again.

Whilst this view may seem to capture our intuitions about kill-or-be-killed cases since it allows for the minimally responsible threatener to be killed in self-defence, this is only because we can appeal to a lesser-evil justification to transgress, with justification, their right to life. The consideration of the minimally responsible threatener's moral responsibility and thus liability to defensive harm therefore does not play a role in the ultimate justification. As Steinhoff (2019, p. 544) notes, by only appealing to a lesser-evil justification to explain why the minimally responsible threatener is able to be killed, their liability to defensive harm simply becomes redundant. The lesser-evil justification therefore does all of the work. This does not equate with our intuition that responsibility for the threat you cause should play a role in why you can be harmed.

Since the limiting harms view thus does not capture our intuitions, I propose a further view. In the next section, I will outline my account of liability to defensive harm. Whilst similar to a limiting harm view, I hope to avoid the problems outlined here. The bearing costs view will instead emphasise that the point at which a minimally responsible agent ceases to be liable for defensive harm is the point at which the other agent should bear some costs to avoid further harm to the minimally responsible agent. In a similar sense to Bazargan's (2014) view then, the bearing costs view is not a strict limit on the harm that can be inflicted.

Bearing Costs View

In this section I argue that there is a different conception of liability on a spectrum that is more plausible than the previous view. This view mirrors the limiting harms view in that there is a level of harm up to which an agent is liable. This, however, is not a limit on the amount of harm that can be inflicted on the agent. Rather, this level of harm (e.g. ♦c) is reformulated as the level of harm at which the other agents involved must bear some costs in order to protect the minimally responsible agent from further harm.

If we recall the implications of the view that liability to defensive harm is scalar from §5, the second implication was that the level of liability to defensive harm can also determine the amount of costs an agent who defensively attacks may be required to bear in some situations. This draws on the idea that liability to defensive harm is related to permissibility and underlines the notion that those involved may be required to bear some costs to avoid harming non-responsible, or lesser responsible, attackers. Consider the classic case below paraphrased from Nozick (1974, p. 34):

Falling Person: A person, through no fault of their own, is falling down a well, at the bottom of which there is another person trapped. The only way to

stop the falling person from killing the person who is trapped is for the trapped person to shoot the falling person with a ray gun that will vaporise their body.

Our intuitions suggest that the trapped person is permitted to vaporise the falling person. However, if there were an option for the trapped person to save the life of the falling person with some cost to themselves, I argue that this would be the morally right thing for the trapped person to do. For example, if the trapped person had the option of breaking the falling person's fall by catching them, even if it would break the trapped person's arm, I argue that this option would be morally required. Of course, this is a case of two non-responsible agents (both the falling person and the trapped person are in no way responsible for their predicament). However, if we accept that the trapped person is required to bear the cost of breaking their own arms, I believe that it is also plausible to suggest that, in different degrees, responsible agents can have similar duties towards lesser responsible agents who are posing a threat to them. Put simply, if a non-responsible agent is required to bear some cost to save another non-responsible agent, then it does not seem absurd to suggest that a responsible agent may also have the same duty towards lesser responsible agents.

Let us return to the second of the three consequences of the relationship between liability to defensive harm and moral responsibility. With respect to the defensive killing of child soldiers, if a child soldier were fully morally responsible, then the attacked agent would not be required to bear any significant costs such as risking their own life or being harmed in some way so as to avoid harming the child soldier. When child soldiers have at least some degree of moral responsibility, they are not completely non-responsible agents. Because liability to defensive harm is arguably linked to moral responsibility in the way just explained, the degree to which they are responsible is the degree to which they are liable to defensive harm. Combatants may therefore be justified in killing child soldiers at least in some situations (which I will outline in §7), even if it is never permissible to kill a non-responsible threat. Concerning the third consequence, the attacked combatant, however, may be required to bear some cost, for example in the form of the risks which they put themselves under, or being harmed themselves to avoid killing the child soldier if the child soldier was not liable to be killed, but rather only to be harmed. I will outline some of the thresholds for this in §7.

Taking the case of **Unjust Assailant** again, it may be the case then that you are required to break *your own* leg if this would save the life of the unjust assailant. This may seem to be a drastic view. However, I believe that this better captures our intuitions about how we should exercise constraint against minimally responsible agents such as child soldiers. Under this view, moral responsibility determines how liable to defensive harm someone is and that liability too comes in degrees. If child soldiers are partly, although not fully, responsible for the threat they pose to other combatants, then whilst it may be permissible to kill child soldiers in some situations, in others combatants may be required to exercise restraint to more of an extent than they would if they were fighting against a fully morally responsible adult combatant. In exercising this restraint, the adult combatant may be required to bear some cost to avoid more harm than the child soldier is liable to. They may, for example, have to bear some burdens themselves or place themselves under some risk.

Indeed, we already have such a view on the treatment of *civilians* in war. *Jus in bello* considerations are often based on a distinction between combatants and non-combatants which offers non-combatants certain protections. Margalit and Walzer (2009) argue that soldiers must exercise restraint in situations where civilians would be foreseeably harmed. ‘When soldiers [...] take fire from the rooftop of a building, they should not pull back and call for artillery or air strikes that may destroy most or all of the people in or near the building; they should try to get close enough to the building to find out who is inside or to aim directly at the fighters on the roof’ (Margalit and Walzer 2009). Views such as this imply that combatants must bear some costs—namely a potentially less successful operation—to protect non-combatants given their ‘innocent’ moral status.²³ My account of liability to defensive harm thus aims to impose a similar special moral status for child soldiers in war. This moral status offers protection to those who are not fully morally responsible for the harms they cause. In what follows I will respond to three possible objections to this view.

In Defence of a Scalar Account of Liability to Defensive Harm

The account of liability to defensive harm I have outlined in this paper is, as far as I can tell, not defended to this extent in the literature. McMahan (2010) outlines three criticisms to liability to defensive harm being scalar: (1) small differences in moral responsibility are morally decisive; (2) intuitions about exercising restraint against child soldiers are mercy-based rather than justice-based; and (3) there are practical issues with scalar liability. In this section, I will discuss these objections in turn.

McMahan (2010, pp. 35–36) first argues that liability cannot always be on a spectrum because even a small difference in moral responsibility can be morally decisive. To argue for this, McMahan (2010, p. 35) provides a third case, paraphrased below:

Drugged Assailant: Similar to **Unjust Assailant**, however, the assailant has taken a drug which they believed would make them high. Instead, it causes them to begin to attack you. They will kill you if you do not kill them.

In **Drugged Assailant**, whilst the drugged assailant may ordinarily be a kind person, one mistake (taking the drug) has caused them to become a threat (McMahan 2010, p. 35). Given that the drugged assailant is responsible (although only to a lesser and perhaps even minimal degree) in this case, we would see it as permissible, at least under McMahan’s (2010, p. 35) view, for you to kill them in self-defence. Similarly, because in this case you do not pose an unjust threat (and are not morally responsible for any unjust threat at all) you are not liable to defensive harm. This is because the ‘slight asymmetry in responsibility can be morally decisive’ particularly when the outcome is all-or-nothing as is the case for life-or-death situations (McMahan 2010, p. 35). Liability to defensive harm under McMahan’s (2010) view

²³ Innocence in this sense is simply a claim that they are not morally liable to defensive harm because they are not directly participating in war.

can therefore be a ‘yes or no’ consideration which is dependent on even a minimal amount of moral responsibility.

The previous view would mean in the child soldier cases then that there would be no requirement to exercise restraint against them in kill-or-be-killed cases such as these, and child soldiers would be liable to defensive harm to a sufficient degree if they are sufficiently responsible for the threat they cause. This is because even a minimal degree of responsibility on their part, under McMahan’s (2010) view, deems them liable to defensive harm, including lethal harm if this is necessary. This suggests that the degree of moral responsibility plays no role in kill-or-be-killed cases as there are only two outcomes. McMahan (McMahan 2010, p. 36) does not simply conclude that there is no reason at all to show restraint towards child soldiers in war (given their age and victimisation), but he claims simply that there is no *requirement* to do so.

I believe that here McMahan (2010, pp. 35–36) has confused potential outcomes in specific cases with the liability for those outcomes. In situations where there are only two outcomes, as in the kill-or-be-killed cases, the *most proportionate* option is to kill the drugged assailant/child soldier because they are sufficiently responsible for the unjust threat they pose. But this does not mean that liability is a binary notion—that there are only two options (yes, they are liable to be killed, or no, they are not liable to be killed). Rather, it means that there are only two outcomes in kill-or-be-killed cases. In these cases then, if the child soldier is the aggressor, then the child soldier is *more morally responsible* for the threat which they pose than the just combatant (the just combatant has not caused the threat in any way) and is therefore more liable to defensive harm than the just combatant since the just combatant is not liable at all. If there were an option which fell between kill or be killed (for example, if the combatant were able to maim the child soldier or take them hostage) then this would be the *most proportionate* option of the three.²⁴

This therefore seems to be a criticism of the arbitrariness of deciding at what point liability to defensive harm tips the decision towards it is permissible or justified to attack this agent. However, this arbitrary ‘line in the sand’ is not created by the notion of liability to defensive harm itself, but rather by the situation and the options available to agents. For my view then, this morally decisive point would be considered on a case-by-case basis when considering what defensive options are available, and which one ought to be chosen in light of the available alternatives.

I want to go further than this and argue that in cases where the attacker has less moral responsibility (as is typically the case with child soldiers), the defender has an obligation to choose the third option even if this causes greater harm to themselves. In cases where there is an asymmetry of moral responsibility, with the aggressor being less morally responsible, the defender has a duty, as a matter of justice, to

²⁴ Of course, if this option were available in a parallel case only involving adults the third option would always be the only permissible option. As will be explored, however, this is not my full claim. Instead, I am arguing that in cases involving children, the defender should, as a matter of justice, accept a minimal level of harm. The third option is therefore required at a lower threshold than in cases involving only adults.

choose the most proportionate option—as they have in any case regardless of moral statuses. However, the asymmetry plays a role in deciding which *is* the most proportionate case. In kill-or-be-killed cases, this duty does not extend to the defender not being permitted to kill the aggressor, even if the aggressor is not morally responsible since the aggressor is after all *more* responsible for the threat than the victim.

Another objection McMahan (2010, p. 36) raises is that the idea that combatants are required to exercise restraint against child soldiers is that our intuitions are mercy-based rather than justice-based. Put simply, we feel that soldiers should do more to help child soldiers because they are children. This may be exacerbated by the fact that child soldiers may be victims of adult exploitation (McMahan 2010, p. 36). We are therefore guided by the idea that it would be merciful to spare their life, but this is not *required* of the combatants—it is supererogatory and something which they may choose to do if they have high moral ideals (McMahan 2010, p. 36).

But I do not believe that mercy is motivating to the extent that McMahan (2010, p. 36) argues for. We do not simply add on a consideration of mercy to our thought process when we consider cases such as child soldiers. Whilst we may be influenced by the idea of showing mercy to non-responsible threats (especially when they are vulnerable as children are), I believe that this is not just a question of mercy, but our intuitions about these cases show that this is a question of justice to those who cannot fully be held responsible for their actions, in this case child soldiers. Applying mercy considerations seems supererogatory—they are good and admirable considerations, but we are not required to apply them. In contrast, justice-based considerations seem morally required—if you do not follow these duties, you are criticisable or blameworthy for not doing so. I believe cases involving child soldiers are of the second kind, whereas the same case involving a fully morally responsible agent would be entirely mercy-based. To illustrate, consider the cases below:

Child Combatant: A child combatant is pointing a gun at a fully responsible adult combatant. The adult combatant has two ways available to them to stop the child combatant from fatally shooting them. They can either (1) shoot the child combatant, most likely killing them but with no risk to the adult combatant, or (2) wrestle the child soldier to the ground, thereby only minimally harming the child soldier but at a moderate risk of injury to the adult combatant.

Adult Combatant: The same as Child Combatant, however, the child combatant is replaced with a fully morally responsible adult combatant instead.

I argue that in **Child Combatant**, in virtue of the child's diminished responsibility and therefore diminished liability to defensive harm, the adult combatant is morally required to take option (2), even with the risk to themselves such as breaking their arm. This is because (2) seems to be the *most proportional option* available given the responsibility status of the child. In contrast, in **Adult Combatant**, (1) seems to be the most proportional option given the equal responsibility status of the two combatants—the level of attack (being shot) is proportional to the level of threat (being shot by a responsible agent). Moreover, in **Child Combatant**, our intuition is that not doing (2) is *blameworthy*. On a neo-Strawsonian account of moral responsibility as I outlined in §2, blame indicates wrongdoing. In this case then, intuitively

the agent has done something *wrong* in not choosing (2). This is in contrast with not choosing (2) in **Adult Combatant**. Our intuition is that the agent has not been *merciful*. Since mercy is not a duty, we would not blame the agent for not choosing (2) in **Adult Combatant**. I believe that it is our intuitions about cases like these which show that exercising restraint against child soldiers can rise to the level of a duty, not merely a supererogatory, mercy-based consideration.²⁵

McMahan's (2010, p. 34) final objection is rather vague. He mentions that we must consider practicality, but he does not expand on this point (McMahan 2010, p. 34). I assume that his argument is something like the following. In war, combatants cannot know the extent to which the child soldiers they are fighting against are morally responsible for the threat they cause. Therefore, combatants cannot be expected to exercise restraint against child soldiers if they do not know the extent to which they should exercise this. It is essentially impractical for liability to defensive harm to be on a spectrum because in the moment we most likely do not know how responsible agents are for the threat they cause.

Whilst it is true that combatants may not know the specifics, they will most likely, however, have a general idea. For example, combatants will know that the age of the child soldiers (as they are under 18) typically makes them less morally responsible.²⁶ It can also be argued that intelligence collected on the enemy would give combatants insight into how the child soldiers are treated. We can therefore formulate 'rules of thumb'—or more accurately rules of engagement—which generally make these decisions easier and get these decisions closer to being correct. It is only in the minority of cases where rules of thumb do not apply correctly.

Furthermore, these practicality considerations of McMahan (2010) would also apply to adult combatants. Because combatants may not know the specifics of the enemy's moral responsibility, this does not mean that they cannot generalise that adult combatants are morally responsible (in the same way as they can generalise that child soldiers are not morally responsible) until they see evidence to the contrary. As I have suggested in §6.2, exercising restraint against certain groups in war is not novel. I am merely suggesting, similar to the special moral status civilians have in war, child soldiers should also have a special moral status.

Conclusion

In this paper I have outlined McMahan's (2010) argument for moral responsibility being necessary for an agent to be liable to defensive harm. The argument is essentially as follows. Self-defence arguments are not enough to ground liability to

²⁵ My argument in this paper is only to suggest that there is a *pro tanto* duty to do (2), not that the duty to do (2) should override other considerations which may be at play in the war context. It is perhaps important to remember that liability to defensive harm is not the only consideration agents take into account in war. Other justifications may still permit the adult combatant to kill the child in this case. However, this would simply be because in the conflict between liability to defensive harm considerations and other justifications, the other justification in this case has more motivational force.

²⁶ See §4 for common excusing conditions of moral responsibility for child soldiers.

be killed as they are too permissive and allow for those who pose a just threat (for example, when they have been attacked unjustly and choose to defend themselves) to be liable to defensive harm. Instead, liability to defensive harm is determined by whether the agent is morally responsible for the unjust threat they pose.

I have agreed with McMahan (2010) that moral responsibility is necessary for combatants to be liable to defensive harm. However, I have argued that since moral responsibility comes in degrees so can liability to defensive harm. I have also suggested that even if child soldiers may not be wholly responsible for the threat they cause, they are also not wholly non-responsible. They are therefore liable to defensive harm, but to a lesser extent than a morally responsible adult combatant would be. Combatants fighting against child soldiers are therefore required, as a matter of justice, to choose the most proportional method of attack—which is not always to kill the child soldiers—even at some cost to themselves.

As a final note, one might wonder whether the excusing conditions of this view could plausibly apply to (at least some categories of) adult combatants. I believe that the fact that some adult combatants may also have diminished responsibility merely points to the reality that some agents are not sufficiently morally responsible even if we typically treat them as such. Adult combatants, like their child counterparts, who are lesser morally responsible are therefore less liable to defensive harm. What distinguishes child soldiers from their adult counterparts, however, as I mention in §7, is that we can regularly assume that child soldiers have diminished responsibility, and therefore can operate on a ‘rule of thumb’. This is not an assumption which we can regularly make about adult combatants.

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