CrossMark

Against a "Combined Liability-Lesser-Evil Justification"

Uwe Steinhoff[1]

Abstract Jeff McMahan has recently proposed what he calls a "combined liability-lesser-evil justification." Its core idea is that the fact that someone has no right against the infliction of a certain lesser harm (like squashing his finger) makes it easier for the necessity or lesser evil justification to justify inflicting a greater harm on him (like killing him). This idea has been taken up by authors like Saba Bazargan or Helen Frowe. I will argue that McMahan's basic idea is implausible to begin with (since it implies that a person's right to life becomes less stringent because he has forfeited some *other* right), leads to counter-intuitive results, and seems to stem from a confusion between discounting the rights of wrongdoers and "subtracting" one right from the other. I then argue that Bazargan's conclusion that minimally responsible threats (MRTs) can sometimes be killed as well as certain other conclusions that Bazargan regards as a particular advantage of his "hybrid account" are single-handedly generated by *one* element of that account, namely by the lesser-evil discounting view. Thus, the hybrid view is redundant. Moreover, both the hybrid view and the lesser evil discounting view of killing MRTs have strongly counter-intuitive implications. Finally, I show that Frowe's application of the combined justification to non-responsible threats is entirely arbitrary and there-fore useless. "Combined liability-lesser-evil justifications" should be rejected.

✉ Uwe Steinhoff
   ustnhoff@hku.hk

1   Department of Politics and Public Administration, University of Hong Kong, Pokfulam Road, Hong Kong, China

🙋 Springer

1 Introduction

Jeff McMahan has recently proposed what he calls a "combined liability-lesser-evil justification" (McMahan 2014a, 440; see also 2014b, 138–140).[1] A motivation for introducing this new kind of justification might be the wish to overcome certain perceived shortcomings of the so-called moral responsibility account of liability to defensive attack. According to this account, one is liable to defensive attack if one is morally responsible for an objectively unjustified threat of harm (McMahan 2005, 394), and this liability then can allegedly provide a liability-based *justification* for attacking liable persons (McMahan 2014b, 124). Yet McMahan thinks that a liability-based justification cannot (fully) justify defensive force against what he calls "lesser aggression," that is, aggression where the threat to use force is conditional (as in "Your money or your life") (2014b, 117), and he deems this counter-intuitive. Conversely, *if* the liability-based justification *fully* justified the use of force against lesser aggressors, then it would no longer explain (short of ad hoc stipulations) why there should be any proportionality limits on the number of lesser aggressors killed in self- or other-defense, and McMahan deems this counter-intuitive too. The combined liability-lesser-evil justification is supposed to solve *both problems*: that is, explain why defense against lesser aggression is permissible *and* why the numbers of lesser aggressors killed remains relevant for proportionality considerations (2014b, 136–140).

Saba Bazargan and Helen Frowe, on the other hand, who have taken up this justification, are less concerned about "lesser aggressors" than about "minimally responsible" or non-responsible threats, like people threatening others on grounds of a reasonable mistake (they reasonably take the other to be an aggressor) or merely with their body (they are falling through no fault of their own and threaten to crush the person below). Both authors think that the liability-based justification cannot (fully) justify defense against such persons, deem this to be counter-intuitive, and then provide the combined justification as a solution (Bazargan 2014; Frowe 2014, 67–70).

Thus, if the combined justification has to be rejected, this means that the moral responsibility account of liability to defensive force would still face the above-mentioned problems, which then is a further reason to reject the responsibility account itself.[2] Moreover, the possibility of a completely new justification for the use of force which, miraculously, has been overlooked for centuries is obviously relevant not only due to its implications for the moral responsibility account but also in its own right, in

---

[1] For another potential endorsement of such a justification, see Tadros (2014, 60 and 62). Since I have encountered this claim, let me note that Tadros did *not* endorse a *combined* justification already in Tadros (2011, 248-256). Tadros offers there a *lesser-evil* justification for harming innocent threats that is based on *discounting* the latter's interests. Such a *discount* is not a *combination* (see also the discussion of Bazargan below). However, I said "potential" four sentences ago since it is not even clear that Tadros *really* goes beyond mere discounting in the later article. McMahan, for that matter, has recently admitted (unlike the other authors discussed here) that the combined justification has little if any practical significance. See McMahan (2017, 18-24, esp. 24, the first paragraph). My argument here is that it is even theoretically confused.

[2] McMahan (2017) has recently tried to offer an alternative solution to one of these problems, namely to the problem of limiting the number of "lesser aggressors" that can permissibly be killed. This new alleged "solution" has been rightly criticized as entirely ad hoc and theoretically unfounded by Rodin (2017). Unfortunately, in turn, Rodin's own alleged solution to the problem is theoretically *incoherent*, since it contradicts the very idea of a liability-justification (see Steinhoff 2017).

particular if such an alleged justification would justify things that are actually unjustifiable. Therefore, a closer look is certainly in order.

Thus, in section 2, will argue that there is no reason to accept such a combined justification in the first place. In section 3, I will demonstrate that Bazargan's account is actually not "hybrid" or combined at all and in any case mistaken. In section 4, I argue that Frowe's application of the combined justification to non-responsible threats is arbitrary and therefore useless. "Combined liability-lesser-evil justifications" should be rejected.

2 McMahan's "Combined Liability-Lesser-Evil Justification"

To understand McMahan's combined justification, we first need to understand what McMahan means by a liability justification and by a lesser evil or necessity justification.[3] He states that "part of what it means to say that a person is *liable* to attack is that he would not be *wronged* by being attacked" (McMahan 2009, 8). This means, for example, that a person who is liable to be killed "has forfeited his right not to be killed, at least for certain reasons and by certain persons" (McMahan 2012, 137). A necessity justification (also known as a lesser evil or choice of evils justification), in contrast, is a justification for inflicting harm to which the victim is not liable because he has retained the right not to be harmed in this way. The justification for inflicting the harm anyway lies in this rights infringement being necessary to avert a far greater evil (for example, one might have a justification to kill one innocent person in order to save one hundred other innocent persons). Thus, a necessity justification is a justification for *overriding* the right of a person for the (far) greater good (McMahan 2012, 137).

McMahan claims:

> [L]iability and necessity justifications are in principle combinable. Suppose, for example, that a person, P, has made himself liable to suffer harm up to amount x as a means of preventing an innocent person from suffering a harm for which P would be partly responsible. Yet to prevent this other harm it is necessary to inflict on P a harm greater than x—say, $x + y$. If the harm that the innocent person would otherwise suffer is sufficiently serious, it could be justifiable to inflict a harm in the amount of $x + y$ on P. The harm that P would suffer up to x would be justified as a matter of liability, while the additional harm, y, would be justified on grounds of necessity. Even though P would be liable to be harmed, the infliction of harm beyond that to which he was liable would have to be justified by reference to the demanding standards that govern the intentional harming of innocent people. (McMahan 2012, 138)

The crux of this kind of justification is revealed in this last sentence. The less harm needs to be justified by the necessity justification (since it is being justified by the liability part of the combined justification), the more restricted is the reach of the necessity justification's "demanding standards" (not in the sense that its standards are relaxed, but in the sense that there is less harm they need to justify). This is supposed to

---

[3] The possible distinction between lesser evil and necessity need not concern us for present purposes, since it does not affect the following argument.

be true not only in regard to the harm we may inflict on one person, but also regarding the numbers of people one may kill in order to avert a harm. On McMahan's account, one may in principle *kill more* people (for example soldiers) to avert some harm to innocents if those people are *liable* to at least *some* harm than if those people are not liable at all (McMahan 2014b, 136–140, esp. 139). (Thus, the point of this kind of justification is not that some acts, like the killing of soldiers, can be justified by a liability justification, and that some *other* acts, like killing civilians, can be justified by a lesser evil justification, but rather that *one* act of inflicting harm on *one* person can be justified by combining the justifications, which then can also have consequences for the number of people on which one may inflict such harm.)

The main problem with the combined justification concerns precisely its core idea, namely the idea that the fact that someone has no right against the infliction of a certain lesser harm (like squashing his finger) makes it easier for the necessity justification to justify inflicting a greater harm on him (like killing him). McMahan provides no argument as to why one should accept this idea in the first place (nor do others); yet such an argument would be needed, since far from being self-evident, the idea is in fact rather puzzling.

One straightforward reason why this idea is puzzling is that it implies that a person's right to life becomes less stringent because she has forfeited some *other* right. Yet it is entirely mysterious why that should be the case. The idea that it is a lesser evil to kill innocent Bob than his identical and equally innocent twin Bill, only because Bob has through responsible but entirely innocent action (maybe he gambled) lost his right that others do not harm him by seizing 10 dollars from him while Bob hasn't, seems to be entirely absurd and to contradict what we take rights to be. Maybe one might object that the combined justification does not apply to property rights because property rights are categorically different from the right to life. Yet the right not to have one's wrist or one's arm broken (which are typical examples of defenders of the combined justification) is also categorically different from the right to life.

I have come across the objection here that this is not entirely mysterious, since, allegedly, the right not to be killed and the right not be maimed are not different rights but "at the bottom the same right: the right not to be harmed."[4] However, there is no such logical relation as "being at the bottom the same." Things x and y are either the same, period, or they are not. If they are the same, then Leibniz's principle of identity applies, that is, whatever is true of x also has to be true of y. Given, however, that it is possible to violate someone's right x not to be harmed (for example by pinching his nose or stealing an apple from him) without violating his right y not to be maimed (by cutting off his arm) or his right z to life (by killing him), the right not to be harmed is clearly different from both the right to life and the right not to be maimed.

Another objection I have heard is that the idea is at least not mysterious in those cases where the lesser right is included within, and thus part of, the greater right (although the objector admits that the lesser and greater rights McMahan talks about are not of this sort).[5] For example, the right not to have one's finger smashed is allegedly part of the right not to have one's body smashed because a finger is part of the body. However, that only implies that by smashing a person's finger one smashes a *part* of his body. Smashing a person's body, in contrast, seems semantically to require

---

[4] The objection was raised by an anonymous reviewer, the communication is on file with the author.
[5] The objection was raised by an anonymous reviewer.

significantly greater damages, and it indeed does seem mysterious why someone's having forfeited his right that his finger not be smashed lessens the stringency of his right that his whole body not be smashed. If, on the other hand, one defines the right that a person's body not be smashed as the right that no part of the person's body be smashed, then one cannot forfeit the right that one's finger not be smashed without also forfeiting the right that one's body not be smashed, and hence there would be no room for a "combined justification" here.

However, there is also another interpretation of the objection. To wit, if someone has forfeited his right that his index finger not be smashed, then whatever duty one violates by completely smashing his whole body (including the finger), one has at least not violated a duty not to smash his index finger – unlike in the case of completely smashing the whole body (including the finger) of a person who has not forfeited his right that his finger not be smashed. However, first, as the examples provided below will show, even in *such* cases smashing the whole body of a person who has not forfeited the right that his finger not be smashed is still not worse then smashing the whole body of a person who has forfeited that right (the steamroller examples below *are* examples of such cases); and second, the cases McMahan refers to are actually *not* of this kind – by simply killing someone one does *not* violate *both* his right that his finger not be smashed (for one can kill people without violating this right) *and* the right that he not be killed. And thus McMahan's idea remains puzzling.

There is a further, more complicated reason why the idea is puzzling. Let me explain. If there is a combined liability + necessity justification, then there also exists a combined rights-waiving + necessity justification. McMahan explicitly distinguishes liability, that is loss of a right through one's unjust and unjustified action, from waiving a right through consent. If, for instance, a professional boxer is hit by his opponent without the opponent thereby violating his right, then this is not so because the boxer was liable to be hit; rather, "the reason his right has not been violated is simply that he has consented to be hit" (McMahan 2009, 9). If, however, the necessity justification part in the combined liability + necessity justification need only justify harm in the amount of y because due to his liability the target person has no right that harm in the amount of x not be inflicted on him, then in the case of the parallel rights-waiving + necessity justification the necessity justification part also need only justify harm in the amount of y since the target person here too has no right that harm in the amount of x not be inflicted on him. *How* it came about that he does not have this right – through forfeiture/liability, through his waiving the right, or perhaps because he never had this right in the first place – should make no difference for the fact that the necessity justification need only cover y but not x.

With this in mind, consider now the following example:

Waived Right: In a certain society everyone knows that due to some cosmic fluke Pat constantly runs into situations where he can (and often does) save large numbers of innocent people by violating or infringing the rights of fewer innocent people. On one such occasion Pat has saved Al. Out of gratitude, Al says to Pat: "If you ever encounter a situation where you cannot save innocent people from

unjust harm without squashing my finger, I allow you to squash my finger. That is, with respect to such situations, I hereby waive my right that you do not squash my finger. However, I categorically insist on my right that you do not inflict more harm on me than that.[6]

Unfortunately, Pat soon confronts this situation:

Steamroller: Five persons are trapped in the path of a steamroller. The only way to save them would be for Pat to turn the steamroller to the left or to the right. In both cases one innocent person would be squashed completely. Both options of averting the death of the five would be proportionate (we assume) if the other option was unavailable. The person on the left path (who has been saved by Pat as often as Al) is not only innocent but also has not waived any rights. The person on the right is innocent Al.

If we conceive of the necessity justification strictly as a *lesser* evil justification, and if McMahan were right in assuming that inflicting harm on an innocent person can be more easily justified by a necessity justification if the person does not have the right that some lesser harm be inflicted on him, then it follows that Pat must not turn the steamroller to the left because it would violate the necessity condition that is implied by a necessity justification: if there is a milder – less harmful or less rights-infringing – means to avert the threat, then the more harmful means can hardly be necessary to avert the threat. If he turns it, he *must* turn it to the right. I submit that this is absurd. (I will consider some objections in a moment).

As an aside, if Pat tried to turn the steamroller to the left, then he himself would become, on McMahan's account, "*liable* to be killed by virtue of his moral responsibility for wrongful [namely unjustified and unjust, that is, rights-violating (McMahan 2014c, 114)] harm, or a threat of wrongful harm, to others" (McMahan 2012, 137). (By moral responsibility McMahan only means that the harm emanates from an act for which the agent can be held accountable in the sense that he did not suffer a psychotic episode, for example. Responsibility does not imply culpability.) But since McMahan thinks that "liability justifications" are "agent-neutral," so that any person may kill someone who is liable to be killed (2014c, 115–118), and since his position implies (2014b, 137), his protests not withstanding,[7] that one may kill *any* number of people who are liable to be killed, it would follow that third parties may not only kill Pat if this is necessary to keep him from turning the steamroller to the left, but that they may kill any number of successors who jump onto the steamroller trying to turn it to the left. It seems to me that this implication strongly speaks against McMahan's account.

---

[6] I have come across the objection that a person might waive his right only on condition that the waiver not be factored in a combined justification to inflicting greater harm on him. Yes, that is conceivable, but this is not the case in my example. Al does not mention any such condition.

[7] See note 2.

The situation does not improve if we take numbers into account. Suppose many people have followed Al's example and waived their rights that Al not squash their fingers. One day, Pat confronts the following situation:

> *Numbers*: In order to save 1000 people from being steamrolled, Pat has to turn the steamroller either to the left or to the right. On the left are n innocent people, on the right are $n + 1$ innocent people. Both options of averting the death of the 1000 people would be proportionate (we assume) if the other option were unavailable. Pat is about to turn the steamroller to the left because he wants to save the larger number of innocent people. In this moment someone bursts onto the scene who has allegedly morally crucial information: "Wait. The persons on the right have all waived their right that their little fingers not be crushed."

As already noted, on the logic of the "combined justification," the numbers of people one may *kill* in pursuit of an important good (like saving large numbers of innocent persons) can, interestingly (and, I think, mysteriously), be increased by the fact that these people (or some of them) have no right against the infliction of certain *non-lethal* harms. But then the fact that the people on the right have no right that their little fingers not be squashed (because they waived this right) could, given the right numbers (and even if their fingers would *not* be crushed[8]), indeed outweigh the fact that there is an *additional* innocent person among them. Thus, the combined justification could make saving the *greater* number of completely innocent people *un*justifiable and justify Pat in saving the *lesser* number of completely innocent people. Yet all else being equal: is it really remotely plausible to claim that saving the *lives* of the *lesser* number of *completely innocent* people is the *lesser* evil here only because the completely innocent people in the larger group have waived their right that their fingers not be crushed? I severely doubt it.

Let me now come to some possible objections to my line of argument. First, I have encountered the claim here that McMahan could avoid the problem by rejecting the view, as many sophisticated consequentialists do, that small harms (like finger-crushings) can aggregate in such a way as to outweigh the loss of one life. In reply, first, my example is not about choosing between finger-crushings on the one hand and lost lives on the other, but about whose and how many lives should be lost. Therefore adopting a sophisticated stance about aggregation of harms will not help McMahan. Moreover, the sophisticated consequentialists the objector seems to have in mind would hardly entertain the idea that killing a person whose finger is about to be crushed is a lesser evil than killing someone whose finger is not about to be crushed (and even if they did, the problem would still not be the same, as just noted); and then, of course, it is not particularly surprising that they think that the good of avoiding even thousands of crushed fingers cannot outweigh the evil of one death. McMahan, however, *already grants*, as a necessary element of the combined justification, that killing someone who is liable to a small harm is a lesser evil than killing someone who isn't. And therefore he

---

[8] In this case, one could not argue that the killing of the larger number of people contained "fewer" rights violations – even if that mattered. It seems, however, that it doesn't, given that intuitively one should save the larger number in *both* pairs of cases (in the pair with crushed fingers as well as in the pair without crushed fingers). In fact, it seems odd to say that completely crushing a person is "morally worse" than crushing and killing a person in such a way that her fingers remain intact. Morality is not that fetishistic.

would have to explain why the "lesserness" of these lesser evils cannot aggregate in such a way as to finally outweigh the loss of one additional life. (Conversely, if he claims that they cannot aggregate, he then has to explain why killing someone who is liable to a small harm is a lesser evil in the first place.) In addition, if the alleged differences in evilness between the lesser evil of killing persons who are liable to some small harms and the killing of persons who are not liable *cannot* be aggregated, McMahan would also have to explain how the combined justification then can possibly do what he expects it to do, namely to indicate the number of lesser aggressors beyond which the killing would become disproportionate. No explanations come to my mind, and if McMahan has such explanations, it is incumbent on him to provide them. Finally, my example would still work even if the people had waived not just their right that their fingers not be crushed but also their right that their legs not be crushed.

Second, I said that the implication of the combined justification that the steamroller would have to be diverted to the right is absurd. Yet McMahan of course might just bite this bullet. However, I doubt that many others will be inclined to do so; and those who are not thus inclined have a compelling reason to reject McMahan's combined justification, not least since there is no discernible argument why one should accept the combined account and bite the bullet in the first place.

More importantly, I have also come across the objection that my argument from rights-waiving is irrelevant for liability: if Pat (or the people on the right in *Numbers*) were *liable* to his (or their) finger(s) being crushed, *then* it would indeed be obligatory to divert the steamroller to the right. An example appealing to rights-waiving, so the objection, cannot show otherwise.

However, this objection misses the point of the argument advanced here. To repeat: if the necessity justification part in the combined liability + necessity justification need only justify harm in the amount of y *because* due to his liability the target person *has no right* that harm in the amount of x not be inflicted on him, then in the case of the parallel rights-waiving + necessity justification the necessity justification part need also only justify harm in the amount of y since the target person here too has no right that harm in the amount of x not be inflicted on him. *How* it came about that he does not have this right – through forfeiture/liability or through his waiving the right – should make no difference for the fact that the necessity justification need only cover y but not x. Thus, conversely, if someone has waived a right against a minor harm but – as *Steamroller* suggests – that harm *cannot* be ignored in a lesser evil justification, then it is entirely unclear why one should be allowed to ignore this harm if a person was *liable* to it.

There is, after all, a difference between entirely ignoring a harm – that is, not considering it in the proportionality consideration of the lesser evil justification *at all* (which is what the *combined* justification requires as the first step) – and merely discounting it, that is, giving it *lesser moral weight* (which is perfectly possible without "combining" anything).[9] Showing that the steamroller would have to be diverted to the right if Pat was *liable* (in McMahan's sense) therefore does not establish the correctness of the combined justification. To wit, on McMahan's understanding of liability, one can only become liable through one's own responsible wrongful actions. And it might indeed be the case (although even here doubts remain) that it would be unjustified to divert the steamroller to the left *if* the person or persons on the right had *forfeited* some

---

[9] For more on this difference, see the discussion of Bazargan below.

right through their own *wrongful* action – but the reason for this is that one might be justified in *discounting* their rights (at least if they are not only "morally responsible" but actually *culpable*). The idea that the interests or the stringency of the rights of wrongdoers who are responsible for their wrongdoing can be discounted in the proportionality calculus of lesser evil or necessity justifications is a plausible and time-honored one, and some might mistakenly take McMahan's $x + y$ formula as a more precise and therefore superior reformulation of this old and intuitive idea. Yet *discounting* the stringency of rights (so that the rights of responsible wrongdoers *weigh less* – but not *zero* – than the rights of people who do not engage in wrongdoing) is something very *different* from what McMahan is doing with his formula. He does not discount the rights of wrongdoers *across the board*, he tries to *subtract* the harms against which *certain* rights provide protection from the amount of harm against which *certain other* rights provide protection, thus making, allegedly, these latter rights less stringent. He thus subtracts one right from the other, as it were. As the above discussion shows, however, this procedure leads to counter-intuitive results, and if it does not work in the case of rights-waiving or of not having a certain right in the first place, then there is no reason to assume that it can work in the case of rights forfeiture or liability.

Moreover, and finally, we need not even rely on an example of rights waiving. Consider this example:

> *Shock devices*: In order to save 1000 people from being steamrolled, Pat has to turn the steamroller either to the left or to the right. On the left are n people, on the right are $n + 1$ people. The people on the right have remote shock infliction devices, with which they can inflict painful shocks on m other people they know to be entirely innocent. They are indeed about to inflict those shocks since they reasonably believe that otherwise Earth and all its inhabitants (including the people to be shocked) will be destroyed. In fact, if they had received the same evidence, the people on the left would also have inflicted the shocks. *Both* steamrolling the people on the left (somehow) and steamrolling the people on the right will prevent the infliction of the shocks planned by the people on the right.[10]

The $n + 1$ people of this example are certainly not culpable, rather, they mistakenly believe themselves to have a necessity justification for inflicting the shocks, and they would inflict them with the intention to save humanity. Yet they are morally responsible for threats of unjust harm, and thus, on McMahan's account, liable to some harm – maybe also to an electrical shock.[11] Thus, on McMahan's combined justification account, killing the *larger* number of people on the right becomes a *lesser* evil than killing the smaller number of people on the left. In light of the moral innocence of all the people involved, this seems, at least to me, a morally entirely unacceptable result. It looks simply bizarre to assume that an *innocent* person's *right to life* somehow loses in stringency only because the person has responsibly but innocently forfeited her right that *an electric shock* not be

---

[10] People who think that the right inclusion argument mentioned above has any merit should imagine the steamrolling to be painless (the steamroller is equipped with an anesthesia ray).

[11] Note that I am not criticizing McMahan here for holding them liable. Although I reject McMahan's explanation as to *why* they are liable (his moral responsibility account of defensive liability), they actually *are* liable, since they are the source of an imminent attack.

inflicted on her. If McMahan thinks that this is not bizarre, he should provide an argument for this claim. So far, as I have already pointed out, he has not.

I conclude that there might be "liability justifications" so that one may (under certain circumstances) inflict harms on a person because that person has *forfeited* his rights against the infliction of such harms, and there are lesser evil justifications so that one may inflict certain harms on a person because the interests of this person may be *discounted* or because this person's rights are *reduced* in their stringency, but there is no reason to assume – while, as we saw, there are reasons against assuming[12] – that there is a *combined* justification à la McMahan.

3 Against Bazargan's "Hybrid Account" of Justifiably Killing "Minimally Responsible Threats"

Saba Bazargan takes up McMahan's idea of a "combined liability-lesser-evil justification." To wit, he proposes a novel "hybrid" account of the permissibility of killing minimally responsible threats (MRTs).[13] His account allegedly combines two elements, namely "the complex account of liability" and "the lesser-evil discounting view." I argue that Bazargan's conclusion that minimally responsible threats can sometimes be killed as well as certain other conclusions that Bazargan regards as a particular advantage of his hybrid account are single-handedly generated by *one* element of the "hybrid account," namely by the lesser-evil discounting view. The lesser-evil discounting view therefore does not need to be combined with "the complex account of liability," nor, indeed, with any account of liability. Thus, Bazargan's hybrid view is redundant. Moreover, I will argue that both the hybrid view and the lesser evil discounting view of killing MRTs have strongly counter-intuitive implications and should therefore be rejected.

3.1 Bazargan's Account Described

Let us first describe Bazargan's account. Examples of minimally responsible threats are the following:

> *The Mistaken Resident*: An armed and dangerous serial killer, known to kill without warning, is on the loose in a small town. Unbeknownst to anyone, he has a long-lost identical twin who happens to be passing through that same town. The twin stops at a random residence one night to ask for directions. Since the resident has been harassed in the past, she answers the door armed. Seeing what appears to be the serial killer, the resident immediately shoots in what she reasonably believes to be necessary and proportionate defense. (Bazargan 2014, 114-115)

---

[12] For additional reasons why it should be rejected, see also Kamm (2014, 502-503).

[13] While this term is actually misleading, this need not concern us here. For an explanation as to why it is misleading, see my pertinent remarks here: http://peasoup.us/2017/07/journal-moral-philosophy-discussion-pea-soup-kerah-gordon-solmons-self-defence-multiple-threats-critical-precis-renee-jorgensen/.

The Conscientious Driver: A careful driver operating a car maintained as well as can be reasonably asked of her is passing through a residential neighborhood on her way to the cinema. Through no fault of her own, a mechanical failure causes her to lose control of her car. She strikes and kills a child who is playing in the front yard of her parents' house. (Bazargan 2014, 115-116)

Bazargan's novel "hybrid justification for the killing of MRTs is composed of two principles" (2014, 121), namely, first:

The Complex Account of Liability: If P is at least minimally responsible for an objectively unjust harm which she will impose on Q unless we preemptively harm P, then P is liable for no more than n percent of the unjust harm for which she is responsible, where n is equal to the percent moral responsibility she bears for that unjust harm. (Bazargan 2014, 121)[14]

For clarification, we should note Bazargan's definition of liability:

A person is morally liable to be harmed in a certain way just in case she has done something to forfeit her right not to be harmed in that way. (Bazargan 2014, 119)

The second principle or element of Bazargan's hybrid account is this:

The Lesser-Evil Discounting View: When determining whether there is a lesser-evil justification for imposing on an MRT a defensive harm greater than that to which she is liable, we ought to discount the disvalue of that harm relative to the weight of the harm that the threatener would otherwise impose on her potential victim. (Bazargan 2014, 127)

For clarification, we should note how Bazargan characterizes a lesser evil justification:

If the negative consequences of abiding by a constraint are sufficiently weighty, then we have a lesser-evil justification for doing to an agent what that agent has a right that we not do. The right, in this case, is infringed rather than violated. (Bazargan 2014, 126)

That is:

In such a case, she [the agent] retains her right not to be harmed, though it is outweighed by competing moral reasons. (Bazargan 2014, 126)

By allegedly combining the lesser-evil discounting view and the complex account of liability (it will become clear below why I say "allegedly"), Bazargan creates:

---

[14] He gives no indication as to how, in theory or in practice, these degrees of responsibility are to be measured.

The Hybrid Justification for Killing MRTs: Though MRTs are not morally liable to be killed, there is an agent-neutral permission to kill them defensively. This is because imposing a lethal harm on someone who bears some moral responsibility for an unjust threat is (ceteris paribus) the lesser evil relative to the alternative of allowing the MRT to kill her nonresponsible victim. The lesser evil is substantial enough to provide a justification for killing the MRT since the disvalue of the harm imposed on the MRT is discounted relative to the weight of the harm that the MRT would otherwise impose on her victim. (Bazargan 2014, 129)

Bazargan claims that his account has significant advantages over:

The Simple Responsibility-Based Account of Liability: The party that is more morally responsible for a fact-relative wrongful threat is liable to suffer that degree of harm if necessary to prevent it from being imposed on her victim; this is because it is fairer to impose that harm on the more responsible party than it is to allow her to impose that harm on the less responsible party. (Bazargan 2014, 121)

He summarizes these alleged advantages as follows:

[T]he hybrid justification (unlike the liability-based justification) yields the welcomed conclusions that (a) multiple MRTs individually threatening one and the same innocent cannot be permissibly killed and (b) MRTs are owed compensation for the nonliable harm imposed upon them. And an implication of the claim that killing an MRT infringes her rights is that MRTs are permitted to fight back in defense against the harm permissibly imposed on them by a third party or by her potential victim. (Bazargan 2014, 136)

3.2 Bazargan's Hybrid Account as an Unnecessary Complication: The Redundancy of the Liability Element

Before turning to the conclusions that Bazargan explicitly marks as "welcome," we first have to look at the actual main conclusion, namely that the minimally responsible threat can be killed. For this conclusion, too, appeal to liability is unnecessary, and so, therefore, is the hybrid account.

The main idea of the combination of "liability-justifications" and lesser-evil justifications is, as we saw, that if someone like the mistaken resident is *liable* to *some* harm (for example to a broken wrist), then a lesser-evil justification for inflicting *more* harm on him than he is liable to only needs to justify the *remaining* harm.[15] In other words, if a broken wrist[16] amounts to 1 unit on the harm scale, and being killed to 100 units, then a lesser-evil justification for killing someone who is liable to 1 unit of harm need only justify the infliction of 99 units.

---

[15] "Consequently, for a lesser-evil justification to permit killing the MRT, it would have to permit inflicting a harm equivalent to the remaining 50% of the harm she would suffer in being killed." (Bazargan 2014, 126)

[16] The broken wrist example is Bazargan's (2014, 122). The use of harm units is mine.

It should be noted that Bazargan, like McMahan, provides no argument why one should accept this main idea in the first place. Be that as it may, Bazargan realizes that (even granted the main idea) the combination of the liability and the lesser-evil justifications would not by itself yield the permissibility of killing the conscientious driver or the mistaken resident if they were only liable to a broken wrist. The reason for this is that "a lesser-evil justification requires that the harm averted be substantially greater than the harm inflicted" (Bazargan 2014, 126). For example, one might be allowed to kill one innocent person to save ten other innocent persons, but one is hardly allowed to kill one innocent person to save the life of one other innocent person and to save two further innocent persons from a broken wrist. Accordingly, the potential victim of the mistaken resident cannot justifiably kill the latter only because the latter is liable to a broken wrist.[17] The harm threatening the potential victim counts for 100 harm units (death), and the harm he would have to justify inflicting on the mistaken resident counts for 99 harm units. This difference, however, does not make the harm averted by the potential victim "substantially greater."

This is why Bazargan introduces the lesser-evil discounting view. According to this view, the harms inflicted on the minimally responsible threat *count for less* (and apparently for *significantly* less) than equal harms inflicted on the non-responsible potential victim. However, while Bazargan, as we see, rightly recognizes that it is "instructive" to realize that "the complex account [of liability] does not by itself yield the view that there is a lesser evil justification for killing the MRT" (Bazargan 2014, 126), he does not note that it is equally instructive to realize that the lesser-evil discounting view *does*, all by itself, yield the view that there is a lesser evil justification for killing the MRT, at least if the discount is significant enough (and it would only have to be *minimally* more significant than on the hybrid view.)

Thus, appeal to liability is entirely unnecessary here. Of course, someone might claim that the reason why the harm inflicted on the MRT can be discounted is that he is *liable* to some *other* harm. That claim, however, does not sound particularly plausible, and one would at the very least like to see an argument for such a claim. Bazargan provides none (nor does anybody else). Note also that showing that appeal to liability is *necessary* is something very different from showing that it is sufficient. Given that Bazargan adopts a responsibility account of liability, liability *implies* responsibility: liability only exists where someone *forfeits rights* through his own *responsible* action. But then one cannot demonstrate the non-redundancy of the appeal to liability by showing that liability implies the discountability of the liable person's interests; rather one would have to show that responsibility *alone* does *not* ground the discountability of the interests of a person or of the harms to be inflicted on a person. Again, Bazargan does not show that; indeed, he does not address this question.

Let us address it now. Note that Bazargan's account of liability seems to construe the necessity condition as internal to liability: one can only be liable to harms that are necessary to avert the unjust threat for which one is responsible.[18] Consider now the following variation of *Mistaken Resident* (the reader might have to read this example

---

[17] Bazargan (2014, 126-127) makes the same point with a more complicated example.
[18] "Now, according to responsibility-based accounts of liability, an agent's moral responsibility for a fact-relative wrongful harm is enough to make her liable to proportionate harm necessary to avert the harm she is imposing." (Bazargan 2014, 120)

three times, but, unfortunately, the complexity is necessary): The serial killer has *two* identical-looking and innocent brothers, who at different doors in town face a lethal threat. To wit, both of them face a disabled resident who, out of fear of the serial killer, has programmed his armed and camera-controlled military wheelchair (a loan from the army) to shoot anybody who looks like the serial killer. Inflicting harm on disabled resident Albert will not avert or mitigate the unjust threat of harm for which he is responsible (the wheelchair would fire even if Albert were dead), so Albert is not liable to any harm (killing him would be futile and thus unnecessary). In contrast, inflicting harm on disabled resident Bert will avert the threat to the second twin, since Bert's wheelchair is somehow connected with Bert's nervous system. Crucially, the two wheelchairs are also connected to each other. In the backrests, behind the hearts of each of the disabled men, there is a control device. If one of these devices is hit by a bullet, the *other* chair will shut down. There is a sniper nearby who from his outlook sees all four persons. He could save the first twin (the one facing non-liable Albert) by destroying the device in Bert's backrest with a bullet – which, however, would kill Bert since the bullet would pass through his heart. And he could save the second twin (the one facing liable Bert) by destroying the device in Albert's backrest – which, however, would kill Albert. Thus, on Bazargan's account, the sniper would have a lesser evil justification to kill Bert in the course of saving the twin facing Albert,[19] but he would *not* have a lesser evil justification to kill Albert in the course of saving the twin facing Bert. This, I submit, is extremely hard to swallow. It seems to elevate a morally irrelevant difference to a morally decisive one. Of course, Bazargan could just insist that killing Bert is permissible while killing Albert isn't, but that seems to be extremely counter-intuitive, and, again, Bazargan has not given us any reason to accept such a counter-intuitive conclusion anyway.

Note, moreover, that even if one accepted an account of liability that refuses to make necessity internal to liability, so that both Albert and Bert would be liable to the infliction of harms, Bazargan would still owe us an argument that responsibility alone is not sufficient for the discounting of harms. For example, let us define "ebolability" as a condition where a person carries both the Ebola virus and has a rash. Let us further suppose that it is a fact that all people who have the Ebola virus also have a rash, since the virus causes the rash (as in Bazargan's account moral responsibility for an unjust threat grounds liability). Then it might be true that all persons dying from the Ebola virus were ebolable, but it would still not be true that the virus alone was insufficient to kill them. Obviously, it was the virus that killed them, *not* the combination of virus and rash.

Moreover, Bazargan not only *fails* to explain why liability should be necessary for discounting the harms inflicted on someone responsible for an unjust threat; in fact, and remarkably, his *own* explanation as to why harm inflicted on the MRT can be discounted, thus opening the way for a lesser evil justification, entirely *omits* any reference to liability but instead exclusively focuses on *responsibility*. "Insofar as one of the two parties has to bear a cost, and the threatener bears some moral responsibility for the predicament whereas her victim does not, it is fairer for the threatener to be killed

---

[19] To emphasize this again: Bert, according to Bazargan, is liable to *some* harm, but he is not liable to be killed. Note also (with respect to the rights inclusion argument) that the lesser harm Bert is liable to cannot be included in the greater harm of death since his death is *not necessary* to divert the threat of harm *he* is responsible for. His death saves the first twin, not the twin facing him.

than it is for her victim to be killed." (Bazargan 2014, 127, see also 130 on "double counts.") Moreover, *even Bazargan's own official formulation of the "hybrid view"* (quoted above) *does not use liability for any explanatory purposes whatsoever.* (This is why I said above that Bazargan *allegedly* combines the complex account of liability with the lesser evil discounting view.) All the explanatory weight is carried by the concepts of lesser-evil, responsibility, and discount. In other words, while Bazargan claims to have provided a "hybrid" view that combines the lesser-evil discounting view with a complex account of liability, his official formulation of this hybrid view only combines the lesser-evil *justification* with the lesser-evil *discounting* view. Liability plays no role; on the contrary, *non-liability* does, since inflicting harms on non-liable persons is a defining characteristic of lesser-evil justifications.

At this point it should be fairly obvious that the "welcome conclusions" that Bazargan emphasizes are also produced by the lesser-evil discounting view alone. Bazargan states that a "decisive advantage of the hybrid justification (over the liability justification) is its ability to explain why it is wrong to kill multiple MRTs who are independently threatening a single innocent" (Bazargan 2014, 132). The explanation is:

> Since a lesser-evil reason for inflicting a harm is rights-infringing, the MRT does indeed have a basis of complaint—she is harmed in a way exceeding the degree of harm to which she was liable. This explains why killing several MRTs is wrong. If the rights infringements are additive, there quickly comes a point where killing the MRTs simply no longer counts as the lesser evil. (Bazargan 2014, 134)

However, the lesser-evil discounting view can explain this by itself. The lesser-evil-discounting view says that harms inflicted on the MRT are *dis*counted, not that they count for *nothing* (as would be the case if the MRT would be liable to the harms). Thus, if these discounted harms are inflicted for lesser-evil reasons, inflicting them is rights-infringing – with all the implications just mentioned by Bazargan. Thus, a combination with the complex liability account is unnecessary, indeed, counterproductive: again, *non*-liability is doing all the explaining here, not liability.

The same is obviously true for the implication that the MRTs are owed compensation: they are owed compensation because they were *not* liable to the harms inflicted on them. Thus, a combined liability/lesser evil justification view is unnecessary to explain the need for compensation, as appeal to a lesser-evil justification can explain the need for compensation all by itself.

Finally, if one accepts the premise, as Bazargan seems to do, that persons whose rights have been justifiably infringed may defend themselves, then we do not need a *combined* liability/lesser evil justification account in order to generate the implication that MRTs may defend themselves; rather, a lesser evil justification account (which provides a justification precisely of rights *infringement*) straightforwardly implies this in conjunction with said premise.

3.3 Why the Lesser-Evil Discounting View and Thus Also Bazargan's Hybrid Account of the Permissibility of Killing "MRTs" Is Wrong

In Bazargan's official formulation of "*The Hybrid Justification for Killing MRTs*" (quoted above) we find the following important sentence with an even more important

qualification: "imposing a lethal harm on someone who bears some moral responsibility for an unjust threat is (ceteris paribus) the lesser evil relative to the alternative of allowing the MRT to kill her nonresponsible victim" (Bazargan 2014, 129). Ceteris paribus, all else being equal. On Bazargan's account, the reason why the innocent identical twin of the serial killer may kill the mistaken resident in self-defense is that the interests of the mistaken resident are discounted on grounds of the latter's responsibility. Yet that would in fact hardly be sufficient (a fact that Bazargan might be alluding to with the "ceteris paribus" but fails to discuss).

Consider, for instance, a case where the mistaken resident of Bazargan's example is a surgeon about to operate the next morning on an innocent patient who will die if the killer's innocent twin shoots the surgeon in self-defense. This innocent patient is in no way responsible for the threat that the surgeon poses to the twin. Thus, *his* interests or rights (and thus the harms inflicted on him) *cannot* be discounted. But then the discounted interests and rights of the mistaken resident *together* with the rights and interests of the patient *outweigh* the rights and interests of the identical twin. Thus on Bazargan's account, the identical twin does not have a lesser evil justification anymore to shoot the mistaken resident – shooting him would *not* be the *lesser* evil compared to not shooting him. Thus, he would not be permitted anymore to defend himself against the mistaken resident's attempt to kill him. But this, I submit, is implausible and counter-intuitive and provides a reason to reject Bazargan's account.

Bazargan states that "the lesser-evil justification plays a far more prominent role in 'one-on-one' cases of defense than has been thought" (Bazargan 2014, 136). However, this might be trying to bring two things together which are simply incompatible: the self-defense justification and the lesser-evil justification. Unlike the proportionality criterion of the lesser-evil justification, the proportionality condition of justified self-defense weighs the severity of the defender's counter-measures against the severity of the aggressor's attack (where the factors determining this severity include the threatened physical or material harms, the culpability of the aggressor, and the degree to which the attack violates the victim's honor and autonomy and the social-legal or moral order) (Steinhoff 2013, esp. 1021–1023); it does *not* weigh *all* the social benefits (including all harms it avoids) of the defender's defensive action against all its costs (Steinhoff 2008, 224–225; McMahan 2009, 41–42 and note 3; Reitberger 2013, 79). If it did, one would not be permitted to use lethal self-defense against a culpable aggressor whom one knows is about to save three other people tomorrow, let alone against someone who is on the brink of saving *many* others because he is about to invent the cure for some disease (which in case of his death will not be found for some time to come). Yet legally one clearly is, and it is strongly counter-intuitive to claim that morally one isn't.[20]

But then Bazargan would at least have to provide an argument that self-defense against minimally responsible threats *is* (as far as the "remaining harm" is concerned) governed by the proportionality considerations of the lesser-evil

---

[20] Of course, *at some point* a threshold might be reached where the consequences of one's self-defense are *so* dire as to make the costs prohibitive. That is no problem for the self-defense justification as understood here. After all, if, as Bazargan thinks, there is something like a lesser evil justification that can justify *overriding* the rights of people, then there can also be a *greater evil prohibition* that can justify overriding the rights of people, including the right to self-defense.

justification, instead of simply assuming this.[21] Given, again, that it is morally counter-intuitive (and legally certainly not the case) that the identical twin is enjoined from defending himself against the surgeon, one may well doubt that such an argument can be provided.

However, Bazargan seems to actually accept that lethal defense against the surgeon is permissible. Yet he argues that he did not want to propose a comprehensive account of self-defense.[22] In other words, the permissibility of shooting the mistaken resident under these circumstances could be explained by *another* justification. Yet, again, this would make Bazargan's "hybrid justification" redundant. Law recognizes this. In many jurisdictions, the lesser evil or "choice of evils" statutes are explicitly formulated in such a way that they are *only* applicable to cases where there is not already *another* justification (usually the self-defense justification) available to justify the offense. In other words, if you can justify an act with the straightforward self-defense justification, then there is no reason to appeal to the much more unwieldy lesser evil justification.

Moreover, Bazargan simply cannot have it both ways. The other justification doing the job here, is, of course, as pointed out, precisely the self-defense justification. In law, this justification implies that the aggressor is *liable* to the harm inflicted on him and not owed any compensation, and the justification triggers the discountability of certain indirect consequences (like the death of the surgeon's patient). But this *contradicts* Bazargan's approach: either the mistaken resident is liable to the harms inflicted on him, or he isn't; either the indirect consequences are discountable, or they aren't. If the self-defense justification applies in this case, Bazargan's justification is not only redundant, it must also be wrong.

In that context, it should also be noted that Bazargan claims: "Intuitively, an MRT is owed compensation for the amount of harm imposed upon her exceeding the degree to which she would be liable if the harm were distributable." (Bazargan 2014, 134) I am not sure what role the phrase "if the harm were distributable" is supposed to play here. On Bazargan's account, the MRT in his example is liable to a broken wrist, whether the harm imposed on her is distributable or not (Bazargan 2014, 122). "[T]he degree of harm to which an individual is liable is the harm that she threatens to cause multiplied by the percentage degree of her moral responsibility." (Bazargan 2014, 121) Thus, on his account, the harm to which people are liable if the harm were distributable is exactly the same harm to which they are liable if the harm is not distributable. However, contrary to what Bazargan claims, it is not intuitive at all that the MRT (or her estate [Bazargan 2014, 134]) in *Mistaken Resident* is owed any compensation. This counter-intuitiveness is also reflected in the fact that, to the best of my knowledge, there is not one Western jurisdiction that would hold the twin liable to pay compensation to the Mistaken Resident's kin. Of course, Bazargan might simply claim that these jurisdictions are committing a moral mistake. Yet, again, he has not provided any argument in support of such a claim.

I conclude that Bazargan's hybrid account is redundant – all the important work done in this account is done by the lesser-evil discounting view and the lesser evil justification itself, not by Bazargan's "complex account of liability." If, however, for the explanation of a phenomenon we have to choose between a simple theory and a

---

[21] The same point also applies to Frowe and McMahan in the context of non-responsible threats and "lesser aggressors," respectively.
[22] Bazargan (personal communication).

complicated one, and we get the complicated theory by adding an element to the simpler one; and if the defender of the complicated one provides no argument for the necessity of this added element and does not even make use of it in his official formulation of the more complicated theory; and if, moreover, the simple theory is perfectly able to explain the (supposed) phenomenon in question, then we have good reason to apply Occam's razor and discard the more complicated theory. Moreover, Bazargan's theory leads to counter-intuitive results. Since Bazargan does not provide an argument that would show that those results should be accepted in spite of their counter-intuitiveness, Bazargan's account should be rejected.

Let me note that Bazargan-Forward has responded to the above criticism.[23] There is, however, no need to go into the details here,[24] for Bazargan seems to actually admit that my main point is correct. He states:

> It's true that I neglect to mention liability in my characterization of the 'hybrid justification.' But what's crucial in the hybrid justification is the bearing of *some moral responsibility for an unjust threat*. Whether we call that 'liability' (which is determined in part by whether we think necessity is internal to it) doesn't matter for the sake of my main thesis. What's being 'hybrid-ized' (or 'combined') with the lesser evil justification is the kind of justification derived from one's moral responsibility for an unjust threat.[25]

Well, it does not matter what we *call* it, but it certainly matters what it *is*. And moral responsibility is not liability. That does matter for Bazargan-Forward's original thesis that we need a combined liability/lesser evil account – a thesis he seems rightly to be willing to give up now in light of my criticism. Moreover, there simply is no "combination." That evils and goods, rights and interests, have to be *weighed* (which might, of course, involve discounting) is simply part and parcel of the lesser evil justification (Fletcher 2000, § 10.2). Accordingly, Bazargan-Forward's proposal would at best be one more interpretation or version of the lesser evil justification, not some kind of new "combined" justification.

Bazargan-Forward also says:

> So it might be correct that I should have focused on responsibility rather than liability – but that doesn't undermine the basic claim I'm making: if you're minimally responsible for an unjust killing, the fact that you are merely *minimally* responsible suggests that we can impose only a little bit of defensive harm on you; if it turns out that the only way to stop that unjust killing is by imposing more than that little bit, we can accordingly discount that great harm (in the way specified by what I call the 'complex account').[26]

---

[23] Saba Bazargan-Forward, "Commentary on Uwe Steinhoff's 'Just War Theory,'" ms. on file with the author. I talk of "Bazargan" when referring to the original article and of "Bazargan-Forward" when referring to said commentary, thus reflecting the name change of the author.

[24] But see Steinhoff (2018).

[25] Bazargan-Forward, "Commentary on Uwe Steinhoff's 'Just War Theory,'" ms. on file with the author, p. 3.

[26] Ibid.

This certainly was not the basic claim Bazargan-Forward made in the original paper. His claim there was more ambitious. Moreover, what *does* undermine Bazargan-Forward's new "basic claim" is my discussion of McMahan's "combined justification," and especially the examples provided in section 2 above. Bazargan-Forward has not responded to these examples, although they clearly affect his position as much as McMahan's.

However, he does respond to one charge I make against McMahan, and that also, of course, applies to Bazargan-Forward's position. To wit, he claims that "it is not a consequence of [his] view that violating a right *to ten dollars* can diminish the wrongdoer's right not to be killed."[27] But yes, it is. Under the heading of "*The Complex Account of Liability*" he writes, to quote again:

> If P is at least minimally responsible for an objectively unjust harm which she will impose on Q unless we preemptively harm P, then P is liable for no more than n percent of the unjust harm for which she is responsible, where n is equal to the percent moral responsibility she bears for that unjust harm.[28]

However, first, to violate, as responsible agent, someone's right to ten dollars *is* to be morally responsible for an objectively unjust harm, just like killing someone unjustly but as a responsible agent *is* to be responsible for an objectively unjust harm. Accordingly, the unjustly harming agent will become liable to harm herself, and this is all that is needed to trigger Bazargan-Forward's "Lesser Evil Discounting View." Moreover, Bazargan-Forward explicitly says: "I am assuming that harms can be measured on a single dimension yielding an interval measure of their moral significance." (Bazargan 2014, 122) Such a formulation hardly suggests any appeal to "thresholds,"[29] so I do indeed think I got the consequences of his account right.

4 Frowe's Combined Justification for Killing Non-responsible Threats and Her Denial of the Latter's Permission to Defend Himself against the Attempt to Kill Him

An example of a non-responsible threat is Robert Nozick's famous falling man, who is pushed by someone down a well against his will in order to kill you (and you are innocent and did not pose a threat to anybody when the man was pushed). You are at the bottom of the well and will indeed be killed unless you disintegrate the falling man with your ray gun (Nozick 1974, 34–35). Helen Frowe (2009, 350) once claimed that the falling man may defend himself against that other man's defensive attempt to vaporize him, but now claims that he may not. Her argument is that the falling person has a duty to bear a certain amount of harm, for example paralysis (but not death), to avoid harming the innocent person below (Frowe 2014, 69). Many people will deny this, of course, but let us set this issue aside and just grant Frowe's assumption.

---

[27] Ibid., p. 1.

[28] Ibid.

[29] Incidentally, the threshold idea does not even help either: if the threshold is, for example, losing a right to one's finger, or even one's arm, the fact still remains that a right to one's arm is not the same as the right to one's life, and therefore it is unclear (and we are certainly not given any explanation) why losing the former should diminish the stringency of the latter.

Remember, however, that inflicting paralysis is not enough in the example; rather, the falling man must be vaporized. Thus, while on Frowe's account the falling person has no right not to be paralyzed, "a portion of the harm that Victim inflicts upon Falling Person goes beyond what Falling Person is obliged to bear. She does have rights against suffering this part of the harm, and this harm is therefore unjust." (Frowe 2014, 70) Thus, like McMahan and Bazargan, Frowe supposes here, without argument, that someone's having lost a right against harm less severe than loss of life somehow undermines or diminishes his right against harm in the form of loss of life.[30]

Frowe then combines this first liability step with the following "lesser evil" justification for vaporizing the falling person:

> But our duty to avoid defensively killing innocent people is not as stringent as our duty to avoid non-defensively killing innocent people. This means that if Victim is killed, he suffers more morally weighted harm than Falling Person would suffer if she is killed. Ultimately, then, Falling Person's death is the lesser evil, since she bears less harm in excess of what morality requires. (Frowe 2014, 69)

This is not true conversely, and therefore the falling man is allegedly not allowed to defend himself against the man below (Frowe 2014, 70). Note, however, that the first sentence in this quote is a mere (and of course controversial) stipulation and, moreover, it is not even clear that the stipulation would help if we accepted it. To wit, on Frowe's own account, the person standing below would encroach on the falling man's rights by vaporizing him (vaporizing him is unjust). Moreover, he does so through his own responsible action. But one might of course quite reasonably argue that the duty not to encroach on another person's right through one's own agency is more stringent than the duty not to harm another person without agency. Accordingly, one could argue that it is the man below who violates a more stringent duty. If this violation would not cost him his right to life, the falling man above would then nevertheless still have a lesser evil justification to lethally defend himself if necessary.

I see no reason why one should prefer Frowe's argument to the one I have provided right now (Frowe has not offered such a reason). In any case, appeal to a "combined liability-lesser-evil justification" seems to be arbitrary and to obscure things more than to clarify them.

I conclude that there simply is no need for, but strong reasons against, combined liability-lesser-evil justifications a lá McMahan or Frowe or alleged hybrid accounts like Bazargan's.

---

[30] Frowe herself (2014, 69), however, refers to Tadros (2011, 251), which might be problematic, see note 1.

References

Bazargan, S. (2014). Killing minimally responsible threats. *Ethics, 125*(1), 114–136.

Fletcher, G. P. (2000). *Rethinking criminal law*. Oxford: Oxford University Press.

Frowe, H. (2009). The justified infliction of unjust harm. *Proceedings of the Aristotelian Society, 109*(1pt3), 346–351.

Frowe, H. (2014). *Defensive killing*. Oxford: Oxford University Press.

Kamm, F. M. (2014). Responses. *Journal of Moral Philosophy, 11*(4), 476–517.

McMahan, J. (2005). The basis of moral liability to defensive killing. *Philosophical Issues, 15*, 386–405.

McMahan, J. (2009). *Killing in war*. Oxford: Oxford University Press.

McMahan, J. (2012). Targeted killing: Murder, combat, or law enforcement. In C. Finkelstein, J. D. Ohlin, & A. Altman (Eds.), *Targeted killings: Law and morality in an asymmetrical world* (pp. 135–155). Oxford: Oxford University Press.

McMahan, J. (2014a). Proportionality and just cause: A comment on Kamm. *Journal of Moral Philosophy, 11*(4), 428–453.

McMahan, J. (2014b). What rights may be defended by means of war? In C. Fabre & S. Lazar (Eds.), *The morality of defensive war* (pp. 115–156). Oxford: Oxford University Press.

McMahan, J. (2014c). Self-defense against justified threateners. In H. Frowe & G. Lang (Eds.), *How we fight* (pp. 104–137). Oxford: Oxford University Press.

McMahan, J. (2017). Liability, proportionality, and the number of aggressors. In S. Bazargan-Forward & S. C. Rickless (Eds.), *The ethics of war: Essays* (pp. 3–27). Oxford: Oxford University Press.

Nozick, R. (1974). *Anarchy, state, and utopia*. New York: Basic Books.

Reitberger, M. (2013). License to kill: Is legitimate authority a requirement for just war? *International Theory, 5*(1), 64–93.

Rodin, D. (2017). The lesser evil obligation. In S. Bazargan-Forward & S. C. Rickless (Eds.), *The ethics of war: Essays* (pp. 18–45). Oxford: Oxford University Press.

Steinhoff, U. (2008). Jeff McMahan on the moral inequality of combatants. *Journal of Political Philosophy, 16*(2), 220–226.

Steinhoff, U. (2013). Rodin on self-defense and the 'myth' of national self-defense: A refutation. *Philosophia, 41*(4), 1017–1036.

Steinhoff, U. (2017). The Ethics of War: Essays. (Review). *Notre Dame Philosophical Reviews*, available at http://ndpr.nd.edu/news/the-ethics-of-war-essays/.

Steinhoff, U. (2018). Replies. *San Diego Law Review* (forthcoming).

Tadros, V. (2011). *The ends of harm: The moral foundations of criminal law*. Oxford: Oxford University Press.

Tadros, V. (2014). Orwell's battle with Brittain: Vicarious liability for unjust aggression. *Philosophy and Public Affairs, 42*(1), 42–77.